



GEOFFREY MARSHALL

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# Geoffrey Marshall

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### I

GEOFFREY MARSHALL was regarded by many as the greatest constitutional theorist this country has seen since Dicey. He brought to the study of politics and the law the tools of analytical philosophy and jurisprudence developed at Oxford, and showed that they could yield insights of permanent value in the analysis of the British Constitution.

He was born on 22 April 1929 in Chesterfield, the only child of Leonard and Kate Marshall (née Turner), just before the advent to power of Ramsay MacDonald's second Labour government. The family moved to Blackpool, in 1931, to avoid, so Geoffrey insisted, the consequences of Ramsay MacDonald's National Government. His mother kept a boarding house at Blackpool. Geoffrey won a local authority place at Arnold's School in 1940, where his Latin master, Mr Haythornthwaite, sparked his lifelong interest in language and precise expression. Geoffrey excelled both academically and on the sporting field, conceiving a particular admiration for Stanley Matthews and becoming a lifelong fan of Blackpool. Indeed, Geoffrey was on the 'books' of Blackpool Football Club for a while as an amateur, and played, on occasion, on the same field as such giants as Stanley Matthews and Stanley Mortensen. He was always strongly athletic, and remained a powerful squash player until nearly the end of his life, being held responsible for the degenerate vertebrae of three of the Fellows of Queen's, as well as several Schoolteacher Fellows and other visitors who made the mistake of agreeing to play

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against him. He retained also, from his early days in Blackpool, a love of ballroom dancing at which he was highly skilled. Indeed, it was said that Geoffrey's proficiency at this activity was remembered with reverence, if not awe, at the Winter Gardens Ballroom long after he had left Blackpool.

In 1947, Geoffrey was interviewed at Balliol by the Master, Lord Lindsay, whose pomposity and self-importance he disliked.

'I see that you come from Lancashire,' Lindsay inquired.

'Yes, sir,' replied Geoffrey.

'And that you are studying economics.'

'Yes, sir.'

'How many spindles are there in the average Lancashire factory?'

'Around 10,000,' Geoffrey guessed.

'That seems a very large number of spindles.'

'We have some very large factories in Lancashire,' retorted Geoffrey.

Despite this interview, Geoffrey was offered a deferred place at Balliol. Not understanding what 'deferred' meant, he decided to reject it and to take up a place at Manchester University to study Politics and Economics, gaining his BA degree in 1950. This was a fortunate choice, for Geoffrey was to come under the influence of Professor W. J. M. Mackenzie, doyen of the political science profession in Britain in the early postwar years, and Mackenzie urged him to undertake graduate work.

In his final year, Geoffrey heard Harold Laski give the lectures which were published posthumously as *Reflections on the Constitution*.<sup>1</sup> Geoffrey was asked to correct Laski's lecture notes for publication, and this no doubt stimulated his interest in constitutional problems. Geoffrey retained, perhaps surprisingly, a lifelong admiration for Laski. The Laski he admired, was not the socialist propagandist, but the early Laski, the author of *Studies in the Problem of Sovereignty*, and of the essays collected in *The Foundations of Sovereignty*, the pluralist Laski, the critic of state sovereignty.<sup>2</sup> What Geoffrey admired was Laski's attack on the metaphysics of the state, his insistence on looking at the state realistically, and his exposure of the confusion between legal and moral sovereignty.

But while Geoffrey was fascinated by the themes of the early Laski, he never fell under Laski's *intellectual* influence. That perhaps was fortunate. Sir Frederick Pollock, after reading *Studies in the Problem of Sovereignty*, told Oliver Wendell Holmes that Laski's thought was confused, his mind

<sup>1</sup> Harold Laski, *Reflections on the Constitution* (Manchester, 1951).

<sup>2</sup> Harold Laski, *Studies in the Problem of Sovereignty* (New Haven, CT, 1917); id., *The Foundations of Sovereignty* (London, 1922).

‘often loose and sometimes erroneous’, and moreover ‘un-legal’.<sup>3</sup> Geoffrey, in discussing Laski’s essay on ‘The Sovereignty of the State’, which was one of the *Studies*, declared that: ‘Here and in other essays there is conviction and eloquence wedded to a lack of precision from which on these points Laski never really seems free.’ Geoffrey then goes on to consider various different meanings of sovereignty which Laski fails to distinguish—unlimited legal authority, absolute power, undivided allegiance, and the immunity of the Crown and its agents from legal proceedings.<sup>4</sup> Unlike Laski, Geoffrey could never be accused of lack of precision. Indeed, Laski’s allusive and slapdash style was as far removed as it is possible to imagine from Geoffrey’s approach, which was cool and analytical where Laski was loose, and sceptical where Laski was committed.

After taking his BA, Geoffrey spent a further year as a graduate research scholar at Manchester, completing an MA thesis on the political philosophy of David Hume. Then, in 1951, he became an Assistant Lecturer in the Department of Political Science at Glasgow, where he remained until 1954 and where he wrote his doctoral thesis. The subject of the thesis was parliamentary sovereignty and the constitutional crisis in South Africa over the abolition of the entrenched sections in the South African Constitution. This thesis formed the basis for Geoffrey’s first book, *Parliamentary Sovereignty and the Commonwealth*,<sup>5</sup> a work which immediately established him as one of the leading constitutional scholars in the country and which remains, nearly fifty years later, a classic in the field. The book was, Geoffrey wrote, the culmination ‘of a long-standing fascination by the idea of sovereignty,’ which could ‘be traced’

to a first undergraduate reading of the passage in which Sir Ivor Jennings explains that De Lolme was mistaken in thinking that Parliament could do anything except make a man into a woman and a woman into a man; since if Parliament enacted that all men should be women, they would be women as far as the law is concerned. The intellectual neatness of this arrangement impressed and convinced me at the time, but I have wondered ever since why there is (so far as I know) no full-length study of so curious a constitutional principle.<sup>6</sup>

In 1954 Geoffrey moved to Oxford, becoming a Junior Research Fellow at Nuffield College. At around this time he began to eat dinners at the Middle Temple to prepare for admission to the Bar. He never, however,

<sup>3</sup> Mark DeWolfe Howe (ed.), *Holmes-Pollock Letters* (Cambridge, MA, 1946), p. 248.

<sup>4</sup> Geoffrey Marshall, ‘Pluralist Principles and Judicial Policies’, *Political Studies*, 8 (1960), 4.

<sup>5</sup> Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford, 1957).

<sup>6</sup> *Ibid.*, p. v. The passage referred to in Jennings is in *The Law and the Constitution*, 5th edn. (London, 1959), p. 170.

sat the bar examination, and in later years he used to say that he was the oldest unqualified lawyer in the country. In 1957 he married Patricia Woodcock, a student of military history; they were to have two sons. In 1957 also, Geoffrey was elected a Fellow and Tutor in Politics at The Queen's College, Oxford, where he remained until his retirement in 1999, becoming Provost of the College in 1993. His pupils have included the political theorist Brian Barry, the political scientist Vernon Bogdanor, the philosopher Peter Hacker, and the Canadian legal scholar Stephen Scott.

Geoffrey's eminence was widely recognised. He was elected a Fellow of the British Academy in 1971 at the remarkably early age of 42. In 1995 he was elected President of the Study of Parliament Group, a body comprising academics and parliamentary clerks meeting from time to time to discuss problems of parliamentary government. He was an assistant editor of the journal *Public Law* for forty-five years. He was also an active member of the Bielefelder Kreis, an international research group, comprising scholars from ten countries, which meets annually to discuss problems of legal theory. In Canada, he served as visiting professor at McGill University and acted as a consultant to the Canadian government on constitutional issues. In 1985 he was appointed Andrew Dixon White Professor at Large by Cornell University. He was asked to become a candidate for the Gladstone Chair of Government and Public Administration, as it then was, at All Souls College, but declined to be considered. His reasons were characteristic. All Souls, he declared, lacked a car park and squash courts. Moreover, the terms of the Chair required its holders to deliver thirty-six lectures a year. Unfortunately, so Geoffrey declared, he possessed only three.

Geoffrey never allowed his scholarly activities to overcome his sense of humour. He once said that he preferred Bentham to John Stuart Mill because there were no jokes in Mill. His interest in the nuances of language and his dry wit were reflected in his book reviews, in letters to *The Times*, and in limericks and other occasional verses, a volume of which would certainly merit publication. One of his poetic efforts is called 'The Rape of Sabine—A Quick History of Political Thought'.<sup>7</sup> Here are three of the twelve stanzas.

Descartes could take his head apart  
To see what made it go  
Then—oh dear me—he couldn't see  
And stubbed his Cogito.

<sup>7</sup> 'Sabine', of course, refers to G. H. Sabine, author of the standard textbook *A History of Political Theory*, 4th edn. (New York, 1973).

Montesquieu would hum and hue  
 When girls sat on his knee  
 But Jacques Rousseau was full of go  
 And forced them to be free.

Language, Truth and Logic  
 God Almighty much resented  
 Unlike Voltaire, he thought that Ayer  
 Should not have been invented.

Geoffrey's characteristic air of self-deprecation and fundamental modesty led many to underestimate his scholarly achievement. He made, however, fundamental contributions to the study of the British Constitution, contributions unequalled in his generation.

## II

British political science derives, fundamentally, from two basic influences. The first is that of Dicey, who sought to display the conceptual logic of the British Constitution, to discover what it was that distinguished the British Constitution, both from the American Constitution and from the codified constitutions of the Continent. The second basic influence is that of Bagehot, who, with Ostrogorski, sought to understand political 'forms' by analysing the political 'forces' which lay behind them. Both approaches have in common an aversion to grand theory, to approaches to political science derived from the natural sciences, and to ideology.<sup>8</sup>

The bulk of post-war British political science owes more to Bagehot than it does to Dicey. This is particularly true of political science in Oxford, which has been primarily concerned with the empirical observation of government and the analysis of elections. Indeed, the dominant school in the social sciences in post-war Oxford has been severely empirical, whether it be David Butler's work in psephology, the work of Harrod in the Economists Research Group, of Flanders, Clegg, and McCarthy, founders of the Oxford School of Industrial Relations, or the sociological investigations of Halsey, Goldthorpe, and Heath. The concerns of Oxford social scientists have not only been practical; they have also often been reformist. Vernon Bogdanor has sought to influence the debate on constitutional reform;

<sup>8</sup> This paragraph is derived from Vernon Bogdanor, 'Comparative Politics', in Brian Barry, Archie Brown, and Jack Hayward (eds.), *The Study of Politics: The Twentieth-Century British Contribution* (Oxford, 1999), p. 175.

Harrod, Donald MacDougall, and Robert Hall were pioneers of Keynesianism; while Halsey sought to remind governments of the demands of common citizenship and of equality in education.

From all this activity, Geoffrey held back. He concerned himself little with the empirical observation of government. Once when asked why he did not do that sort of work, he replied, jocularly, that he was far too old to begin research at his time of life. Moreover, although a university councillor on Oxford City Council in the years 1967–74, and sheriff from 1971 to 1972, Geoffrey did not involve himself in public life or controversy. His work has, however, in an almost subterranean way, affected public attitudes to the control of discretionary power. If there is more scepticism today than there was forty years ago towards the idea that ministerial responsibility to parliament constitutes an effective control of discretionary power, and if support for a Bill of Rights is now widespread, the credit is due, in no small measure to him.

Geoffrey owed much more to Dicey than to Bagehot. He stood apart from most Oxford political scientists, in that his intellectual influences lay not in the social sciences, but in philosophy and jurisprudence.

Of his first book, *Parliamentary Sovereignty and the Commonwealth*, Geoffrey said that it was ‘an attempt to look at some of the traditional implications of the sovereignty doctrine in the light of certain ideas about the function and description of legal rules in theoretical writing about law, and also of recent constitutional developments outside the United Kingdom’. Parliamentary sovereignty, he went on to say, in a comment that perhaps forms the *leitmotif* of all his work, ‘is an institutional arrangement resting upon an idea, and the idea is one which has philosophical (and even theological) connexions’.<sup>9</sup> Similarly, ministerial responsibility, the theme of *Some Problems of the Constitution* (written jointly with Graeme C. Moodie), and the constitutional independence of the constable, the theme of *Police and Government*, were also institutional arrangements resting upon ideas.<sup>10</sup> To understand the institutional arrangement, Geoffrey believed, one had to understand the idea underlying it, the conceptual foundation. *Parliamentary Sovereignty and the Commonwealth* was thus an attempt ‘to indicate the influence of theory upon political and judicial practice’. For, ‘Wherever the sovereign capacity

<sup>9</sup> Marshall, *Parliamentary Sovereignty and the Commonwealth*, pp. v, 2.

<sup>10</sup> Geoffrey Marshall, and Graeme C. Moodie, *Some Problems of the Constitution* (London, 1959, 5th edn., 1971); id., *Police and Government* (London, 1965).

of legislatures is debated, theoretical issues lie very close to the surface, and political philosophy keeps breaking in.'

But, in order to understand 'the influence of theory upon political and judicial practice', the tools of jurisprudence and of modern analytical philosophy are indispensable. 'The analysis of language,' Geoffrey declared in *Parliamentary Sovereignty and the Commonwealth*, 'which has proved so fruitful in general philosophical inquiries ought to prove no less useful here.'<sup>11</sup> Geoffrey's work owes much to the linguistic analysis pioneered, first by the British empirical philosophers, Hume and Bentham, and in the twentieth century by Wittgenstein and Austin, and adapted to jurisprudence by H. L. A. Hart, Bentham's heir and critic. It is they, rather than the social scientists, who can be considered his intellectual mentors.

Wittgenstein, Austin, and Hart spent much time on analysing the concept of a rule which they saw as fundamental in social and legal life. Indeed, the analysis of different types of rules was an important topic in Austin's famous Saturday mornings. In *Parliamentary Sovereignty and the Commonwealth*, Geoffrey uses a quotation from Wittgenstein's *Philosophical Investigations* as the epigraph to one of his chapters: 'When one shows someone the King in chess and says "this is the King", this does not tell him the use of this piece unless he already knows the rules of the game.'<sup>12</sup>

In his inaugural lecture as Professor of Jurisprudence at Oxford, H. L. A. Hart had argued that progress could be made in the subject if one transformed questions such as 'What is law' and 'What is the state' into questions of the form 'Under what conditions is it appropriate to use the term "law" or "state"?'<sup>13</sup> This was in line with Wittgenstein's celebrated aphorism, 'Don't ask for the meaning, ask for the use.' Similarly, in *Parliamentary Sovereignty and the Commonwealth*, Geoffrey urges us to substitute for the metaphysical question, 'what is sovereignty', the questions, 'what rules govern and define the legislative process,' and 'under what conditions may rules of this kind be revised'.<sup>14</sup>

Geoffrey's answer, then, to the metaphysical puzzles associated with sovereignty is to say that sovereignty is a legal doctrine defining the rules regulating Parliament. The sovereign in Britain is 'a body of persons acting

<sup>11</sup> Marshall, *Parliamentary Sovereignty and the Commonwealth*, p. 2.

<sup>12</sup> *Ibid.* p. 4.

<sup>13</sup> H. L. A. Hart, 'Definition and Theory in Jurisprudence', inaugural lecture at Oxford University, repr., in *Law Quarterly Review*, 70 (1954), 37 ff.

<sup>14</sup> Marshall, *Parliamentary Sovereignty and the Commonwealth*, p. 39.



in a certain capacity and following a certain procedure'.<sup>15</sup> Yet one can determine what that capacity is and what that procedure is only if one has the concept of a rule, for both 'capacity' and 'procedure' are rule-governed notions. Thus the designation of any purported sovereign, even of a Hobbesian Leviathan, must include a statement of the rules for ascertaining, at the very least, how that sovereign is to be recognised and what is to count as a valid command of the sovereign. These rules are logically prior to the sovereign. Thus to say that a legal sovereign exists is to say that a certain sort of rule about the nature of legal authority exists. Sovereignty, then, is a legal doctrine which Parliament is perfectly competent to alter, as it was perhaps to do in 1972 when it passed the European Communities Act.<sup>16</sup> Seen in this light, legislative sovereignty 'becomes a special sort of constitutional rule rather than a signal indicating the non-existence of constitutional rules'.<sup>17</sup>

*Parliamentary Sovereignty and the Commonwealth* is a fundamental work for anyone interested not only in the British and Commonwealth constitutions, but also in wider issues of jurisprudence. It may well have influenced H. L. A. Hart's *The Concept of Law*, published in 1961, which revived the study of jurisprudence as an independent discipline. The conceptual power and analytical rigour which the book displayed were to remain the hallmarks of Geoffrey's approach. *Parliamentary Sovereignty and the Commonwealth* was, in its deflation of grandiose, highfalutin theories of sovereignty, like so much of his work, and indeed like the man himself, subtly subversive.

### III

Geoffrey's second book, written in collaboration with Graeme C. Moodie, was *Some Problems of the Constitution*, first published in 1959. The book's modest title concealed yet more subversive material.

In his *Introduction to the Study of the Law of the Constitution*, first published in 1885, Dicey had drawn attention to two principles which he believed underpinned the British Constitution. They were the sovereignty of Parliament and the supremacy of the ordinary law of the land. He had

<sup>15</sup> Marshall, *Parliamentary Sovereignty and the Commonwealth*, p. 11.

<sup>16</sup> Hart, 'Definition and Theory in Jurisprudence', 44 ff. See also Geoffrey Marshall, 'What is Parliament? The Changing Concept of Parliamentary Sovereignty', *Political Studies*, 2 (1954), 193–209.

<sup>17</sup> Marshall, *Parliamentary Sovereignty and the Commonwealth*, pp. 208–9.

given hardly any attention at all to a third important principle, ministerial responsibility to Parliament. Yet, Geoffrey declared, 'In one sense much of the constitutional history of the present century might be represented as a conflict between this and the two former principles.'<sup>18</sup> *Some Problems of the Constitution* seeks to analyse the problems raised by ministerial responsibility in terms of relationships between ministers and 'the Crown, Parliament, the courts, the administration and the public'.<sup>19</sup>

The central theme of *Some Problems* is the inadequacy of the doctrine of ministerial responsibility as a form of control upon government. The doctrine was, of course, adumbrated long before the tightening of party discipline and the development of modern, highly organised, political parties; and *Some Problems* can in one sense be seen as concerned with the consequences of party government for the constitution. It underlines the point that many of our constitutional conventions reflect the conditions of pre-twentieth-century experience before a two-party system came into being.

Traditionally, in Britain, there were two ways in which power could be controlled—first through the courts, and secondly through the 'High Court of Parliament'. However, the courts had not been particularly successful in controlling the administration. 'It must be conceded', Geoffrey declared '... that a fair generalisation about the history in this country of individual efforts to attack the exercise of administrative powers in the courts would be that it is a record of comparative failure.'<sup>20</sup> Part of the reason for this failure was that the doctrine of ministerial responsibility to Parliament had been used to prevent the courts or indeed any other external body from holding power accountable. It was a constitutional fiction, but a fiction useful to the executive, that the courts ought not to intervene on matters of administration of direct concern to the citizen, since the citizen already enjoyed a remedy in Parliament for any abuse he or she may have suffered. The consequence was, as Sir Matthew Hale had noticed as early as the seventeenth century, that if Parliament, perhaps through the exigencies of party politics, was unwilling to grant redress to an individual grievance, the citizen was powerless. For, as Hale said of Parliament: 'This being the highest and greatest court . . . if by any means

<sup>18</sup> Marshall and Moodie, *Some Problems of the Constitution*, p. 11.

<sup>19</sup> *Ibid.*, p. 11.

<sup>20</sup> *Ibid.*, p. 94.

a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.<sup>21</sup>

Thus, so Geoffrey believed, 'A major component of post-war disquiet about governmental discretion has been the growing awareness (in all political parties) that a potential absence of control might lurk behind an artificial phraseology about parliamentary redress and an allocation to the legislature of a role which it does not and could not play.'<sup>22</sup> Parliament, then, in Geoffrey's view, 'must take the major share of credit or blame' for this state of affairs, 'and the doctrine of ministerial responsibility to Parliament may be cast for the role of either hero or villain according to the importance attached to administrative freedom'.<sup>23</sup>

Part of the reason, however, why we had not been more successful in controlling ministers' powers was that we lacked a theory of the state, and so had no theoretical basis on which the consequences to individuals of official action might be elaborated. 'There is', Maitland had declared, in his essay 'The Crown as Corporation', 'wonderfully little of the State in Blackstone's *Commentaries*'.<sup>24</sup> In Britain, the sovereignty of Parliament had been used as a substitute for a theory of the state. There is thus a link between Geoffrey's first book, in which he sought to unravel and demystify the essentially metaphysical notion of the sovereignty of Parliament, and his second, in which he shows that this essentially metaphysical notion gave rise to such absurd fictions as that the king can do no wrong as well as inhibiting the development of new remedies for citizens' grievances.

Marshall believed that there was a gap between the jurisdiction of the courts and that of Parliament, a gap within which the powers of ministers had grown unchecked, as had a host of administrative bodies created by statute. This gap, he believed, should be filled by the creation of an Ombudsman and the development of administrative law.

Today, the whole climate in which we discuss problems of the citizen and the administration has altered out of all recognition since the first edition of *Some Problems of the Constitution* was published in 1959. In 1967 the Parliamentary Commissioner Act was passed creating the Parliamentary Commissioner for Administration, familiarly known as the Ombudsman, while one of the most striking features of the debate on

<sup>21</sup> Cited in S. E. Finer's review of *Some Problems of the Constitution*, in *Political Studies*, 8 (1960), 201.

<sup>22</sup> Marshall and Moodie, *Some Problems of the Constitution*, p. 89.

<sup>23</sup> *Ibid.*, p. 94.

<sup>24</sup> *Ibid.*, p. 92.

ministers' powers since the 1960s has been the revolution in administrative law. It is, of course, notoriously difficult to attribute developments in the law and administrative procedure to the influence of any particular individual; nevertheless, it would be surprising if, when the history of the growth of administrative law is written, Geoffrey Marshall is not accorded his place as one of those who, through his writings, altered the climate of discussion of the relationship between the individual and the state.

Geoffrey was also a strong supporter of a Bill of Rights for Britain, Parliament being unable effectively to protect the rights of the citizen, but he was severely disappointed by the Human Rights Act of 1998, believing that its provisions were too weak to be effective. Amongst his last publications are a number of papers criticising various aspects of the Act as inadequate. Recent experience has done little to disprove his fears.

#### IV

Geoffrey's next book, published in 1965, seemed at first sight to be on an entirely different theme. He had always been interested in the constitutional position of local government, and had, for several years, lectured to police cadets at the now defunct Police College at Eynsham on their powers and duties under the law. In *Police and Government: The Status and Accountability of the English Constable*, he sought to undermine the doctrine that the constable answered to no one but the law and that the police were servants neither of central government nor of local authorities. This doctrine, Geoffrey believed, 'has almost taken on the character of a new principle of the constitution whilst nobody was looking'. He claimed, however, that the doctrine 'implies a rationally indefensible relationship between the functions of police and government'.<sup>25</sup>

The doctrine had, nevertheless, been supported by a series of opinions of various legal and political authorities, which stood 'upon a kind of inverted pyramid'. 'The legal apex of the pyramid' was 'the opinion of Mr. Justice McCardie in *Fisher v. Oldham Corporation* decided in 1930'.<sup>26</sup> The core of the book accordingly comprises an attack on Mr Justice McCardie's decision in this case, [1930] 2 KB 364, that the borough of Oldham was not liable for the actions of the Oldham police because the

<sup>25</sup> Marshall, *Police and Government*, p. 120.

<sup>26</sup> *Ibid.*, p. 34.

police officer was 'a servant of the state . . . a ministerial officer of the central power'.<sup>27</sup>

Geoffrey showed convincingly that the doctrine that the constable enjoyed 'original' authority which guaranteed him from subordination to central or local government, had no historical warrant. The anonymous reviewer of *Police and Government* in the *Times Literary Supplement* thought that the historical analysis of the growth of police powers in the book was 'surely the best treatment of the subject that has been attempted'.<sup>28</sup> But the soundness of Geoffrey's argument, as he himself recognised, was not dependent upon the historical analysis. Whether or not the historical analysis were correct, the fact that powers had originated in a certain way said nothing about the degree of independence which a constable today ought to enjoy in exercising his powers.

Against the doctrine adumbrated in *Fisher v. Oldham Corporation*, Geoffrey pointed out that local authorities were statutorily responsible for the efficient policing of their areas, while the Home Secretary was responsible for law and order in the country as a whole. How could this be so if policing was entirely independent and the police were responsible to the law alone? If the doctrine adumbrated in *Fisher* were correct, then, so Geoffrey claimed, police officers would enjoy 'an independence and freedom from control unique amongst officials exercising executive functions'.<sup>29</sup> Geoffrey concluded in *Police and Government* that the freedom of the police from outside interference applied only to the judicial functions of the police not to their executive ones; and law enforcement was at least as much of an executive as a judicial function.

There is more similarity between the central theme of *Police and Government* and *Some Problems of the Constitution* than might at first sight appear, for both books offer a critique of the existing machinery of accountability. In each case, Geoffrey argues that more controls on executive powers, more avenues of complaint, and more remedies for the grievances of the citizen were needed. One of the reasons, however, why so many were concerned to emphasise the responsibility of the police to the law alone was that they were fearful of the dangers of partisan political interferences in police activities. The legal doctrine about the office of constable that Geoffrey was concerned to undermine had 'been affected by fears about the dangers of party political contamination of the

<sup>27</sup> [1930] 2 KB 371.

<sup>28</sup> *Times Literary Supplement*, 2 Dec. 1965, p. 1107.

<sup>29</sup> Marshall, *Police and Government*, p. 16.

machinery of justice, and a distrust of the competence and capacity of local representative bodies'. 'How,' Geoffrey asked, 'can police be impartial and yet be subject to control by persons not required to be impartial?'<sup>30</sup> He did not, it has to be confessed, offer a really convincing answer to this question.

Geoffrey had been concerned to combat the erroneous view that the sphere of law and order was in some sense 'non-political'. 'This, in some ways peculiar, belief', Geoffrey maintained, 'rests upon the existence of a settled constitution and a stable society, and it most obviously tends to break down when the law is put into operation to enforce policies which are the subject of strong moral or political disagreements within society. The suffragette movement, fascist public meetings, and nuclear disarmament demonstrations provide examples.'<sup>31</sup> The trouble was, however, that the breakdown of the assumption of 'a settled constitution and a stable society', which was beginning to occur in the 1960s, cast more doubt on the political impartiality of central government and local authorities than it did on the probity of the police. During the miners' strike of 1984–5, the Home Secretary was accused of unconstitutionally centralising control of the police, while the South Yorkshire police authority sought to reduce expenditure on the police by discontinuing the use of police horses and eliminating the force's mounted section, an attempt to use the authority's financial powers to affect the manner in which police operations were carried out. With the activities of the police becoming politically controversial, political majorities, whether in central or local government, sought to ensure that the police acted as they, the politicians, wished rather than in an impartial manner. There was, in addition, the danger that political majorities, whether at central or local level, would seek to appoint senior police officers who would be sympathetic to their approach, so producing something resembling a spoils system in the working of this highly sensitive public service. It is hardly surprising that Geoffrey came to modify his approach. In a later book on *Constitutional Conventions*, first published in 1984, Geoffrey quoted with approval the comments of Sir Robert Mark, a former Metropolitan Police Commissioner, from his autobiography, *In the Office of Constable*, published in 1979, that 'the greatest challenge for the police of tomorrow is the threat of change in their constitutional position . . . As political and industrial

<sup>30</sup> *Ibid.*, pp. 19, 75.

<sup>31</sup> *Ibid.*, pp. 112–13.

tensions rise the police will inevitably become the focus of political controversy centred upon their constitutional accountability.<sup>32</sup>

‘That seemed at the time,’ Geoffrey remarked, ‘too dramatic a judgement. But questions that were once academic now figure in party manifestos.’ Geoffrey’s final position was that accountability of the police is best secured not through an ‘extension of political control but in more effective complaints and consultation machinery and in the acknowledgement of a wider scope for questioning and debating the exercise of police powers’.<sup>33</sup> As in *Some Problems of the Constitution*, he seeks accountability not through the political machinery of Parliament, nor through local government, but through the development of new machinery not controlled by politicians. It is an approach which the Nolan Committee on Standards in Public Life was to find congenial. For the Committee, like Geoffrey, believed that parliamentary self-regulation needed to be supplemented by the introduction of codes, monitored by independent outside figures.<sup>34</sup> The Committee pointed the way, not to a fully codified constitution, policed by a Supreme Court on the American model, but to a halfway house. ‘The British,’ one member of the Nolan Committee declared, ‘like to live in a series of halfway houses.’<sup>35</sup> Geoffrey too had been advocating a reformed constitution based on halfway houses. Perhaps it was the cogency and force of Geoffrey’s arguments which had helped to create the intellectual climate within which reforms of the type recommended by Nolan would become acceptable. Once again, he may well, in his quiet way, have succeeded in winning converts amongst those called upon to reform the constitution.

## V

In 1971 Geoffrey published his next book, *Constitutional Theory*. This opened up a new and hitherto unfashionable area of investigation for political science. A constitution, the American scholar Edward Corwin had declared, in a judgement which Geoffrey quoted in the epigraph to the book, could be conceived

<sup>32</sup> Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford, 1984; rev. edn., 1986), p. 153.

<sup>33</sup> *Ibid.*, p. 153.

<sup>34</sup> Committee on Standards in Public Life, First Report, *Standards in Public Life*, vol. I. *Report*, Cm. 2850-1 (London, 1995).

<sup>35</sup> Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London, 1995), p.184.

in the formal sense as the nucleus of a set of ideas. Surrounding this and overlapping it to a greater or less extent is constitutional law . . . Outside this finally, but interpenetrating it and underlying it is constitutional theory, which may be defined as the sum total of ideas of some historical understanding as to what the constitution is or ought to be. Some of these ideas do actually appear more or less clearly in the written instrument itself . . . others tend towards solidification in the less fluid mass of constitutional law; and still others remain in a more or less rarefied or gaseous state, the raw materials, nevertheless, from which national policy is wrought.<sup>36</sup>

During the 1930s Sir Ivor Jennings had spoken of the need for ‘a five-volume treatise on constitutional law, which would set out in the first thousand pages the general principles of public law and which would discuss and analyse at length the ideas expressed in the similar works of the great continental authorities and in the books on political science in English’. Not surprisingly, perhaps, this five-volume treatise was never written, but the ‘general principles of public law’ mentioned by Jennings were, for Geoffrey, the essence of constitutional theory, ‘a collection of general ideas about the legislative, executive and judicial branches of government.’<sup>37</sup> *Constitutional Theory* deals with conceptual or comparative questions about the basic ideas underlying the British and American systems of constitutional government—ideas both about the structure and working of government, such as sovereignty and the separation of powers, and also about ideals such as civil rights, equality under the law, and freedom of speech and assembly. Thus *Constitutional Theory* combines topics usually considered the responsibility of the political scientist with topics normally considered to lie in the province of the political theorist.

In 1984 Geoffrey published a book on *Constitutional Conventions*, returning to a topic on which he had written a chapter in *Some Problems of the Constitution*. The analysis of constitutional conventions, moreover, formed a natural complement to the analysis of sovereignty in *Parliamentary Sovereignty and the Commonwealth*. ‘Both sovereignty and convention’, Geoffrey argued,

are similar in that, besides having a tangled history, they are difficult ideas whose general character has been, and still is, in dispute. Oddly they are also similar in that in recent times questions about their character have been provoked largely by constitutional developments occurring in Commonwealth

<sup>36</sup> Edward S. Corwin, *American Constitutional History*, cited in epigraph to Geoffrey Marshall, *Constitutional Theory* (Oxford, 1971).

<sup>37</sup> *Ibid.*, p. 1.



countries as much as in Britain. In the 1950s a crisis in South Africa caused a revision of ideas about sovereignty. Thirty years later events in Canada have stirred up new questions about conventions.<sup>38</sup>

Thus while the third and final part of *Parliamentary Sovereignty* consists of a rigorous analysis of the key South African case of *Harris v. Dönges* (1952) I TLR 1245, an important chapter in *Constitutional Conventions* analyses the problem of patriating the Canadian Constitution in 1980–2, and the solution to the problem laid down by the Canadian Supreme Court's decision in *Reference Re Amendment of the Constitution of Canada* (Nos. 1, 2, and 3) [1982], 125 DLR (3d) I. The two books together provide what remains the best analysis that we have of what has happened to Dicey's central concepts since the *Introduction to the Study of the Law of the Constitution*.

*Constitutional Conventions*, like *Constitutional Theory*, considers a wide range of topics—for example, the role of the sovereign, the power of dissolution, hung parliaments, ministerial responsibility, and Ombudsmanship. But perhaps the core of the book consists of the analysis of the concept of convention itself in the first and last chapters of the book.

Geoffrey's analysis turns out to be strikingly Diceyan. He endorsed both Dicey's distinction between law and convention and his view of the purpose of convention. The distinction between law and convention was, Geoffrey thought, 'clear enough and worth maintaining. The evidence for the existence of law and convention is in standard cases characteristically different, whether the evidence is assessed by judges or by politicians.'<sup>39</sup>

Secondly,

Dicey's instinct was also right about the purpose of convention. Although conventions cover a wider area than Dicey imagined, and although they do not always modify legal powers, the major purpose of the domestic conventions is to give effect to the principles of governmental accountability that constitute the structure of responsible government. The main external conventions have the comparable purpose of seeing that responsible government is shared equally by all the member states of the Commonwealth, and that accountability is allocated in accordance with political reality rather than legal form.<sup>40</sup>

Where Dicey went wrong, Geoffrey believed, was in underestimating the variety of constitutional conventions. This led him to offer a wrong explanation of the reasons why conventions were obeyed; or, rather, to

<sup>38</sup> Marshall, *Constitutional Conventions*, p. vii.

<sup>39</sup> *Ibid.*, p. 17.

<sup>40</sup> *Ibid.*, p. 18.

provide an explanation where no explanation was needed. Geoffrey himself had changed his mind on this point since, in *Some Problems of the Constitution*, he had argued that conventions were obeyed, not only, as Dicey had suggested, because disregard of convention would lead to a consequential change in the law, but also because it might lead to a consequential change in the structure of government. Conventions, Geoffrey had argued, 'describe the way in which certain legal powers must be exercised if the powers are to be tolerated by those affected'.<sup>41</sup>

In *Constitutional Conventions* Geoffrey criticised this position on two grounds, first because supposed conventions are not in fact always obeyed; and, secondly, because a breach of a convention may lead to the convention itself being altered. He now tended to the view that it was probably unnecessary to ask why conventions were obeyed, 'since we pick out and identify as conventions precisely those rules that are generally obeyed and generally thought to be obligatory'.<sup>42</sup> On this view, just as treason never prospers—for if it did none would call it treason—so conventions are never breached—for if they were none would call them conventions. Conventions were part of the critical, as opposed to the positive, morality of the constitution and it followed, therefore, that 'we do not need any special or characteristic explanation for obedience to the rules of governmental morality. Whatever we know about compliance with moral rules generally, will suffice.'<sup>43</sup>

## VI

It is characteristic, however, of the conclusion of *Constitutional Conventions* that Geoffrey, unlike, say, Dicey or H. L. A. Hart, provided no theory of his own to supplement or replace those which he criticised. He had no doctrine of his own to propound. In this, he resembled perhaps J. L. Austin, the linguistic philosopher, or his hero, David Hume, 'the greatest of the British empirical philosophers'.<sup>44</sup> Plamenatz, in discussing Hume, wrote of a Dutch admiral who tied a broom to his flagship 'as a boast or a warning to his enemies'. Boastfulness was, however, as far from Hume's character as it was from Geoffrey's. Hume, Plamenatz went on to say,

<sup>41</sup> Marshall and Moodie, *Some Problems of the Constitution*, p. 35.

<sup>42</sup> Marshall, *Constitutional Conventions*, p. 6.

<sup>43</sup> *Ibid.*, pp. 6–7.

<sup>44</sup> Entry on 'Hume' in A. W. B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London, 1984), p. 263.

‘used his broom deftly and quietly, raising little dust, but he used it vigorously’.<sup>45</sup> The same could be said of Geoffrey.

Geoffrey was a critic rather than an originator of new theories. His scepticism reflected his personality, witty, wise, and immune to changes in fashion. Intellectually self-sufficient, his kindly nature was roused to anger only by the arrogant and the pretentious whose pomposity he always delighted in pricking with his witty asides. The most self-effacing of men, he was entirely lacking in self-importance. He probably never realised how much he was loved and admired by his pupils, his friends, and his colleagues.

On his seventieth birthday, he was presented with a collection of essays, entitled *The Law, Politics, and the Constitution*, published by Oxford University Press, and edited by Vernon Bogdanor, a former pupil, David Butler, and Robert Summers, a long-standing colleague and friend.

## VII

We may sum up Geoffrey’s intellectual contribution in the following way. He was one of a tiny handful of political theorists in the Western world who also wrote extensively on topics in legal theory and jurisprudence, including that vital branch of the general subject of the rule of law relating to standards and procedures for holding police legally accountable for how they conduct their activities. In various essays, and especially in his book *Police and Government*, he focused in general terms on what is to be done when, for example, police assault accused persons for the purpose of inducing confessions, conduct improper searches of persons and private property, fabricate evidence, and the like.

Geoffrey was aware, too, that police ‘are extremely exposed to accusations and complaints many of which are virtually certain to be unjust, insubstantial or malicious’.<sup>46</sup> He was also conscious that some police who are themselves subjected to law in the conduct of their activities might become demoralised and perhaps even deterred from vigorous fulfilment of duty. He knew, too, that police could be subject to the danger of ‘partisan political contamination’.

Yet in various writings Geoffrey favoured versions of a Police Disciplinary Code, and advocated a more effective complaints procedure

<sup>45</sup> John Plamenatz, *Man and Society*, 2 vols. (London, 1963), I, 299.

<sup>46</sup> Marshall, *Police and Government*, pp. 106–7.

for holding police accountable. This especially important branch of the general subject of the rule of law became a lifelong interest. He saw the special importance, symbolic and other, of subjecting the police to the rule of law. His views became well known, and influential. By the time of his death in 2003, many of the ideas for reform that he had originated or supported had become law or established practice, though he would have been loath to claim he had been the sole factor or even a major force in this process. However, it is certain that he contributed key ideas either of his own or by way of examples derived from other systems (including the American).<sup>47</sup>

From the publication of *Some Problems of the Constitution* with Graeme C. Moodie in 1959 onward, Geoffrey also became a leading advocate of more effective accountability of governmental administrators generally, especially for abuses of power contrary to law. This subject, too, is a further major branch of that staple of jurisprudence and legal theory known as the rule of law. Geoffrey wrote extensively both on the definition of abuse of power, and on standards and procedures for holding administrators to account. He advocated the development of a sophisticated body of administrative law for control of official decisions and actions, and supported the appointment of an Ombudsman. In 1976, he also supported a modified incorporation of the European Convention on Human Rights. His ideas here closely approximated various provisions of the Human Rights Act of 1998, although he was highly critical of the Act.

In the course of his efforts to advance the rule of law, Geoffrey not merely advocated better controls on police and also the growth and development of a general body of administrative law. He also elaborated and defended Dicey's concept of 'conventions of the Constitution' which, though enforceable neither in the law courts, nor by the presiding officers in the Houses of Parliament, are 'considered to be binding by and upon those who operate the Constitution'.<sup>48</sup> In *Some Problems* Geoffrey stressed that the definition of 'conventions' may be 'amplified by saying their purpose is to define the use of constitutional discretion'. He went on to say that 'conventions are non-legal rules regulating the way in which legal rules shall be applied'.<sup>49</sup> His stress on conventions may, however, be viewed as an extension of the rule of law, and thus also qualifies as a branch of that ancient subject of legal theory.

<sup>47</sup> *Ibid.*, p. 110.

<sup>48</sup> *Some Problems of the Constitution*, p. 29.

<sup>49</sup> *Ibid.*, p. 30.

Geoffrey opened his book *Constitutional Conventions—The Rules and Forms of Political Accountability* (1984) with a prefatory quote from Edward Freeman, author of *The Growth of the English Constitution* (1872):

We now have a whole system of public morality, a whole code of precepts for the guidance of public men which will not be found in any page of either the statute or the Common Law but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right.

Geoffrey now stressed that although conventions ‘do not always modify legal powers’, the major purpose of domestic conventions ‘is to give effect to the principles of governmental accountability that constitute the structure of responsible government’.<sup>50</sup> Geoffrey’s book is without doubt the leading modern treatment of the subject.

Geoffrey closed the book with an illuminating discussion of ‘the character of convention’ in which he treated the vagueness of conventions, the justiciability of conventions, the obligation of conventions, and the changing of conventions. He emphasised that conventions are ‘unlike both legal rules and ordinary moral rules. They are unlike legal rules because they are not the product of legislative or of a judicial process. They differ from ordinary moral rules because their content is determined partly by special agreement, and many of them govern matters that apart from such agreed arrangements would be morally neutral’.<sup>51</sup> Yet many conventions are rules, are thought to be obligatory, and can strongly and properly influence the exercise of legal powers and the discharge of legal duties. Geoffrey acknowledged that many conventions are general or vague, yet he emphasised that clear cases do arise for the application of conventions and they are in fact applied. Given the intimacy of conventions and law, it is appropriate to treat conventions and Geoffrey’s illuminating writings on them as concerned with an important extension of the rule of law, even though disputes about the meaning or application of given conventions are not justiciable in courts.

A further subject that may also be viewed as a branch of that staple of jurisprudence and legal theory called the rule of law is statutory interpretation. Geoffrey saw that without a stable and uniform methodology for the interpretation of statutes, the rule of statutory law would at least be erratic if not impossible. In a substantial essay, co-authored with Robert S. Summers, Marshall advanced a number of important principles

<sup>50</sup> *Constitutional Conventions*, p. 17.

<sup>51</sup> *Ibid.*, pp. 216–17.

that must be observed if an interpretive methodology is to be faithful to statutory law and uniform throughout the jurisdiction.<sup>52</sup>

## VIII

Geoffrey played a full part in College and University affairs at Oxford, serving in the 1960s as a University representative on the City Council, and succeeding to the position of Sheriff in 1971. His duties included the prevention of unlawful grazing on Port Meadow and the destruction of ragwort. Between 1965 and 1977 he was Secretary to the Governing Body of Queen's. His tutorial fellowship was due to expire in 1996, but in 1993, on the retirement of John Moffat, he was elected to the Provostship of Queen's. He brought to the Provostship great knowledge of how the college operated and a real devotion to, and indeed love, of Queen's. He was a strong believer in the college system and did not flinch from being in a minority of one in university bodies when he thought that college autonomy was at risk. He sought to defend the college system and the tutorial system against the managers and bureaucrats who were seeking to destroy it. He took his duties as Provost seriously, and, though a life-long agnostic, attended chapel regularly. On his retirement in 1999, he was elected to an Honorary Fellowship, having devoted forty-two years of his life to his college. Geoffrey died on 24 June 2003, after being diagnosed with leukaemia.

Despite Geoffrey's massive scholarly achievements, he never lost his innate and natural modesty. He remained a man of great sweetness of disposition, totally lacking in pomposity or ambition. He was both reticent and uncompetitive, hating any form of display or self-advertisement, stridency of any sort. His modesty led many to underestimate the scale of his achievement. He was one of the most underestimated scholars of his generation. But he made a fundamental and permanent contribution to the study of the British Constitution, a contribution that is both searching and profound.

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<sup>52</sup> Geoffrey Marshall and Robert S. Summers, 'The Argument from Ordinary Meaning in Statutory Interpretation', in *Northern Ireland Law Quarterly*, 43 (1992), 213 ff.

*Note.* This biography relies heavily on Vernon Bogdanor's 'Introduction' to the festschrift for Geoffrey Marshall, in David Butler, Vernon Bogdanor and Robert Summers (eds.), *The Law, Politics, and the Constitution* (Oxford, 1999), and the obituary notices in *The Times*, 26 June 2003, and *The Independent*, 1 July 2003. It has also benefited from the recollections of Mrs Pat Marshall and by Dr Martin Edwards, Fellow of the Queen's College, to whom many thanks are due; and from Geoffrey's own, typically humorous account of his life which he had prepared for his memorialist when he knew that he was dying.