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DICEY'S LAW OF THE CONSTITUTION: A REVIEW *

William A. Robson †

THE first edition of this celebrated work appeared in 1885; and such was its vogue until ten or fifteen years ago that there is scarcely anyone over thirty-five years of age who studied law, politics or constitutional history at a university or professional law school in England and the British Dominions who was not "brought up" on Dicey. "Dicey on the Constitution" was regarded for generations not merely as a perfect, accurate and comprehensive statement of the principles of the British system of government; but also as a reliable explanation of its superior virtues and liberties. The book attained an ascendancy over other treatises which amounted almost to a monopoly.

A book does not achieve such a position without substantial merits; and Dicey's merits are as obvious as his defects. For one thing, he wrote extremely well in simple and lucid English. For another, he had a breadth of view concerning the relations between law, politics and economics which contrasts favorably with the dry and pedantic legalism of Blackstone or Austin—a quality which comes out even more strongly in *The Relation between Law and Public Opinion During the Nineteenth Century* than in the present work. In the third place, he had a great facility for enunciating broad and easily remembered principles.

His besetting fault, which the passage of time tends to magnify, lay in a defective power of observation which led him, as Montesquieu had been led in the eighteenth century, to base high-sounding and far-reaching generalizations (so easily remembered, alas, by students and teachers alike) on inaccurate statements of fact. These two writers, the most celebrated exponents of constitutional government in their respective lifetimes, and for long afterwards, both made gigantic mistakes of fact. Montesquieu, misreading the British Constitution, atributed the liberties of England to a separation of powers which never existed there, and elevated the need for such a separation into a dogmatic principle of political theory. Dicey, equally misinformed about the French administrative jurisdiction, gave a totally false impression of *droit*

* The Law of the Constitution. By A. V. Dicey. Ninth Edition. Revised and with an introduction by E. C. S. Wade. London: Macmillan. 1939, Pp. clvi, 681, 15 s. net.

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administratif to the receptive minds of his young readers. The practical results of these misunderstandings have been of immense importance on both sides of the Atlantic. The United States is still struggling desperately to free itself from the yoke that Montesquieu laid upon its shoulders. While in England, as Dr. Wade points out in his long and interesting preface, Dicey's "insistence (now widely rejected) upon the inadequacy of French administrative law to protect the individual has been largely responsible for the rejection of proposals for a final appellate tribunal with administrative experience to control public authorities and their servants in the performance of their duties. His faith in the courts as guardians of liberty has concealed the fact, upon which he did not dwell, that the Government departments enjoy under the common law wide immunity from process."

The text of the new edition has been left as it was in 1908, the editor having wisely abandoned the attempt to bring it up to date. In place of such an attempt he has written a preface of nearly one hundred fifty pages in which Dicey's views are critically examined in the light of modern developments and ideas.

The earlier part of the book consists of an exposition of the sovereignty of Parliament. This remains a leading principle of the Constitution so far as the formal authority of Parliament is concerned; but Dr. Wade emphasizes that the fact that the courts cannot question legislative power is not conclusive of the extent of that power. The growth of organized pressure groups, the practice of consultation by the government with sectional interests concerning bills prior to their introduction into Parliament, the position in regard to Dominion powers resulting from the Statute of Westminster: these and other factors have tended to make the political supremacy of Parliament from the legislative aspect "more and more a fiction."

In Part III of the treatise, Dicey explained some of the conventions of the Constitution, and the relation between those conventions and the law of the Constitution. Here he was a pioneer whose efforts have been more than justified. For it is true, as Dr. Wade remarks, that conventions cover the entire field of governmental activity and alone make it possible to carry on the public affairs of the nation and the Empire. The weakness of Dicey's approach was that although he was willing to include conventions in Constitutional Law, he refused to admit politics into the discussion. But since conventions are at bottom political expedients, he robbed the subject of half its value. He was compelled to consider the ultimate sanction to conventions as residing in the law administered in the courts—one of the least important methods of securing compliance.

Dicey was essentially Austinian in his conception of law. He was unwilling to concede that any rule of conduct could be regarded as law unless it was enforceable in the ordinary courts of justice; and, strangely enough for a man who emphasized the sovereignty of Parliament, he almost entirely neglected the part played by legislation in his conception of the so-called rule of law. The new edition contains much sound sense on the subject of the rule of law as a defence against arbitrary government. Dr. Wade shows clearly that "the rule of law" signifies little unless we know the substance of the law. Law is no more than a mechanism. It may be an instrument for establishing autocratic government or for securing a democracy. To uphold the rule of law as such is to be either the dupe of mere legalism or the victim of sentimentality. "It is no help to an understanding of the legal principles of our own constitution to claim the rule of law—as a legal rule—as a unique feature of the British Constitution." Dr. Wade also explodes with quiet effectiveness the absurdities of Dicey's mania for regarding the courts as the only organs able or competent to restrain arbitrary or illegal action within the State.

Dr. Wade is by no means so clear or unambiguous on the question of liberty. On page lvii he observes that liberty of the individual is nothing more than the residue of his conduct which remains unfettered by any law—a purely *laissez faire* conception. On page lxii he observes that in a federal state where legislation is subject to judicial review "it may be difficult... to achieve that new conception of liberty which is regarded as essential in modern civilization. For liberty to-day involves the ordering of social and economic conditions by governmental authority, even in those countries where political, if not economic, equality of its citizens has been attained." There are obviously two distinct conceptions of freedom involved in these passages. The former implies that freedom consists in the mere absence of restraint; the latter that freedom requires the provision of opportunity through social and economic control of a collective character. One is negative, the other positive.

So many of Dicey's leading opinions and principles have been demolished by the kindly editor in the present edition that very little of his doctrine remains standing; and that which does remain has been modified almost beyond recognition. Through the ruins of his teaching, Dicey somehow manages to emerge as a great man. With the publication of the present edition his treatise ceases to be a public danger and a menace to realistic thinking about the British Constitution. It almost becomes possible to recommend the book to students of law and politics.