



## **AV Dicey and the making of common law constitutionalism**

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# *A.V. Dicey and the Making of Common Law Constitutionalism\**

Martin Loughlin<sup>+</sup>

## 1. *Introduction*

Only in England. A mid-Victorian Whig professor of law steeped in ‘old morality’ publishes his undergraduate lecture notes on constitutional law and sets the hegemonic framework of the British constitution that, for good or ill, prevails to this day.

When Albert Venn Dicey wrote his little book of eight lectures it was commonly assumed that the genius of the British constitution was best revealed through the study of history. This was the assumption he set out to displace. But the arcane bundle of procedures and precedents that make up the English common law was hardly a propitious foundation for this task. Besides, English law was generally felt to be quite unsuited for university study. It was listed in the Oxford curriculum but, as the then Regius Professor of History observed, ‘the legal portion of the so-called Law and History School has become almost a farce’.<sup>1</sup> Appointed to the Vinerian chair of English law in 1882, Dicey set about changing the status of law teaching at Oxford and soon latched on to the mission of demonstrating that the British constitution rested on the bedrock of English law.

His inaugural lecture set out his stall. In ‘Can English Law be taught at the Universities?’, Dicey advocated presenting English law as a coherent whole by shaping the mass of technical legal rules into a clear, logical, and symmetrical form.<sup>2</sup> After lecturing initially on the law of contract, he quickly switched to constitutional law. Deploring the eulogising of the constitution, he took as his task the need to distinguish legal rules from governmental practices and, instead of being pre-

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\* A review of Mark D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020), 460 pp (hereafter, Walters).

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<sup>1</sup> Walters, 44.

<sup>2</sup> A V Dicey, ‘Can English Law be taught at the Universities? An Inaugural Lecture’, 21 April 1883 (Macmillan, 1883).

occupied with its evolution, to expound the law as it stands. Constitutional law must be analysed simply as the set of rules that regulate the exercise of sovereign power in the state.

Following his first course of lectures, Dicey immediately proposed their publication. The book appeared in 1885 as *Lectures Introductory to the Study of the Law of the Constitution*. It cut a swathe through the pomp and pageantry of the constitution's ceremonial forms, underplayed the significance of amorphous governmental practices, and presented constitutional law as a system resting on three basic precepts: parliamentary sovereignty, the rule of law, and a set of rules not directly enforced by courts which he labelled 'constitutional conventions'.<sup>3</sup> The first, 'the dominant characteristic', vested absolute law-making authority in the Crown-in-Parliament.<sup>4</sup> The second, in a phrase that Dicey did so much to popularise, maintained that law is a set of rules that applies to all equally and whose integrity the judiciary is charged with protecting. And his masterstroke was to convert the myriad governmental practices into a special category of rules of political morality that ensured that Parliament's sovereign power of law-making could not be used to undermine 'the rule of law'.<sup>5</sup>

In an England ruled, in Orwell's words, 'by people whose chief asset was their stupidity', these virtues of clarity and simplicity were not to be underestimated.<sup>6</sup> Dicey's method also chimed with a growing scientific temperament of the era which, as legal positivism, had a major impact on legal thought. But these virtues of clarity, simplicity and scientific rigour are surely not in themselves enough to explain how the *Law of the Constitution* came to have such a lasting influence. What explains the remarkable longevity and dominant influence of these lectures?

In this meticulous study of Dicey's role in advancing 'the ideal of constitutionalism within the common law tradition',<sup>7</sup> Mark Walters offers an answer. Walters' method, drawing on a considerable amount of archival research, is in the best traditions of intellectual history. But, unlike Richard Cosgrove's 1980 biography on Dicey,<sup>8</sup> his is not intellectual history traditionally conceived. Like many lawyers delving into history, his ambition is to use historical investigation to promote a

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<sup>3</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8<sup>th</sup> edn. 1915), 34.

<sup>4</sup> Dicey, *Law of the Constitution*, 37

<sup>5</sup> Dicey, *Law of the Constitution*, 413-4.

<sup>6</sup> George Orwell, 'England Your England' [1941] in *Essays* (Doubleday, 1954), 257-83, 278. Orwell also writes that 'England is the most class-ridden country under the sun. It is a land of snobbery and privilege, ruled largely by the old and silly' (270). Orwell can be read as adding a class analysis to Walter Bagehot's comments about the English nation: 'the most essential quality for a free people, whose liberty is to be progressive, permanent and on a large scale, is much stupidity ... Stupidity is nature's favourite resource for preserving steadiness of conduct and consistency of opinion'. Walter Bagehot, 'Letters on the French Coup d'État' 1851' in his *Literary Studies* (Longmans, Green, 1879), vol 1. 309-60, 329-30.

<sup>7</sup> Walters, 1.

<sup>8</sup> Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan, 1980); hereafter, Cosgrove.

contemporary cause. On this matter, Walters is disarmingly explicit, stating that the book's 'ultimate aim remains that of normative legal analysis'.<sup>9</sup> Yet, any attempt to breathe new life into the work of a historically situated writer for the purpose of showing how, beyond the grave, he or she continues to speak to our present concerns is bound to be risky. How successful is Walters' exercise? And what is its significance?

## 2. *What explains Dicey's Influence?*

It is tempting to suggest that Dicey's work became so influential simply because it filled a void. At a time when scores of constitutional law professors in the twenty or more German universities were churning out long and sophisticated treatises on the public law of the Reich,<sup>10</sup> Dicey's study succeeded because it was the first of its type. But there must have been more to it than that. After all, in the year following the publication of Dicey's lectures, Sir William Anson published the first of his comprehensive two-volume study on *The Law and Custom of the Constitution*. Yet Anson himself suggested that, following Dicey, he was simply trying 'to map out a portion of its surface and to fill out its details'. Dicey, he explained, 'has done the work of an artist', whereas 'I have tried to do the work of a surveyor'.<sup>11</sup>

Anson offers a clue: the success of Dicey's book is attributable to the stylistic elegance of its presentation. But other factors contributed. First, there was some very lucky timing. In the year following *Law of the Constitution's* publication, Gladstone tabled his first Irish home rule bill, a contentious reform proposal that would come to dominate domestic politics for the next thirty years. Introducing the bill in the Commons, the Prime Minister praised Dicey's 'valuable work' for demonstrating 'in a more distinct and emphatic manner' the constitutional principle of Parliament's absolute supremacy.<sup>12</sup> That Irish home rule was *the* political issue on which Dicey was most vehemently opposed – an opposition that became fanatical – simply adds a touch of irony to this endorsement. Seizing the opportunity, Dicey persuaded his publishers to quickly issue a second edition. Sales rocketed.<sup>13</sup>

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<sup>9</sup> Walters, 4.

<sup>10</sup> See Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn Books, 2001).

<sup>11</sup> Sir William Anson, *The Law and Custom of the Constitution* vol. 1 (Clarendon Press, first published 1886. 4<sup>th</sup> edn. 1911), Preface to the First Edition, ix.

<sup>12</sup> Walters, 126.

<sup>13</sup> Neither biographer provides precise sales details, but Cosgrove (67-68) explains that 'anxious to see the book in print, Dicey offered Macmillan any profits from the sale of the original edition of 750. A small first edition would sell out quickly, Dicey calculated, and thus necessitate the rapid issuance of a second edition'. When that sold out in 6 months, he negotiated new financial terms and the subsequent editions 'solidified Dicey's financial position so that money was never again a worrisome problem'.

But we should also not overlook his lineage and his connections. Dicey was the grandson of James Stephen, the legal brains behind John Venn's Clapham Sect of Evangelical Whigs who had supported Wilberforce's campaign to end slavery. Through intermarriage, the Wilberforces, Venns and Stephens formed a tightly bound Victorian intellectual aristocracy who also campaigned for Catholic emancipation, parliamentary reform, and the extension of the franchise. Their tenacious advocacy of liberal causes passed on through the generations: Dicey's cousins included John Venn of Venn diagram fame, James Fitzjames Stephen, the prominent lawyer and judge who sought to codify the English criminal law, and the essayist Leslie Stephen, father of Virginia Woolf.

Woolf explained how the Stephen men were shaped by the 'great patriarchal machine' of Victorian institutions through which they competed obsessively and thrived effortlessly: 'Every one of our male relations was shot into that machine at the age of ten and emerged at sixty a Head Master, an Admiral, a Cabinet Minister, or the Warden of a college'.<sup>14</sup> To that list she might have added the bar and the bench. Softened by debilitating physical weakness, Dicey was nonetheless formed in the same mould. In 1858, his uncle, Sir James Stephen, wrote that 'Englishmen...drink in with their mother's milk the spirit of respect for law and lawful authority, and of reliance on themselves and on each other'.<sup>15</sup> Whether or not true of the nation, it certainly characterised the Stephen clan.

These influential liberal idealists promoted free trade, small government, and strict legality, ideals that suffused Dicey's worldview. He lived his life within this tight circle, marrying Elinor Bonham Carter, and supplementing it with a network of friends from Oxford's 'Old Mortality Society'. Less influential than the Cambridge Apostles, it nevertheless included such luminaries as T.H. Green, Algernon Swinburne and, significantly, James Bryce. It was Bryce, then a Cabinet Minister, who gave Gladstone a copy of Dicey's book, recommending it as 'the most valuable contribution to the scientific study of the British Constitution since the publication of Mr Bagehot's brilliant essay'.<sup>16</sup> And when in 1886 Gladstone's ministry fell following defeat on Irish Home Rule, Dicey had no qualms about himself sending a copy of the second edition to Lord

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<sup>14</sup> Cited in Hermione Lee, *Virginia Woolf* (Chatto & Windus, 1996), 52-3; Walters, 22. This assessment is corroborated by Maitland, who also was related by marriage to the Stephens: F.W. Maitland, *The Life and Letters of Leslie Stephen* (Duckworth & Co, 1906), 8: 'They [Leslie Stephen's ancestors] were a strenuous race. Hot tempers we may discern in some instances and sensitive nerves in others; but always there is a certain strenuousness, a certain greediness for work, and not infrequently there is devotion to some cause, a doctrine to be delivered, a crusade to be preached.'

<sup>15</sup> Walters, 20.

<sup>16</sup> Cosgrove, 68.

Salisbury, the new Prime Minister.<sup>17</sup> Apparently, it is not just his book but Dicey himself who had been ‘born under a lucky star’.<sup>18</sup>

### 3. Dicey’s Legacy

The thirty years following publication of the *Law of the Constitution* was an era of dramatic social, economic, political, and intellectual change. Yet throughout this period the substance of the book’s eight editions changed hardly at all. Illustrative is Dicey’s treatment of administrative law. Despite having spent many years advising on administrative law matters as counsel to the Commissioners of the Inland Revenue, his book bluntly denied its existence.<sup>19</sup> Invoking the French system to highlight the superiority of the English, he presented *droit administratif* as the emblem of prerogative despotism in stark contrast to the blessings of liberty conferred by the rule of law. And in the face of mounting evidence to the contrary, Dicey stubbornly refused, almost to the last, to acknowledge his error.<sup>20</sup>

The reason is clear. Rarely has a law book so quickly acquired such acclaim. ‘To call it an instant classic’, comments Cosgrove, ‘does not do it sufficient justice in regard to the authority it acquired in Dicey’s lifetime’.<sup>21</sup> Having immediately established its status as the authoritative text which framed all constitutional debate of the period, it was not to be touched. Besides, it also had the merit of reinforcing the ruling self-image of the high Victorian era. Its core thesis, as William Robson later explained, was that ‘in England the Rule of Law and Liberty prevail, whereas the barbarians of the continent have perforce to endure all the misery and oppression of a lawless tyranny imposed by a privileged state’. Dicey’s book, Robson was saying, ‘brought unction to the soul’ of the governing classes not just in Britain but across the Empire.<sup>22</sup>

Over that thirty-year period, the liberal ideas of Dicey’s youth gave way to a more conservative, even reactionary disposition. His progressive views on reform of the franchise hardened against extending the right to vote to women, he railed against the Trade Disputes Act of 1906 as offensive to the rule of law, and he condemned the Parliament Act 1911, which removed the aristocratic chamber’s right to veto legislation, as having destroyed ‘our last effective

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<sup>17</sup> Cosgrove, 49-50.

<sup>18</sup> Dicey to Mrs J. Bryce, 21 Nov 1902. Cited in Walters, 125; Cosgrove, 112.

<sup>19</sup> In 1876 Dicey was appointed Junior Standing Counsel to the Commissioners and dealt with many issues of tax and also administrative law: ‘Yet in *Law of the Constitution*, Dicey would famously and controversially deny the very existence of administrative law in England’: Walters, 70-75, 74.

<sup>20</sup> Walters, chap. 11.

<sup>21</sup> Cosgrove, 75.

<sup>22</sup> William A. Robson, ‘Report of the Committee on Ministers’ Powers’ (1932) 3 *Political Quarterly* 346-64, 347.

constitutional safeguard<sup>23</sup>. In his extended introduction to his last edition in 1915 the doubts poured out in one long lament: faith in laissez-faire had been undermined, faith in parliamentary government was in decline, and veneration of the rule of law was being eroded by legislation permeated by socialistic ideas.<sup>24</sup> The classical liberalism that had underpinned his dispassionate analytical account of constitutional law seemed increasingly out of place in the world that was emerging.

And yet the book was not displaced. For lawyers nurtured on its teachings it *was* the constitution. When during the interwar period the powers of government were extended, they noisily declaimed that the constitution itself was being subverted. The Lord Chief Justice's intemperate outburst published in 1928 as *The New Despotism* echoed his master's voice and forced the government into appointing a committee to investigate.<sup>25</sup> Its terms of reference, requiring it to report on 'what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law', marked official sanction of Dicey's unrivalled constitutional standing.<sup>26</sup> The terms provoked Cecil Carr to quip that the Committee was being asked 'whether Britain had gone off the Dicey standard and, if so, what was the quickest way back'.<sup>27</sup> William Robson was more blunt: the Committee, he asserted, 'started life with the dead hand of Dicey lying frozen on its neck'.<sup>28</sup>

By mid-century, however, developments in British government were of such structural significance that F.H. Lawson felt able to claim that the *Law of the Constitution* is more a 'phantom than a reality' and Ivor Jennings was confident enough to suggest that the book was now only of historical interest and need no longer be read.<sup>29</sup> But the problem with phantoms is that they never die. Over the last couple of decades this phantom has once again, in the minds of many jurists, loomed large. What Stefan Collini called 'a smooth-surfaced entity known as "Dicey" whose relation to the historical figure writing in the 1880s has dropped from view' has been restored.<sup>30</sup> Conventional rules having been shown not to be working well, the judges, while claiming to operate within Dicey's framework, have sought to qualify parliamentary sovereignty by elevating

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<sup>23</sup> A.V. Dicey, 'The Parliament Act, 1911, and the Destruction of all Constitutional Safeguards' in Sir William R. Anson et al., *Rights of Citizenship: A Survey of Safeguards for the People* (Warne & Co., 1912), 81-107, 81.

<sup>24</sup> Dicey, *Law of the Constitution*, xvii-cv.

<sup>25</sup> Rt Hon Lord Hewart of Bury, *The New Despotism* (Benn, 1928).

<sup>26</sup> *Report of the Committee on Ministers' Powers*, Cmd 4060 (1932)

<sup>27</sup> Sir Cecil T. Carr, *Concerning English Administrative Law* (OUP, 1941), 26.

<sup>28</sup> Robson, 'Report of the Committee on Ministers' Powers' (n22), 351.

<sup>29</sup> F.H. Lawson, 'Dicey Revisited. I' (1959) 7 *Political Studies* 109-126, 109; W.I. Jennings, Review of *The Law of the Constitution*, 9th ed., by A.V. Dicey, (1940) 3 *Modern Law Review* 321-22, 322.

<sup>30</sup> Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850-1930* (Clarendon Press, 1991), 288.

the rule of law to the status of ‘dominant characteristic’. In promoting these changes, they have been obliged to crack apart the analytical, rule-based positivist carapace in the expectation that Dicey’s framework will be revealed not as an arrangement of rules but one of fundamental principles. In this rationalised, rights-based reconstruction, the spirit informing Dicey’s *Law of the Constitution* is said to live on.

#### 4. *Walters’ Mission*

It is this recent rejuvenation of Dicey’s ideas and the reordering of his framework that drives Walters’ project. In his methodically researched and forcefully argued book, Walters challenges the orthodox interpretation of Dicey as a legal positivist and reveals that he had ‘a far subtler, more nuanced understanding of the relationship between sovereignty and legality’.<sup>31</sup> Far from conferring absolute authority to legislate, he argues that Dicey conditioned sovereignty by the spirit of legality. His objective is to show that Dicey had himself embarked on an intellectual journey from ‘a conception of legality as *ordered* rules towards a conception of legality as *reasoned discourse*’.<sup>32</sup> Along the way, Walters is obliged to concede that Dicey ‘never finished this journey’ and indeed that he might never have been ‘consciously aware he was on it’.<sup>33</sup> Walters is nevertheless convinced that, once the detritus that has accreted around the *Law of the Constitution* is removed, we will be able to see more clearly what Dicey actually intended.

Is this reinterpretation convincing? It is a mark of the book’s honesty that Walters is disarmingly explicit about the difficulties he faces in removing Dicey from the analytical straitjacket within which he placed himself. His determination to do so leads to some awkward admissions. He concedes that Dicey ‘got carried away’ about the need to separate law from history, that his differentiation between legal and political perspectives on the constitution ‘does not show Dicey at his best’, and that Dicey ‘did not mean’ his statement that constitutional conventions are rules ‘not of law but of politics, and need trouble no lawyer or the class of any professor of law’.<sup>34</sup> When a passage on judge-made law clearly suggests embrace of a Benthamite-Austinian command theory of law, Walters can only say that ‘it is unlikely that Dicey intended anything of the sort’ and, in any case, Dicey was not ‘overly concerned with labels’.<sup>35</sup>

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<sup>31</sup> Walters, 6.

<sup>32</sup> Walters, 5 (emphasis in original).

<sup>33</sup> Walters, 5.

<sup>34</sup> Walters, 139, 143; Dicey, *Law of the Constitution*, 30.

<sup>35</sup> Walters, 155.



Occasionally, exasperation creeps in. Examining Dicey's analysis of the crucial distinction between law and conventions, Walters notes that his 'discussion at this point is frustratingly thin'; we need 'a full explication of his theory of what law and legal discourse really are – and this is not forthcoming'.<sup>36</sup> When Dicey fails to examine 'internal limits on the exercise of sovereignty', this is treated as a 'missed opportunity'.<sup>37</sup> And on his overall revision of Dicey's framework, Walters can only say that I 'cannot pretend that Dicey saw all these implications of his work in quite the way I do'.<sup>38</sup>

These equivocations only go so far. They still considerably underestimate the weight of evidence that Dicey strictly adhered to a legal positivist philosophy and was much indebted to John Austin's methods. Dicey's first book, on rules for selecting parties to an action, examined 1,300 cases for the purpose of classifying them into 118 rules bolstered by the authority of the relevant precedents together with a catalogue of their exceptional circumstances.<sup>39</sup> Walters accepts that the method of that book 'seems illustrative of Benthamite-Austinian jurisprudence' but argues that, for two reasons, the code Dicey produced was not Benthamite. First, because 'Bentham thought the common law was incoherent and should be replaced by legislative codes, whereas Dicey thought that the common law could be shown to be coherent' and secondly because Bentham's codes were designed to advance the principle of utility whereas Dicey's made no such claim.<sup>40</sup> So far as I can see, this simply indicates how strictly Dicey adhered to the analytical method of legal positivism while severing it from a specific political cause.

His second book, from 1879, carries the snappy title, *The Law of Domicil as a Branch of the Law of England, Stated in the Form of Rules*. It adopts a similar method in that the relevant statute and caselaw 'is therein reduced into a series of definite rules' to produce 'a code of what may be termed the English law of domicil'. Dicey explains that, although the topic is sometimes called 'by an unfortunate misnomer, Private International Law', he treats it as a branch of the law of England in that it 'rests on the broad distinction between rules which are strictly laws, as being part of the municipal law ... and rules prevailing in other countries, which are not laws to us at all, since they do not rest on the authority of our own State'. By adopting this method, the book 'completely avoids the errors which have arisen from confusing the rules of so-called Private International Law, which are in strictness "laws" but are not "international", with the principles of international law properly so called, which are "international" since they regulate the conduct of nations towards

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<sup>36</sup> Walters, 146.

<sup>37</sup> Walters, 202, 207.

<sup>38</sup> Walters, 370.

<sup>39</sup> A.V. Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (Wm. Maxwell, 1870).

<sup>40</sup> Walters, 65.

each other, but are not in the strict sense of the term “laws”.<sup>41</sup> This is the type of statement that could have been written by Austin himself.

When we come to the *Law of the Constitution*, the same method is put to work. Dicey follows Austin in insisting on the need to maintain a clear distinction between the law as it exists and as it ought to be, in gathering the legal materials on the subject for the purpose of producing it as systematic knowledge, and then by reducing that knowledge to a few clear and simple propositions. This is evident in the way he sifts the precedents and authoritative texts ‘to explain the nature of Parliamentary sovereignty and to show that its existence is a legal fact’.<sup>42</sup> That method is also adopted to explain that ‘general propositions ... as to the nature of the rule of law carry us but a very little way’ and that such principles as can be discovered in the constitution are ‘mere generalisations drawn either from the decisions or dicta of judges, or from statutes which ... are in effect judgments pronounced by the High Court of Parliament’.<sup>43</sup> And he claims that although ‘a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of historians or of statesmen’, that lawyer will soon find that ‘he is only following one stage farther the path on which we have already entered’ and will discover that it is the ‘supremacy of law which gives the English polity the whole of its peculiar colour’.<sup>44</sup>

The main difference between Dicey and Austin, it seems, is that Dicey quickly saw that one reason for Austin’s relative lack of influence in English jurisprudence was his tortuous writing style. Frankly acknowledging that Austin ‘cannot handle the English language’,<sup>45</sup> Dicey set about presenting Austin’s method in a more nuanced and elegant way. This is one reason why *Law of the Constitution* lived on; in Laski’s encomium, it ‘captivated me [with] a kind of mellow wisdom’ and while ‘I didn’t always agree and I sometimes doubted accuracy ... I never stopped admiring’.<sup>46</sup> But the stylistic traits that enticed so many also caused Dicey to blur various issues and, quite understandably, these are the source of the exaggerations, equivocations and evasions that Walters finds so frustrating. Presented with so many caveats and equivocations, it seems sensible to conclude along with Felix Frankfurter that the *Law of the Constitution* is a ‘brilliant obfuscation’.<sup>47</sup>

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<sup>41</sup> A.V. Dicey, *The Law of Domicil as a Branch of the Law of England, Stated in the Form of Rules* (Stevens, 1879), iv-v.

<sup>42</sup> Dicey, *Law of the Constitution*, 37.

<sup>43</sup> Dicey, *Law of the Constitution*, 199, 192.

<sup>44</sup> Dicey, *Law of the Constitution*, 413-4.

<sup>45</sup> Dicey, ‘The Study of Jurisprudence’ *Law Magazine and Review*, Aug. 1880, 382-401, 386; cited in Cosgrove, 26.

<sup>46</sup> Harold Laski to O.W. Holmes Jr, 12 January 1921; cited in Walters, 131.

<sup>47</sup> Felix Frankfurter, ‘Foreword to a Discussion of Current Developments in Administrative Law’ (1938) *Yale Law J.* 515-518b, 517.

Dicey was both enamoured by common law method and greatly influenced by legal positivist ideas of his time and, being a stylist rather than a philosopher, he blended traditional and modern ideas with consummate ambiguity to produce a text, both elegant and simple, which could stick in the mind of the dullest of lawyers.

### 5. *What explains Dicey's resurrection?*

Why is so much intellectual energy now invested in revealing the 'true' meaning of the lecture notes of this mid-Victorian professor? This is no antiquarian exercise. Presented as intellectual history, Walters' book is intended as an intervention in contemporary political debate. He seeks to reinterpret the meaning of the *Law of the Constitution* precisely because it has lingered on as the canonical text of British constitutional law. It may be an exaggeration to say that it *is* the constitution – it does not, after all, present a comprehensive account of the rules that establish the institutions of government and regulate their relations – but it remains the template around which almost all interpretative disputes about British constitutional law continue to revolve.

Dicey believed that English law is at the base of English politics and is central to understanding its constitution. With the eclipse of classical liberalism, that claim got submerged beneath the weight of modern regulatory measures designed to advance collective welfare. This explains why scholars like Jennings and Lawson proclaimed that Dicey's ideas could be consigned to legal history. But in the last few decades, Dicey's influence has been increasing. This has been a period of growing judicial activism in the review of governmental decision-making, leading to the tensions implicit in Dicey's framework gradually emerging. And since many of these judicial rulings cannot easily be explained by reference to that framework, they now threaten its authority and legitimacy.

A clear illustration is offered by *Jackson v Attorney General*, in which the Countryside Alliance brought an action claiming that the Hunting Act 2004, passed under the Parliament Acts procedures, was invalid. Though the Lords rejected this heretical argument, they nevertheless took the opportunity to advance some heretical claims of their own. Freely citing 'our greatest constitutional lawyer', they scattered their judgments with declarations that 'the classic account given by Dicey' is now 'out of place', that his principle of the absolute legislative sovereignty of Parliament must now be qualified, that 'the rule of law ... is the ultimate controlling factor', and

that since sovereignty is ‘a construct of the common law’, the judges possess the authority to modify it.<sup>48</sup>

Continuing to pay lip service to Dicey’s framework, the judiciary now recognises that it needs to be reconstituted. Constitutional scholars have for some time been seeking to do just that. This work might be said to have commenced in earnest with Trevor Allan’s pioneering studies from the early 1990s which, acknowledging ‘the profound influence which Dicey’s writings still exert on contemporary perceptions’, sought to utilise the ideas of Friedrich Hayek and Ronald Dworkin to help ‘extract the core of good sense in Dicey’s discussion, and to adapt his insights to the demands of modern constitutionalism’.<sup>49</sup> Drawing on Hayek’s understanding of constitutionalism, Allan has been advancing a normative theory of the rule of law, arguing that it establishes a set of principles of just conduct – the ‘rule of reason’ – that is located at the core of British constitutional practice.<sup>50</sup> This exercise culminates in his claim that ‘the sovereignty of Parliament is only a manifestation of the *sovereignty of law*’.<sup>51</sup>

Allan argues that Dicey had failed to provide a ‘consistent and coherent theory of the constitution’, maintaining that this was ‘mainly attributable to his adherence to Austinian legal positivism’.<sup>52</sup> The significance of Walters’ study is that, by undertaking a historically informed reconstruction of his work, he shows that Dicey did in fact advance a coherent constitutional theory, and his theory is indeed compatible with Allan’s reconceptualised scheme. Allan’s work advances the claim of ‘the common law constitution’. By revealing the ‘true’ Dicey, Walters is able to relabel it ‘the common law constitutional tradition’.

## 6. *The Project of Common Law Constitutionalism*

Common law constitutionalism might sound a vaguely attractive formulation but when its foundations are examined we see that it is a more contentious undertaking than its innocuous sounding label might suggest. Like Dicey, its advocates write with elegant simplicity. And like Dicey, by doing so they disguise just how skewed their account of the constitution of the British

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<sup>48</sup> *Jackson v Her Majesty’s Attorney-General* [2005] UKHL 56, paras 95, 102, 107, 102.

<sup>49</sup> TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993), 3. Walters notes (283, 360) that ‘no one has better explained Dicey’s position [on the relationship between parliamentary sovereignty and legality] than Trevor Allan’ and that ‘[m]y conclusions on how to read Dicey’s *Law of the Constitution* are consistent with those that Trevor Allan has advanced for more than 30 years.’

<sup>50</sup> TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2001), 2.

<sup>51</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP, 2013), 33 (emphasis in original).

<sup>52</sup> Allan, *Law, Liberty, and Justice*, 16.

state actually is. Since its advocates are keen to bring Dicey within its remit, the ideological underpinnings of his work might first be considered.

As we have seen, Dicey espoused the classical liberal values of laissez-faire, formal equality, and strict legality. These values both permeated and distorted his account of constitutional law. They caused him, for example, to ignore the pivotal role of the Crown in the British system.<sup>53</sup> Given the then existing extensive immunities of the Crown from the ordinary processes of law, Dicey's claim that the constitution rests on the rule of law – 'that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' – perverted the true relationship between government and the individual.<sup>54</sup> Another was by presenting an account in which the rise of administration meant the decline of the constitution. And a particular fear that drove his thought was a consummate distrust of democracy, with Dicey attributing 'every political evil imaginable to the party system'.<sup>55</sup>

Overarching all this was Dicey's adherence to sovereignty. Walters makes great play of the distinction between Austin and Dicey on this foundational concept. He suggests that the widespread assumption that Dicey rested his claim about parliamentary sovereignty on Austin's positivist theory is 'unsustainable' because Dicey advanced an idea of legal sovereignty 'that from the Austinian perspective is oxymoronic'.<sup>56</sup> This simplistic distinction fails to acknowledge the difference between a formal exercise of examining 'the law of the constitution' and appreciating the nature of the constitution itself.<sup>57</sup> In the *Law of the Constitution* Dicey examines sovereignty 'from a legal point of view', as a 'legal fact', and as 'the very keystone of the law of the constitution'.<sup>58</sup> And he explains how this legal doctrine is distinguishable from Austin's political conception in which the last word lies with the electorate. But Walters, in common with most jurists, too readily accepts Dicey's book as an account of 'the constitution', as distinct from 'the law of the constitution'. When we examine Dicey's treatment of 'the constitution', it is apparent that Dicey

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<sup>53</sup> Walters, 215: 'the entire question of executive power was treated as a sort of afterthought in *Law of the Constitution* ... Dicey did not analyse prerogative power in its own right and his definition of the royal prerogative was only given late in the book during his discussion of the conventions of the constitution'.

<sup>54</sup> Dicey, *Law of the Constitution*, 189. The critical issue was not that of individual personal liability of Ministers but the protection from legal liability conferred by Crown immunity in the exercise of the powers of departments of State: see Harold J. Laski, 'The Responsibility of the State in England' (1919) 32 *Harvard Law Review* 447-72.

<sup>55</sup> Cosgrove, 110; Ian C. Fletcher, 'The Zeal for Lawlessness: A.V. Dicey, *The Law of the Constitution*, and the Challenge of Popular Politics, 1885-1915' (1997) 16 *Parliamentary History* 309-29.

<sup>56</sup> Walters, 179.

<sup>57</sup> Walters conflates these categories. Note, e.g., 'Dicey also said that expounding the constitution is really no different from expounding other parts of English law.' (Walters, 160: emphasis supplied).

<sup>58</sup> Walters, 37, 68.

adhered to the Austinian view. It then becomes clear that he treats parliamentary sovereignty as a legal fact *because* it is a political fact.

This is most explicitly revealed in Dicey's books on Irish home rule. Within one year of publishing the *Law of the Constitution* he had published the first of his three books on that subject. In these, he argues that beneath 'all the formality, the antiquarianism, the shams of the British constitution, there lies latent an element of power which has been the true source of its life and growth'.<sup>59</sup> That power is 'the absolute omnipotence of Parliament' which is 'nothing else but unlimited power'. He explains that this sovereign power is 'put in force by the ordinary means of law' but his account makes plain that the authority of law rests on the existence of this unlimited sovereign power. When Dicey claims that Irish home rule 'would dislocate every English constitutional arrangement', this is not because the formal legal doctrine would be qualified. Home rule is a constitutional threat because it 'would all tend to weaken the power of Great Britain'. By undermining the sovereignty of Parliament, 'it deprives English institutions of their elasticity, their strength, and their life; it weakens the Executive at home, and lessens the power of the country to resist foreign attack'.<sup>60</sup>

In these works, Dicey is expounding the constitution, not merely the law of the constitution. His arguments show that the legal rule concerning the sovereign authority of the Crown in Parliament rests its authority on a political and ersatz historical claim that the sovereignty of the British state depends on the retention of unlimited power at the centre. Home rule places fetters on that power not because of any formal legal restrictions but because, in creating a separate power base, it establishes the conditions for the formation of a countervailing claim of right. 'Each successive generation from the reign of Edward I onwards', Dicey later explains, 'has laboured to produce that *complete political unity* which is represented by the absolute sovereignty of the Parliament now sitting at Westminster'.<sup>61</sup> Sovereignty means the central authority's unrestricted political power and for Dicey there was no value in maintaining the shadow without the substance.<sup>62</sup>

Keen to stress the importance of Dicey's claim about 'the supremacy of ordinary law', Walters is obliged to discount these arguments.<sup>63</sup> He must do so because otherwise we would see more clearly that he is actually turning Dicey on his head. To read Dicey today, he argues, 'is to rediscover the value of the simple but powerful idea that sovereign power gains its authority or legitimacy only when

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<sup>59</sup> Dicey, *England's Case against Home Rule* (London: Murray, 1886), 168.

<sup>60</sup> Dicey, *England's Case* 169, 171, 173, 196

<sup>61</sup> Dicey, *Law of the Constitution*, xc (emphasis supplied).

<sup>62</sup> For more extended analysis see Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81 MLR 989-1016, esp. 994-1005.

<sup>63</sup> Walters 187: 'There is no power, not even sovereign or constituent power, that lies above or beyond the ordinary law'.

law in its ordinary or common sense is supreme'.<sup>64</sup> Properly understood, it is the other way round: Dicey claimed that ordinary law gains its authority only when the sovereign power is supreme. Dicey recognised that a law-based system could flourish because the English had so quickly and so successfully established the absolute authority of the central power. Ordinary law ruled because it operated under the absolute authority of the Crown in Parliament. One of the reasons why Dicey felt that home rule would lead to 'the immediate dislocation and the ultimate rebuilding of the whole English Constitution', is that it could only result in 'leaving the settlement of constitutional questions to a Court'.<sup>65</sup> Constitutional questions were for Parliament, not the courts.

In Dicey's worldview, the constitutional arrangement founded on sovereignty amounts simply to a set of conventional practices that fix the terms on which the activity of governing is carried on.<sup>66</sup> And he recognised that 'the basis of English democracy' required that these constitutional changes were for Parliament and ultimately for 'the assent of the nation as represented by the electors'.<sup>67</sup>

We can now see more plainly the ambition behind common law constitutionalism. From a Diceyan perspective, its first heretical step is to claim that sovereign power is subject to the supremacy of law. Then follows a second heresy: 'our constitutional law remains a common law ocean dotted with islands of statutory provision'.<sup>68</sup> If the aim is to discover 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state',<sup>69</sup> can it really be said that the Bill of Rights, the Acts of Union, the Reform Acts, the Parliament Acts, the Official Secrets Acts, the Public Order Acts, the Local Government Acts, the Human Rights Act, the Scotland Act and many more besides are ephemera? That claim had been most boldly expressed by Keir and Lawson, who argued that 'statutes have for the most part only a fleeting interest' and it is only by reading judgments can one 'fully appreciate the real genius of the constitution'. And this is because 'the most abiding impression which a study of constitutional cases conveys is not ... of historical change, but of the permanence of the Common Law'.<sup>70</sup> The constitution, it is asserted, is not as Dicey had suggested the set of rules authorised by Parliament that allocate and regulate the exercise of political power. It is a set of legal principles that govern

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<sup>64</sup> Walters, 227

<sup>65</sup> Dicey, *England's Case*, 274, 271.

<sup>66</sup> This explains Dicey's statement that: 'Our Constitution ... has always been from a legal point of view liable to a revolution by Act of Parliament'. Cited in Walters, 382. For its Hobbesian foundation see Martin Loughlin, 'The Constitutional Imagination' (2015) 78 MLR 1-25, 5-7.

<sup>67</sup> A.V. Dicey, *A Leap in the Dark, or Our New Constitution* (John Murray, 1893), 199.

<sup>68</sup> Sir Stephen Sedley, 'The Sound of Silence Constitutional Law without a Constitution' (1994) 110 LQR 270-91, 273:

<sup>69</sup> Dicey, *Law of the Constitution*, 22

<sup>70</sup> D.L. Keir and F.H. Lawson, *Cases in Constitutional Law* (Clarendon Press, 1928), v-vi.

the exercise of political power – including the terms on which Parliament’s sovereign power is exercised. That shift destroys Dicey’s scheme.

The final heretical step is to build on Keir and Lawson by presenting not the constitution as an extant rule system but ‘the ideal constitution’ that the ‘judges seem to have in their minds’, and which comprises ‘those fundamental rules of Common Law which seem essential to the liberties of the subject and the proper government of the country’.<sup>71</sup> This idea of an invisible constitution has been actively taken up by Sir John Laws, who argues that sovereignty rests ‘not with those who wield governmental power, but in the conditions under which they are permitted to do so’ and therefore that ‘the constitution, not the Parliament, is in this sense sovereign’. These conditions, he elaborates, ‘should now be recognised as consisting in a framework of fundamental principles’ that the judiciary are charged with maintaining.<sup>72</sup>

The revolutionary shift contemplated by common law constitutionalism comes more sharply into focus. In *Jackson*, Lord Steyn had ruminated that circumstances might dictate that the courts may have to ‘qualify’ the principle of sovereignty by reference to the principle of constitutionalism.<sup>73</sup> Constitutionalism is a theory that, properly conceived, applies only to documentary constitutions; it espouses the claims that not only must that constitution be comprehensive and incorporate a division of powers but also that it is to be conceived as a permanent regime of fundamental law whose meaning, as determined by the judiciary, expresses the regime’s entire collective political identity.<sup>74</sup> It becomes an even more ambitious and contentious project when applied to Britain’s evolutionary, conventional constitutional arrangements. But this is what common law constitutionalism contemplates. Contrary to Walters’ argument, it entirely overturns Dicey’s system.

### 7. *The Significance of Walters’ Project*

In *A.V. Dicey and the Common Law Constitutional Tradition*, Mark Walters presents a novel interpretation of Dicey’s works intended to show how Dicey’s arguments can be shown to strengthen the claims of common law constitutionalism. I have argued that case has not been made out. Dicey was crystal clear that the two main features of English government ever since the Norman Conquest have been ‘the omnipotence or undisputed supremacy throughout the whole

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<sup>71</sup> Keir and Lawson, *Cases*, 3.

<sup>72</sup> Sir John Laws, ‘Law and Democracy’ (1995) *Public Law* 72-92, 92.

<sup>73</sup> *Jackson v Her Majesty’s Attorney-General* [2005] UKHL 56, para 102.

<sup>74</sup> See Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022), Introduction.



country of the central government' and 'the rule or supremacy of law'.<sup>75</sup> And the second feature was a consequence of the first. Ordinary law prevailed because it was authorised by the sovereign authority of the Crown in Parliament. By constitution, then, Dicey meant the corpus of laws, customs and practices that indicate how the sovereign powers of the state have come to be allocated. We can extend this point: the constitution of the British state cannot be understood without first appreciating that the ordinary law applied in England and Wales differs in significant respects from that of Scotland and of Northern Ireland. Those differences are authorised by a central sovereign power. The British constitutional settlement, it might be said, is a complex arrangement that defies simple explanation.

This is what common law constitutionalism apparently eschews. Recognising that lawyers cannot live too long with complexity and ambiguity, the clever vanguard – those educated in classics, literature, and philosophy before taking up the mundane practice of law – are now proposing a more aesthetically pleasing image of the British constitution. But do they appreciate the radical character of what they espouse?

When Dicey examined the law of the constitution he limited his explanation entirely to the laws of England, leading to occasional solecisms such as that of referring to Her Majesty's Government as the 'executive of England'.<sup>76</sup> But he was at least clear that the system was anchored by the unlimited sovereign authority of a central power which 'preserves that unity of the State which is essential to the authority of England and to the maintenance of the Empire'.<sup>77</sup> It is now being suggested that the source of all constitutional authority is the English common law. This is a blatant, if less than explicit, appeal to English hegemony. Dicey at least sought to justify his claim of English dominance by reference to England's overwhelming material power.<sup>78</sup> Advancing this peculiarly English claim of common law constitutionalism, a claim that excludes reference to principles of Scots law and at a time when British governmental arrangements have never been more differentiated, can surely have the effect of only dislocating further the existing strained constitutional arrangements of the British state.

This conclusion might be avoided by an argument that the appeal to 'common law' supremacy is not intended to refer to the bundle of English precedents but advances some abstract 'natural' rights claim. Yet this would have no less contentious implications. It countenances a radical shift in constitutional foundations brought about by judges engaging in a scholastic exercise in political reasoning and invoking general principles that owe nothing to Dicey's legal method,

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<sup>75</sup> Dicey, *Law of the Constitution*, 179.

<sup>76</sup> Dicey, *Law of the Constitution*, 8.

<sup>77</sup> Dicey, *Case Against*, 283.

<sup>78</sup> Dicey, *Leap in the Dark*, 29, 127.

nothing to strict legality, and nothing at all to ‘ordinary law’.<sup>79</sup> Whatever judges might be doing when devising constitutional principles that qualify sovereign authority, it certainly cannot be understood as the application of ordinary law.<sup>80</sup> And if this is indeed what is being asserted, then the exercise of historical reinterpretation that Walters is undertaking seems superfluous.

Common law constitutionalism most probably intends to blur these two distinct claims and advance ‘common law’ claims founded not on precedents but on some idealised and rationalised reconstruction.<sup>81</sup> This is the common law seen through Hayek’s eyes as a spontaneous order that evolves in a liberty preserving direction by subjecting government to law. In this conception, law finds its authority on some vague claim of continuity between past and present and the constitution is explained as an interpretative practice that, as Walters puts it, emerges through a ‘circular discourse ... without any fixed originating point’.<sup>82</sup> Having overthrown Dicey’s legal method and constitutional framework, the most significant continuity is with his political beliefs in the virtues of classical liberalism.

In this blurred form, common law constitutionalism is rapidly gaining a following. In *R(Miller) v Prime Minister*, concerning a challenge to the decision to prorogue Parliament for a five-week period, the doctrine has recently received the Supreme Court’s imprimatur. Contrary to its ruling in the first *Miller* case, the Court here had no hesitation in converting conventional practices concerning governmental accountability to Parliament into ‘constitutional principles’. Asserting its authority to determine their meaning, it then held that, since this exercise of prerogative power infringed those principles, the prorogation was invalid.<sup>83</sup> The Court here replaces Dicey’s account of the constitution as a set of rules with that of a system of principles, eradicates the formal distinction between laws and conventional practices, and, though ostensibly done in the name of upholding parliamentary sovereignty, declares itself to be the ultimate arbiter of ‘the fundamental principles of our constitutional law’.<sup>84</sup>

The Supreme Court’s ruling provides a further illustration of common law antipathy towards the Crown’s prerogative powers and in this respect is in tune with Dicey’s ideological orientation. But the ruling does not simply qualify Dicey’s framework; it destroys it. And in doing

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<sup>79</sup> Cf. Dicey: ‘Constitutional conflicts are at bottom contests decided by policy & power rather than by argument or law’. Cited in Walters, 385.

<sup>80</sup> Walters is therefore unable to vindicate the claims made in Mark D. Walters, ‘Is Public Law Ordinary?’ (2012) 75 MLR 894-913.

<sup>81</sup> Walters, 198: ‘Dicey was far too quick to dismiss the ideas of “judges such as Coke” as obsolete’.

<sup>82</sup> Walters, 370

<sup>83</sup> *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41, para. 52. Cf. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 146: judges are ‘neither the parents nor the guardians of political conventions; they are merely observers’.

<sup>84</sup> *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41, para. 38.

so, it undermines the purpose of Walters' exercise. Walters accepts that Dicey 'might have been shocked' by the ruling. Determined to retrieve the situation, however, he suggests that Dicey 'would have seen in the Supreme Court's decision evidence of the very kind of constitution that he sought to expound in his work - a legal constitution forming an integral part of the ordinary law of the land and shaped by a distinctively common law discourse concerning both parliamentary sovereignty and the spirit of legality'.<sup>85</sup> This is surely wishful thinking. By asserting the right to determine the meaning of the constitution, the Supreme Court was exercising constituent power, a power that Dicey acknowledged as vesting in the Crown in Parliament.<sup>86</sup> Whether the Court is able to discharge that onerous responsibility competently might, on the limited available evidence, be doubted.<sup>87</sup> But whatever the future holds, and notwithstanding Mark Walters' powerful and arresting study, it seems doubtful that the Court will continue any longer to pay deference to the work of this mid-Victorian Whig scholar.

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<sup>85</sup> Walters, 359.

<sup>86</sup> Dicey, *Law of the Constitution*, 84; Walters, 222-3.

<sup>87</sup> See, e.g., *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41, para 51. Here too we see the antipathy towards party government that the Supreme Court shares with Dicey.