Principles of Public Law

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TEXTBOOK WRITERS AND THEIR PRINCIPLES

5.1 Introduction

In the absence of a codified constitutional document in the UK (see above, 1.7.2 and 2.2), generations of law students have been introduced to the constitutional system primarily through the use of textbooks. For better or worse, one long dead textbook writer, Professor Albert Dicey, continues to have a firm foothold in many expositions of the British Constitution by present day writers, and even in the speeches of a few politicians (see above, 4.2). No doubt some modern writers overemphasise the relevance of his thinking to present day conditions. It is something of an exaggeration to say of his best known book, *An Introduction to the Study of the Law of the Constitution* (1st edn, 1885, London: Macmillan), that 'Dicey's word has in some respects become the only written constitution we have' (Jowell, J and Oliver, D (eds), *The Changing Constitution*, 3rd edn, 1994, Oxford: OUP, p v). What is not in doubt, however, is that his analysis still acts as an important point of reference. Questions about this 'Dicey phenomenon' should cross the minds of inquisitive students soon after they begin their studies. Are the views of this one professor of law really so important that, over 100 years after its first publication, his book continues to be on students' reading lists? How can Dicey's work still be relevant to the modern constitution? We need, therefore, to conclude the search for the source of principles by providing a brief critical assessment of what Dicey said about the British Constitution. This book, like many others, will return to Dicey's views, especially in relation to three features of the constitution – parliamentary sovereignty, the rule of law and constitutional conventions. The purpose of the present chapter is to provide an overview of Dicey's thinking on these matters.

5.1.1 A biographical sketch

Albert Venn Dicey was born in 1835 into a middle class, evangelical Christian family; he died, aged 87, in 1922. His life, therefore, spanned a period of great change in government and administration (see above, 3.8–3.9.2). He witnessed the establishment of parliamentary democracy, the Victorian reforms of the Civil Service, the 'administrative revolution' and the formation of an independent Irish State. He was a well known figure during his lifetime and, it is said, twice refused a knighthood. (Had he lived in the 1990s, he would undoubtedly have been a panellist on television and radio programmes such as *Question Time* and *Any Questions*).

Throughout his life, he suffered from a muscular weakness which often made it difficult for him even to write. He failed exams more than once because the examiners could not read his handwriting. His prose style, though, was a model of clarity and succinctness. After graduating from Oxford, he practised at the Bar for several years with no outstanding success. He continued to write articles, regularly had letters published in *The Times* and wrote a book. In 1882, at the age of 47, he was appointed to a chair at his old university and it was as an academic that he exerted a profound influence, though his aspirations were to be an MP or a judge. During his 27 years at Oxford, he wrote two monumental books, both of which are still much used, discussed and criticised: *Introduction to the Study of the Law of the Constitution* (the edition most often used today is the 10th edition, published after Dicey's death with an introduction by Professor ECS Wade in 1959, London: Macmillan) and *Law and Public Opinion in England* (1st edn, 1905, London: Macmillan).

Dicey's political views were those of a market liberal, meaning he had a commitment to individualism and free trade (see above, 1.6.1). Above all, he was against 'State collectivism', believing there was a contradiction between such 'socialism' and democracy. He was concerned by the increasing State regulation of economic activity and the growing provision of services by government. Of all the particular political causes with which Dicey was involved, his strongest pronouncements were about Home Rule and independence for Ireland. He was a passionate, obsessive Unionist and opposed all proposals that any part of Ireland should cease to be part of the UK (see above, 3.9.2). For Dicey, the maintenance of the UK was of fundamental importance, and one of his answers to the growing civil unrest in Ireland was to advocate suspending trial by jury. The Irish Free State came into being shortly after Dicey's death.

Dicey was also outspoken in his opposition to the vote for women, arguing, among other things, that 'nor can it be forgotten not only that women are physically and probably mentally weaker than men, but that they are mentally, as a class, burdened with duties of the utmost national importance, and of an absorbing and exhausting nature, from which men are free' – by which he meant motherhood ('Letters to a friend on votes for women', see McAuslan, P and McEldowney, J (eds), *Law, Legitimacy and the Constitution*, 1985, London: Sweet & Maxwell).

5.1.2 How to read Dicey

Dicey's *Introduction to the Study of the Law of the Constitution* started out as a series of lectures given to undergraduates at the University of Oxford in the 1880s. The book was a runaway success with law students everywhere, not least because of its easy, clear style. They 'were attracted by Dicey's convenient format which encouraged certainty and precision in a subject which was

vague and imprecise' (McEldowney, J, 'Dicey in historical perspective – a review essay', in McAuslan, P and McEldowney, J (eds), *Law, Legitimacy and the Constitution*, 1985, London: Sweet & Maxwell, p 41). Dicey's book is arranged around three features of the constitution, as Dicey saw it:

(a) the sovereignty of Parliament;

(b) the rule of law; and

(c) constitutional conventions.

Dicey was not, of course, the first writer to describe and analyse these features of the constitution. In relation to parliamentary sovereignty, for instance, William Blackstone had set down a definition more than a century before when he wrote: 'The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within bounds' (*Commentaries on the Laws of England*, 1765–69). In many respects, Dicey's fame rests on his powers as a popular writer, rather than on being a wholly novel analyst.

It is important to understand not just each of the features of the constitution (set out above) in isolation, but also Dicey's attempt to explain their interrelationships. The last edition of the book to be revised by Dicey himself was in 1908. How should the book be read more than 90 years on? Professor ECS Wade has suggested three possible approaches (see his introduction in *Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, London: Macmillan, p xxviii):

(i) to accept Dicey's principles, and more particularly the sovereignty of Parliament and the rule of law, as portraying only the period of which he wrote;

(ii) to regard these principles critically and in the light of future events to admit that they were only partially true of the 19th century and certainly inapplicable today;

(iii) to accept these principles, supplemented if need be by later developments, and to show how they can be fitted into modern public law.

5.1.3 Dicey's critics

A strange feature of the Dicey phenomenon is that almost everyone disagrees with all, most or some of his analysis. As one commentator has put it, for us to continue to focus on Dicey's work 'is to belabour a horse which is thought to have died so long ago, after assaults so numerous and savage, that humane considerations might dictate another line of investigation' (Arthurs, HW, 'Rethinking administrative law: a slightly Dicey business' (1979) 17 Osgoode Hall LJ 1, p 4). One early, influential riposte to Dicey came from Professor Sir Ivor Jennings, who was professor of law at the London School of Economics, then Cambridge. Jennings was a Fabian socialist who welcomed the increasing government regulation of business and social security provision, and who shared none of Dicey's hostility to the interventionist State. Jennings'

own book (*The Law and the Constitution* (1st edn, 1933), 5th edn, 1958, London: London UP) criticised the whole scope of Dicey's analysis, arguing that Dicey failed to deal with the powers of government: Dicey 'seemed to think that the British Constitution was concerned almost entirely with the *rights of individuals*' (p 55). In fact, even when Dicey was writing, central and local government had considerable discretionary legal powers to carry out all sorts of functions, from the compulsory purchase of land to restricting overseas trade. Jennings also makes more specific criticisms of Dicey's analysis of parliamentary sovereignty, the rule of law and the nature of conventions, which we consider below. Jennings' assessment was that Dicey 'honestly tried ... to analyse [the constitution], but, like most, he saw the constitution through his own spectacles, and his own vision was not exact' (p 316).

5.2 Dicey's understanding of parliamentary sovereignty

In Chapter 1 of *An Introduction to the Study of the Law of the Constitution*, Dicey argues that 'the sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions'. This means that the Queen in Parliament has 'under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'. Dicey distinguished this legal sovereignty from *political* sovereignty, which, he argued, lay with the electors, whose views were represented in Parliament by MPs. Parliament's legal sovereignty was, as a matter of reality, limited externally by the possibility that a large number of subjects might disobey or resist laws. There was also an internal check on sovereign legislative power – 'the moral feelings of the time and society' which MPs, including those in government, shared. Dicey claimed that representative government produced a coincidence between the external and internal limits on sovereign legislative power.

In Chapter 2, Dicey goes on to contrast the powers of Parliament and non-sovereign law making bodies (such as local authorities, railway companies empowered to make bylaws and legislatures in federal systems). He details the characteristics of Parliament. First: 'There is no law which Parliament cannot change ... so called constitutional laws can be changed by the same body and in the same manner as any laws, namely by Parliament acting in its ordinary legislative character.' Secondly, there is no marked or clear distinction between laws which are not fundamental (or constitutional) and laws which are. There is no written constitutional statute or charter. Pausing here, we may note that it was these two features which, for Dicey, made entrenching legislation impossible in the British system.

Thirdly, no judicial body can pronounce void any enactment passed by Parliament on the ground of such enactment being contrary to the constitution

or any other ground whatever (except, of course, its being repealed by Parliament). Earlier, Dicey had demonstrated that the courts will not inquire into any alleged irregularities in parliamentary procedure. Nor is the fact that an Act is contrary to international law or morality any basis for the courts declaring it invalid.

In Chapter 3, Dicey then compares the system of parliamentary sovereignty in Britain with systems of federal government, especially those of the US and Switzerland. He argues that a federal State derived its existence from the constitution just as any corporation (such as a railway company!) did from the charter by which it was created. This meant that the constitution of federal countries must necessarily be 'written' and 'rigid'. The distribution of powers was also an essential feature of federalism which led to weak government. Federalism also tended to produce conservatism and 'legalism' (the predominance of the judiciary in the constitution).

5.2.1 Dicey's conception of democracy

Before moving on, we need here to note in a little more detail the way in which Dicey conceived of democracy – something which underlies both his approach to parliamentary sovereignty and the rule of law. Paul Craig, in his challenging book *Public Law and Democracy in the UK and USA* (1990, Oxford: Clarendon), explains that Dicey's approach to the British Constitution was based on 'certain assumptions concerning representative democracy and the way it operated' (p 13). Dicey's vision of democracy was one 'in which the will of the electors was expressed through Parliament, and in which Parliament controlled the government' (p 30). As we have already noted, Dicey thought that MPs reflected the views of the majority of electors; if they did not, this would be 'corrected' at the next general election. It is not at all clear, Craig suggests, how 'Dicey would prevent or forestall the danger of majority oppression' of minorities. If the majority in Parliament enacted legislation which detrimentally affected minority interests, the common law (which, as we shall see shortly, is a key feature of Dicey's conception of the rule of law) could not protect rights, because the principle of parliamentary sovereignty would prevail. In any event, Craig argues, Dicey's image of the British Constitution was flawed even when he wrote, and is certainly no longer sustainable today. Dicey thought that power moved in one direction: from the electors, via Parliament, to the government. But the reality was always more complex; even in Dicey's time 'our constitutional system became one dominated by the top, by the executive and the party hierarchy' (p 42). It needs also to be remembered that Dicey did not regard all adults as fit to participate in the election process: he opposed women's suffrage (see above, 5.1.1).

5.2.2 Jennings attacks Dicey's view of parliamentary sovereignty

Even though Jennings, too, saw Parliament's legislative power as central to the British constitutional system, he was scathing in his criticism of Dicey's version of parliamentary sovereignty. First, he regretted that Dicey used the ambiguous term 'sovereignty' in this context:

> ... this is a word of quasi-theological origin which may easily lead us into difficulties. Sovereignty was a doctrine developed at the close of the Middle Ages to advance the cause of the secular Stage against the claims of the Church ... if sovereignty is supreme power, Parliament is not sovereign [*The Law and the Constitution*, 5th edn, 1958, London: London UP, pp 147–48].

Jennings did not believe that 'legal sovereignty' in the sense described by Dicey was sovereignty at all: it was not supreme power. Rather, for Jennings, 'it is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation' (p 149).

Jennings then goes on to argue (p 150) that Dicey's comparison of sovereign and non-sovereign legislatures is 'entirely beside the point' and ridicules Dicey's suggestion that a local authority in England and the Parliament of Canada share characteristics because they are both non-sovereign. Jennings states that, 'if sovereignty is merely a legal phrase for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws on those subjects, but not on any other subjects' (p 151).

Jennings also attacks Dicey's assertion that a sovereign Parliament was incapable of entrenching legislation. 'Entrenchment' is the process whereby, in some constitutional systems, laws dealing with basic constitutional arrangements and human rights are given a protected status; the legislature may repeal or amend them only by following a special procedure such as a two-thirds vote in favour. Dicey denied that entrenchment was possible in the British system, citing several instances in which Acts with purported entrenchments of their own provisions (as in the Union with Scotland Act 1706) had in fact been repealed or amended by Bills in subsequent Parliaments following the usual parliamentary procedures. For Jennings, the true rule was that 'the courts accept as law that which is made in the proper legal form' (p 152) because 'legal sovereignty' was just the name for the rule that the legislature has, for the time being, power to make laws of any kind in the manner required by the law. Parliament was, therefore, capable of entrenching legislation because the power to change the law *included the power to change the law affecting itself*.

5.2.3 Can the common law provide a basis for declaring Acts of Parliament unconstitutional?

In addition to Jennings' general critique, written in the 1930s, several other characteristics of our modern constitution seem, at first sight, to undermine Dicey's conception of parliamentary sovereignty, perhaps catastrophically. First, some senior judges have, in recent extra-judicial writings, suggested that, in extreme circumstances, a British court would apply common law principles and hold that an Act of Parliament was legally ineffective on the ground that it was inconsistent with a fundamental constitutional principle – something which Dicey vehemently rejected. Lord Woolf has written ('*Droit public* – English style' [1995] PL 57, p 69):

> If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might chose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I myself would consider that there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the court's inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.

The type of oppressive legislation which Lord Woolf has in mind is a statute depriving Jews of their British nationality, or one which prohibits marriages between Christians and non-Christians, or vests the property of all red haired women in the State. At least one other judge, Laws LJ, shares Lord Woolf's opinion ('Law and democracy' [1995] PL 72) and Lord Cooke of Thorndon, while a judge in New Zealand, spoke of the possibility that some common law rights lie so deep that even Parliament cannot override them: see *Fraser v State Services Commission* (1984) and *Taylor v New Zealand Poultry Board* (1984).

Such comments by serving judges, made during the 1990s, reflect both a resurgence of judicial self-confidence about their place in the constitutional order and a re-assertion of 'rights talk' (see below, Chapter 19). For most of the 20th century, judges explained the legitimacy of their power of judicial review of the legality of governmental decisions in terms of the *ultra vires* principle (the notion that the main role for the court is to ensure that ministers, local authorities and other public bodies do not overstep the powers granted to them, or duties imposed upon them, by statutes – see below, 11.3). *Ultra vires* provides no constitutional basis for a court to declare legally invalid an Act of Parliament itself. During the 1980s and 1990s, some innovative judges have come to rely on justifications for judicial review which are based on a conception of democracy in which people have fundamental rights against the State, to be protected, in the last resort, by the courts. These rights include freedom of expression and access to justice. For some judges, such as Woolf and Laws, it has been only a short jump from saying that ministers and other

public bodies must not infringe fundamental rights to saying, or hinting, that nor must Parliament itself. These suggestions that the common law may provide a basis for a court refusing to recognise the validity of an Act of Parliament do, however, need to be kept in perspective. They were made outside the courtroom and so carry no formal precedent value; they are clearly intended to apply in only the clearest and most extreme situations; and it is far from certain that other members of the judiciary share such views. Above all, it needs to be borne in mind that the comments of Lord Woolf and Laws LJ were made before the enactment of the Human Rights Act 1998, which now provides a statutory basis upon which the courts may hold a statutory provision incompatible with fundamental rights (see below, Chapter 19). On balance, then, Dicey's assertion that the courts have no *common law* powers to refuse to apply statutes continues to have broad support.

5.2.4 The power of the courts to 'disapply' statutory provisions as incompatible with European Community law

A second challenge to Dicey's understanding of parliamentary sovereignty comes from the UK's membership of the European Union. As we have already noted (see above, 2.3), laws enacted by the institutions of the European Community and the case law of the European Court of Justice are required by Community law to take priority over any other law in each of the Member States (see, further, 7.9.1). On several occasions, courts in the UK have, accordingly, held that provisions contained in an Act of Parliament are legally ineffective. In *R v Secretary of State for Transport ex p Factortame Ltd (No 3)* (1992), provisions in the Merchant Shipping Act 1988 which sought to restrict the right to register fishing vessels in the UK to British owned companies and individuals, were set aside. It was held that this condition of registration was inconsistent with the right of freedom of establishment set out in the EC Treaty. In *R v Secretary of State for Employment ex p Equal Opportunities Commission* (1995), the House of Lords held that provisions in Employment Protection (Consolidation) Act 1978 were indirectly discriminatory against women and were thus contrary to European Community law.

This power vested in the courts to adjudicate on the legal validity of Acts of Parliament seems, at first sight, to be quite contrary to Dicey's version of parliamentary sovereignty. It is, however, possible to attempt a reconciliation in the following way. The power of British courts to 'disapply' provisions of Acts of Parliament as contrary to Community law falls short of a power to 'pronounce void' an enactment 'on the ground of such enactment being contrary to the constitution' (in Dicey's words). This is because the court in this situation is merely faithfully following the will of Parliament as expressed in ss 2 and 3 of the European Communities Act 1972. Although set out in complex language, those sections require judges to give effect to the principle of priority of Community law over national law. If it thought desirable to do

so (the argument goes), Parliament could repeal or modify ss 2 and 3 of the 1972 Act (as it can any other Act) and so once again require British judges to recognise the supremacy of Acts of Parliament over all other laws, including those of the European Community. There has, in other words, been a delegation of legislative power by Parliament to the European Community (just as Parliament delegates some rule making powers to ministers and local authorities), which may at any time be revoked and the powers once again be exercised by Parliament itself. This argument, it has to be said, has an air of unreality and sophistry about it. So long as the UK remains a member of the European Union (as surely it will for the foreseeable future), then ss 2 and 3 will remain in place. If some other, later Act of Parliament on a particular subject sought to enact a rule inconsistent with Community law, but expressly stated that the rule was to be treated as valid by British courts 'notwithstanding any incompatibility with Community law' (or some such formula), it is unclear how a British court would deal with the issue. To understand what might happen, we need, however, to delve into several technical matters, and this we will do in Chapter 7. The conclusion there will be that, while the UK remains a member of the European Union, British courts are unlikely to recognise as valid provisions in a future Act of Parliament which expressly enacts laws contrary to Community law (see below, 7.8.1).

5.2.5 The Human Rights Act 1998

As we shall see in more detail later, most of the rights set out in the European Convention on Human Rights (ECHR) were brought into national law by the Human Rights Act 1998 (see below, Chapter 19). Under s 4, the higher courts (in England and Wales this means the High Court, the Court of Appeal and the House of Lords) are empowered to make 'declarations of incompatibility', by which it is formally held that a statutory provision is inconsistent with the ECHR, as interpreted by the British courts. Such a declaration will not invalidate an offending provision in a statute, but merely alert Parliament to the conflict. In its White Paper, *Rights Brought Home,* Cm 3782, 1997, London: HMSO, the Labour government was careful to explain that this constitutional innovation did not undermine the concept of parliamentary sovereignty (para 2.13):

> The Government has reached the conclusion that the courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty ... To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it.

This disappointed many of those people who campaigned for incorporation of the ECHR into national law. These critics argued that the Human Rights Act conferred insufficient power on the courts to insist upon the constitutional invalidity of offending statutory provisions. Under the Human Rights Act, the government is under no legally enforceable duty to introduce legislation rectifying any infringement identified by the court; and nor is Parliament itself under any compulsion to approve legislation which the government does choose to introduce following a declaration of incompatibility.

Another disappointing feature of the Human Rights Act, according to some people, is that it does not 'entrench' itself into the UK legal systems. You will recall that entrenchment means that a piece of legislation is given a protected status, making it capable of being repealed or amended only by a special procedure (such as requiring two thirds of MPs to vote in favour, or for there to be a referendum). For Dicey, parliamentary sovereignty meant that such entrenchment was not possible (see above, 5.2.2). In *Rights Brought Home*, the government appeared to agree with this:

> 2.16 On one view, human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for [the Human Rights Bill].

Although, at first sight, the Human Rights Act seems to be an important constitutional innovation, in formal terms it does not undermine the concept of parliamentary sovereignty popularised by Dicey. What remains to be seen, however, is the extent to which its practical impact may turn out to be a rebalancing of the constitutional relationship between Parliament and the courts. Dicey argued that written constitutions and codified rights legislation in other jurisdictions led to the 'predominance of the judiciary in the constitution'. This may yet turn out to be so in the UK.

5.3 Dicey's view of the rule of law

Let us now move on to consider the second of the main characteristics of the British Constitution discussed by Dicey. In Chapter 4 of *An Introduction to the Study of the Law of the Constitution*, Dicey argues for the importance of the rule of law, which he claimed meant three specific things in Britain.

First, that government officials did not have 'wide, arbitrary or discretionary powers of constraint' (p 188). This meant that no man could be

punished or be made 'to suffer in body or goods' except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. He warns sternly 'that wherever there is discretion there is room for arbitrariness [which] must mean insecurity for legal freedom on the part of its subjects'. Dicey's distrust of discretionary powers in the hands of the executive stemmed at least in part from his view that it was only through *Parliament*, which represented the views of the nation, that government ought to be able to affect people's rights. As an adherent to *laissez faire* liberalism, he was also against government regulation in principle (see above, 5.1.1).

A second meaning is that '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'. Dicey was not thinking about treating aristocrats and farm labourers equally; rather, he meant that government officials, policemen, ministers, tax collectors, etc, could be sued in tort if they conducted their official duties unlawfully. There was no special body of law administered by tribunals which gave immunity to State officials. (Dicey chose to ignore the common law immunity from being sued which judges enjoyed – and still do. He also ignored the legal position of 'the Crown'; at the time, there were considerable procedural hurdles facing anyone attempting to sue a government department.)

Thirdly, the rule of law meant that 'the constitution is the result of the ordinary law of the land'. The general principles of the constitution to do with civil liberties, such as the right of personal liberty and freedom of assembly, were the result or consequence of judicial decisions in cases where individuals sued government officials. This was to be contrasted with countries which had a supreme written constitution where the rights of individuals resulted from the general principles embodied in that document. In Chapters 5–10, Dicey examined certain areas of substantive rights, including the rights to personal freedom, freedom of discussion and of public meeting.

In Chapter 13, Dicey addresses what many later critics identify as the major weakness in his analysis: the relationship between parliamentary sovereignty and the rule of law. He concedes that there might appear to be tensions – or even a contradiction – between these 'two principles which pervade the whole of the English constitution'. Parliamentary sovereignty means that the legislature can legally do whatever it wants to by enacting a statute; but the rule of law means, in part, that common law principles established by judges protect the civil liberties of subjects. In reality, there was no conflict, Dicey argued, for two reasons. His analysis at this point becomes a little hard to follow. First, he states, 'The sovereignty of Parliament favours the supremacy of the law of the land' (p 406). The will of Parliament can only be expressed through an Act of Parliament which gives great authority to the judges who must interpret the words used in the statute. The principle that Parliament speaks only through an Act of Parliament greatly increases the

authority of the judges in the constitution. Also, Parliament, though sovereign, cannot interfere with the day to day administration of justice.

A second main reason why there is no conflict between the two principles is that the 'supremacy of the law necessitates the exercise of Parliamentary sovereignty' (p 411). Dicey argued that the 'rigidity of the law' sometimes prevented government action; in which case the executive needed to obtain from Parliament 'the discretionary authority which is denied to the Crown by the ordinary law of the land'. In other words, statutes do sometimes confer discretionary powers on ministers, local authorities and other public bodies – but these 'powers are never really unlimited, for they are confined to the words of the Act itself, and, what is more, by the interpretation put on the statute by the judges' (p 413). In interpreting statutes, judges 'are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments'. His conclusion (p 414), stronger on rhetoric than systematic analysis, is that:

> By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.

5.3.1 Jennings' criticisms of Dicey's rule of law

In Appendix II of his book, Jennings considers Dicey's theory of the rule of law. In relation to Dicey's first meaning (the absence of arbitrary and discretionary powers), Jennings explains that what Dicey really meant was that 'wide administrative or executive powers are likely to be abused *and therefore ought not to be conferred*' (*The Law and the Constitution*, 5th edn, 1958, London: London UP, p 307, emphasis added). But the discretionary powers of ministers and local authorities were as much part of the 'regular' law of the land as any others. And while, of course, occasional abuse of power might occur, this was no reason for not conferring discretionary powers on officials. These powers, remember, were used to ensure things like minimum standards of health and safety in workplaces and to clear slum housing. This, Jennings said, was of no interest to Dicey:

> Dicey ... was much more concerned with the constitutional relations between Great Britain and Ireland than with the relations between poverty and disease on the one hand, and the new industrial system on the other. In internal politics, therefore, he was concerned not with the clearing up of the nasty industrial sections of towns, but with the liberty of the subject. In terms of powers, he was concerned with police powers, and not with other administrative powers [pp 310–11].

In relation to Dicey's second definition of the rule of law (equality before the law), Jennings flatly denied that there was any equality between the rights and duties of an official and that of an ordinary person. Dicey surely realised this, but had chosen to ignore the public law position of officials – for example, the duty of local authorities to provide education to children and the powers of the tax inspectors to demand information. Dicey was only writing about the position in tort law – not public law. While it was true that, generally, officials could be sued personally by an aggrieved citizen for a tortious act or omission in the course of their duty, Jennings' withering retort was that 'this is a small point upon which to base a doctrine called by the magnificent name of "rule of law", particularly when it is generally used in a very different sense' (p 312).

Lastly, Jennings questioned Dicey's proposition that the rule of law meant that 'the constitution is *the result* of the ordinary law of the land' rather than a constitutional code. Jennings could not see Dicey's point. 'I do not understand,' wrote Jennings, 'how it is correct to say that the rules are the consequence of the rights of individuals and not their source. The powers of the Crown and of other administrative authorities are limited by the rights of individuals; or the rights of individuals are limited by the powers of the administration. Both statements are correct; and both powers and rights come from the law – from the rules' (p 314).

5.3.2 The rule of law and Parliament

Everyone agrees that an important principle within our constitutional system is that government (that is, all public bodies) carry out their tasks in accordance with the law. The meaning and practical application of this principle, however, continues to be contentious. Most modern writers, as did Jennings, come to the conclusion that Dicey's particular formulation of the concept of the rule of law is an inadequate description both of how the principle actually operates, and also what ought to be regarded as important about it.

As we have seen, Dicey's version of the rule of law did not include the placing of legal restraints on the power of Parliament to pass Acts. The implication of Dicey's approach is that, if it were to be enacted that all blue eyed babies be strangled at birth (to use a classic illustration), the court would be under a duty to recognise the validity of such legislation like any other. Dicey's only answer to people who asked whether a court should recognise even a plainly evil enactment duly passed by Parliament was that such legislation was unlikely to be enacted (see above, 5.2). To a considerable extent, Jennings shared Dicey's confidence in Parliament and so did not disparage him on this ground. More recent critics have not shared this faith. For Ferdinand Mount, 'Dicey's doctrine of the rule of law is inescapably a narrow, shrivelled thing. It applies vigorously enough to the rights of

individuals in their dealings with one another and with the State, but it does not really touch the untrammelled quality of parliamentary sovereignty' (*The British Constitution Now*, 1993, London: Mandarin, p 207). As we have already noted, the Human Rights Act 1998 gives courts the power to declare that Parliament itself has failed to respect civil liberties (including, of course, those like personal liberty and freedom of assembly which Dicey regarded as important) set out in the ECHR. The Act stops short of allowing courts to enforce any such finding by refusing to recognise the validity of the offending statutory provision.

5.3.3 The rule of law and governmental discretion

Jennings was clearly right to point out that many statutes confer upon ministers, local authorities and other public bodies discretionary powers necessary for them to carry out their tasks. Later critics have gone further, arguing not only that discretion and the rule of law are not incompatible with one another, but also that discretion, properly exercised, is desirable. The use and occasional abuse of discretionary power is a matter of such importance in administrative law that we need to discuss the issues it raises in more detail (see below, Chapter 8). Here, it suffices to note that no one today agrees with Dicey's position.

5.4 Dicey on constitutional conventions

In Part III of *An Introduction to the Study of the Law of the Constitution*, Dicey examines the last of what, for him, are the three main characteristics of the British Constitution – constitutional conventions (see above, 2.2). He draws a sharp distinction between constitutional 'law' (which is the rules enforced or recognised by the courts) and constitutional conventions which are 'customs, practices, maxims or precepts which are not enforced or recognised by the courts' (p 417). He quickly adds, however, that a lawyer cannot master 'the legal side of the English Constitution' without understanding 'those constitutional understandings which necessarily engross the attention of historians or of statesmen'.

The common characteristic of most conventions was, Dicey argued, that they were rules for determining the mode in which the 'discretionary' (that is, prerogative) powers of the Crown and ministers ought to be exercised. A few conventions also related to the privileges of Parliament. Conventions had one ultimate object: 'Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State – the majority of the electors ...' In other words, conventions secured the sovereignty of the people, he claimed. In the final chapter, Dicey considers

what sanctions exist to enforce conventions – he thought that this was 'by far the most perplexing' of questions in constitutional law. Remember that he has just said that conventions are not law (that is, they will not be enforced by the courts). He rejects the idea that it is the force of public opinion which ensures ministers and others follow conventions: this was really just a restatement of the question.

The real reason for obedience was this: 'the fact that the breach of ... conventions will almost immediately bring the offender into conflict with the courts and the law of the land' (p 446). He gives illustrations of how this works. What would happen if a government no longer had the confidence of the majority of MPs, but the Prime Minister defied convention by refusing to request that the Queen dissolve Parliament so that a general election could be held? The government would be unable to steer the annual Appropriation Act through Parliament (this gives legal authorisation for the government to spend money raised by taxation) and this would leave the government without any lawful means of expenditure. Therefore 'the conventions of the constitution are not laws, but in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally breach the law and incur the penalties of a law-breaker' (p 451).

5.4.1 Jennings on conventions

Jennings rejects Dicey's definition of conventions. For Jennings, they are 'rules whose nature does *not* differ fundamentally from that of the positive law of England' (*The Law and the Constitution*, 5th edn, 1958, London: London UP, p 74, emphasis added). There were, he argued, problems with Dicey's sharp distinction between laws and conventions. First, Dicey generally overemphasised the role of the courts: most public law issues never see a court. Public law powers and duties are created by statute and enforced by administrative authorities. Only in the rarest cases do the courts become involved, and even then an Act may restrict or exclude their jurisdiction. For Jennings, a wider definition of 'law' was appropriate which would include rules such as that it is the Prime Minister and not the Cabinet who advises the Queen to dissolve Parliament. As a matter of history, the courts recognised rules (such as parliamentary sovereignty) which were established around the time of the Glorious Revolution, but conventions which developed later (for example, to do with Cabinet government) were, as a matter of formality, treated as not being part of the common law. But there was no distinction of substance or nature between law and convention.

Jennings also sought to show (pp 128–29) that Dicey's argument that a breach of a convention would lead to a breach of law was not necessarily correct.

5.6 Conclusion

What, then, is left of Dicey's work? We noted at the beginning of this chapter that his writings, especially *An Introduction to the Law of the Constitution*, continue to be a source of reference for academic writers, teachers and politicians. To this extent, even though most people disagree with some or all of what he wrote, Dicey's continuing influence is undeniable. Perhaps the most enduring legacy is Dicey's emphasis on parliamentary sovereignty as *the* defining feature of the British Constitution. As Ferdinand Mount puts it:

> The Constitution, we are told, is parliamentary supremacy and nothing but parliamentary supremacy; it admits no considerations of natural law or human rights, just as it admits no powers for subordinate or external law making bodies, except in so far as Parliament has defined and granted such powers [*The British Constitution Now*, 1993, London: Mandarin, pp 32–33].

Thus, even when the new Labour government was 'bringing rights home' in the Human Rights Act 1998, the primacy of Parliament, rather than rights enforced by courts, was insisted upon (see above, 5.2.5).

Dicey's particular version of the rule of law, with its three elements, has endured less well. In fact, almost every part of it is now discredited, and we must look elsewhere for an understanding of the importance of the requirement that State authorities respect the law.

TEXTBOOK WRITERS AND THEIR PRINCIPLES

In the absence of a codified constitution in the UK, textbooks have provided important descriptions of the constitutional system. Dicey's *Introduction to the Study of the Law of the Constitution* has had a unique influence. It deals with the sovereignty of Parliament, the rule of law and constitutional conventions. Dicey did not 'invent' these concepts, but he did write in a way that popularised his own views about them. People reading Dicey's book today have to decide of what relevance it is today. Some commentators dismiss it as being of only historical interest, while others accept Dicey's principled account (though conceding they need to be adapted to fit into the modern world). Dicey's work has long been held up to vehement criticism.

Parliamentary sovereignty

Dicey argued that MPs reflected the views of the majority of electors – and if they ceased to do this, they would not be re-elected. This fact led him to place Parliament's legislative power at the centre of the constitution. Acts of Parliament, Dicey argued, were, and ought to be, the highest form of law. One Parliament could not bind its successors by 'entrenching' legislative provisions. There are several challenges to this view today, though most people continue to accept that parliamentary sovereignty is a characteristic of the constitution. Today, UK courts have power under the Human Rights Act 1998 to declare that an Act of Parliament is incompatible with the European Convention on Human Rights (though this does not affect the validity of the statute in question). A few judges have even suggested that the common law may provide a basis for holding an Act of Parliament unconstitutional. The major challenge to parliamentary sovereignty, however, comes from the UK's membership of the European Union. While membership continues, European Community law is the highest form of law and Acts of Parliament in breach of Community law may be 'disapplied' by UK courts.

Rule of law

Dicey argued that the rule of law was a concept with three meanings:

(a) that public authorities should not have wide and arbitrary powers and they require legal authority for their actions. Today, however, almost everyone accepts that conferring discretion on public authorities, so long as it is properly supervised, is necessary and beneficial;

(b) that the legal system does not confer special immunities on public authorities or set up special tribunals to deal with claims against public authorities. Commentators have pointed out that, even in Dicey's time, there were many specialist courts and tribunals for adjudicating on claims against officials. This continues to be true today;

(c) that the constitution is the result of the ordinary law, not a codified constitutional document.

One problem with Dicey's conception of the rule of law, according to critics, is its weakness: it offers no protection in situations where an Act of Parliament enacts or permits public authorities to carry out oppressive actions.

Constitutional conventions

Dicey defined these as the customs, practices, maxims or precepts which are not enforced or recognised by the courts. He attached special importance to the fact that conventions existed to regulate the use of prerogative powers by ministers. (Today, prerogative powers may be subject to judicial review.) Academic writers have questioned whether there is really a fundamental difference of substance between constitutional conventions and legal rules.

PART B

PARLIAMENT AND GOVERNMENT