BOOK REVIEWS

AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. By A.V. Dicey. Delhi : Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 1998, Pp. CXC Viii + 535, Rs. 325/-, ISBN 81-7534-102-1.

This book is, as its title imports, an introduction of the study of the law of the constitution. It does not pretend to be even a summary, much less a complete account of constitutional law. The merit of this book lies in the author's application of the analytic method to constitutional law. The author deduced certain guiding principles which according to him underlie the English constitutional machinery. His exposition of these principles was expressed in terms which seemed at the time to admit of little doubt. The clarity of his diction assisted him to make the book a classic. It deals with three guiding principles which pervade the modern Constitution of England. The principles pertain to the sovereignty of Parliament, the rule of law and conventions of the constitution.

THE SOVEREIGNTY OF PARLIAMENT

The legal rule that Parliament is supreme is unquestionable by the courts and is accepted by the administration. The question, who is legal sovereign, stands quite apart from the question, why is he sovereign and who made him sovereign. The historical facts which have vested power in any given sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the ambit of law and belongs to historical or to political philosophy or to ethics.

Keeping in view the volume of current literature which relates to the political philosophy of the doctrine of the sovereignty of Parliament, it is necessary to emphasise that the author was concerned primarily with the doctrine as a characteristic of the body which is now the Parliament of Great Britain and Northern Ireland.

The rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the English legal system rests. The sacrosanctity of the rule is an inevitable corrollary of Parliaments continuing sovereignty. The rule that Acts of Parliament have the force of law is beyond doubt.

The political supremacy of the electorate is still acknowledged as a limitation upon the exercise of legislative power, though a lawyer can claim no special qualification to say precisely how political power is exercised. The

power of the electorate is qualified by the recognition of the increased power of the cabinet, which is able to utilise the power entrusted to it by the electorate to change the law at its will. But every government is disposed to keep its ear to the ground to detect electoral rumblings. In other words, there is a change of emphasis. It is the cabinet system which is fundamental to parliamentary government. That system depends for its efficiency as an instrument of government upon being able to use the legal supremacy of Parliament (or rather the Commons) to serve its ends; it is saved from being an autocratic instrument by the knowledge that at intervals that the electorate may alter the composition of the common and so place the supremacy of Parliament in other hands. But it is the political supremacy rather than the legal doctrine which saves the democratic principle. Indeed the legal instrument of parliamentary supremacy stands in some risk of actually facilitating the creation of an extreme form of government.

It is easy today to attack author's view of parliamentary sovereignty by showing that it can be no longer examined solely by reference to the legislature of the United Kingdom. Once reduced a constitution to enacted form, the question arises, how much of the constitution can be changed by the ordinary process of legislation? If the answer is that Parliament by itself cannot enact a change, then we must seek an explanation different from the author's for the legal sovereignty in that constitution.

The Rule of Law

The supremacy of the law of the land was not a novel doctrine in the nineteenth century. Let no one suppose that the author invented the rule of law. He did of course put his own interpretation upon the meaning of that rule. The rule itself, Holdsworth has shown, may be traced back to the mediavel notion that law, whether it be attributed to a super natural or human source, ought to rule the world.[2]

In England the doctrine of the supremacy of the common law had to be reconciled with the claim of Parliamentary supremacy. The recognition of the legislative powers of Parliament precluded insistence on the part of the lawyers that in common law there existed a system of fundamental laws which Parliament could not alter but only judges could interpret. The price paid by Coke and his followers for their alliance with Parliament, which ensured the defeat of the Crown's claim to rule by prerogative, was that the common law could be changed by Parliament. But the alliance of Parliament and the common lawyers made it certain that in the long run the supremacy of the law would come to mean the supremacy of Parliament. Much of the author's analysis of the rule of law rests upon this foundation, as a comparison between

some of the principal provision of the Bill of Rights and the contents of chapters V to X of this book. He discusses what Holdsworth calls the common law of the constitution, with special reference to personal liberty, liberty of discussion and freedom of assembly.

It was the attainment of independence by the judges of the higher courts which gave emphasis to author's conception of the rule of law,[3] which rests upon the power of the courts to punish individual wrong doers. There are, of course two aspects of judicial independence; freedom from dictation by the administration and freedom from control by Parliament. It is an accepted constitutional doctrine that the minister of the Crown do not temper with the administration of justice, but Parliament indirectly has reduced the sphere of judicial independence by the character of mordern legislation. The abandonment of the principle of *laissez faire* has altered the nature of much of English law.

The common law rests upon an individualistic conception of society and lacks the means of public rights as such. The socialisation of the activities of the people has meant restrictions of individual rights by the conferment of powers of a novel character upon governmental organs. But the change of emphasis in the functions of state has not destroyed the older principles which are protected by the rule of law as the author interpreted it in the field of personal liberty.

The author's three meanings of the rule of law may be paraphrased as follows:

(i) Liberty of action by the individual in England is conditioned by the regular rules of law which the courts apply. This excludes arbitrary interference by the Government. Like private individuals, the officers and servants of public authorities are liable not only for their criminal acts, but civilly in respect of breaches of contract and tort at the suit of an injured person according to law. He was contrasting the rule of law with those systems of government which are based on the exercise of arbitrary power by the rulers.

(ii) The courts of law are alone able to determine what is a breach of the law. They apply the law equally to all men. The official position in the state of a particular defendant will not protect him. He will be judged as an individual in the civil courts and not by a special tribunal.

(iii) Foreign constitutions contain statements of guaranteed rights. Such rights proceed from the enforcement of private rights by the courts which are able to punish all illegalities. Therefore, the constitution so

> far as it is concerned with the protection of private rights, comes from the common law. Such private rights are protected by the law relating to arrest, civil defamation and criminal libel, unlawful assembly, the common law prohibition on martial law, and the control by Parliament of taxation and public expenditure.

It is difficult to compare the operation of the rule to law as the author understood it in 1885 or even in 1914 with its operation today. The difficulty lies principally in the denial by the author that there was a system of administrative law in England. Moreover, he reacted unfavourably to what he originally regarded as the tyranny of administrative law, *droit administratif* in France. He was concerned not with the whole body of the law relating to administration, but with a single aspect of it, namely, administrative jurisdiction (in France, *contentieux administratif*). He was at pains to emphasize that powers of government must be exercised in accordance with ordinary common law principles, whereas in France, administrative law was contained in a separate system. There is no doubt that the author was historically correct upto a point but originally he failed to interpret the true nature of *conseil d' Etat.*

These limitations, however, did not seriously diminish the value of his interpretation of the right to personal freedom, the right to freedom of discussion and the right of public meeting. For it is in these subjects that the common law then, as now plays its important part in securing the liberty of the individual to criticise government without fear of imprisonment or other forms of suppression. It may be necessary for the state to supplement the common law on these topics by statutory provisions but so long as the law relating to arrest and the law of defamation rest on the common law. The author asserted that "no man can be made to suffer restraint on his physical freedom or to pay damages for expressions of opinion not forbidden by law"; so long too will his rights and liabilities be determined by the ordinary courts, and provided one recognises the above limitation, an individual's rights, are far less the result of the English Constitution than the basis on which the constitutional liberty (rather than the constitution itself) is founded.

There is evidence that the developments in the early part of the twentieth century had not escaped the author's notice and that he had indeed come to recognise the existence of administrative law in England. With regard to the French system equally he had come to modify the critical views which he originally had with regard to *droit administratif.* Chapter XII, the Rule of law compared with *droit administratif,* in the course of several editions underwent substantial changes. With regard to English public law, he indicated a change of heart in that he questioned the effectiveness of High Court to enforce public law. "Nor is it quite certain that the ordinary law courts are in all cases

the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the government of the day might not enforce official law with more effectiveness than any Division of the High Court."[4] It could be argued from this that the author envisaged ultimately the advent of a final administrative appellate tribunal. It would now seem that the author kept more abreast of developments across the channel than his earlier critics would have us suppose.

The changed conception of liberty narrows the field for the application of the rule of law in the sense of affording protection of the common law against the Crown, its Ministers and the other organs of administrative government, central, local or independent. The courts still restrict excesses of the prerogative so far as illegal arbitrary action against the individual subject is concerned. But it is the political control exercised through the House of Commons which grows more important as the enacted law extends the legal powers of government. The court may not declare illegal an act passed by Parliament, however, it may restrict the freedom of individuals.

Freedom of speech and freedom of association are as essential to democracy as freedom of person. For without them criticism of political institutions and social conditions is impossible. It is clear that Parliament could impose retrictions on freedom of speech, just as it has regulated the liberty of the individual to deal with his property as he chooses. But freedom of person still finds its bulwark in the common law, buttressed by the writ of habeas corpus against the administration. It is in this connection that the author's conception of the rule of law operates today. It has played, and still plays, its part in strengthening the tradition of political liberty which is the foundation of English parliamentary system. It is to the author that the politician as well as the lawyer turn whenever a threat to individual liberty is proposed.

Conventions of the Constitution

The author defined conventions as rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised. He was concerned to establish that conventions were intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State.

The author's analysis of constitutional conventions has been rightly described by his most formidable critic as a magnificent contribution to English public law.[5]

He used the term, conventions, to describe the various customs, practices, maxims and precepts of which constitutional or political ethics consists. He

then sought to explain - after a brilliant analysis of their content - the connection between the legal and the conventional elements in the constitution. If today the reasons he gave for obedience to conventions are generally rejected, we can be grateful that they afforded the author the opportunity for discussing political theory.

The author's consclusion was that conventions are supported and enforced by something beyond and in addition to public approval. His "something" was that it is nothing else than the force of law. The absence of a written constitution is responsible for the difficulty of dividing law and conventions by a clear line, but it is equally true of States with written constitution that conventions though not written in the constitution play an essential part in the working of the government. It is however, possible to enact a convention as law and yet exclude it from enforcement by an action in the courts.

The reason why conventions are obeyed may be obscure, just as their actual operation is a mystery too deep to be fathomed by the lawyer. But the fact that the cabinet government and indeed the whole administrative machine only function effectively by these means must be acknowledged. In their application to cabinet government, the author was the first constitutional lawyer to analyse their nature. His was, indeed, a magnificent contribution to English public law, if only because it led to the recognition that conventions are indispensable to an understanding of English legal institutions.

The author was absolutely right to include his analysis of constitutional conventions, perhaps the most valuable part of the book. But he had imposed upon himself the limitation to exclude politics. Conventions are political expedients, therefore, he had to connect them with law as enforced in the courts. Since he belonged to the school of thought which regarded obedience to an enforcing authority as of the essence of law, he solved his difficulty in the way he did. That this conception of obedience no longer explains the observance of the intricate mass of precepts, which furnish the key to an understanding of parliamentary government and the status of British Commonwealth, does not lessen the debt which is owed to the author for his brilliant exposition of the nature of conventions.

There is no need then to apologise for the limitations of the law of the constitution if one remembers the background in which the book was written. This does not however, explain the remarkable influence which the book had over a period of more than a century, yet no modern writer on the Constitution however critical of the authors work, fails to include some detailed comment on his principles. As book reviewers traditionally say, this book should find its

way into the library of everyone seriously interested in the subject. However, it must be read and it should provoke debate.

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REFERENCES

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1. See Holdsworth, HISTORY OF ENGLISH LAW, Vol. II (1923) at 121, 133,195, 196 and Vol. X (1938) at 647-650.
2. See Holdsworth, HISTORY OF ENGLISH LAW, Vol. X (1938) at 644-650.
3. 8th Ed.; p. XI viii.
4. Sir Ivor Jennings, *In Praise of Dicey*, 13 PUBLIC ADMINISRATION at 2.