

Ian Mitchell's Law-related BOOK RECOMMENDATIONS

05 – *Law of the Constitution - Dicey*

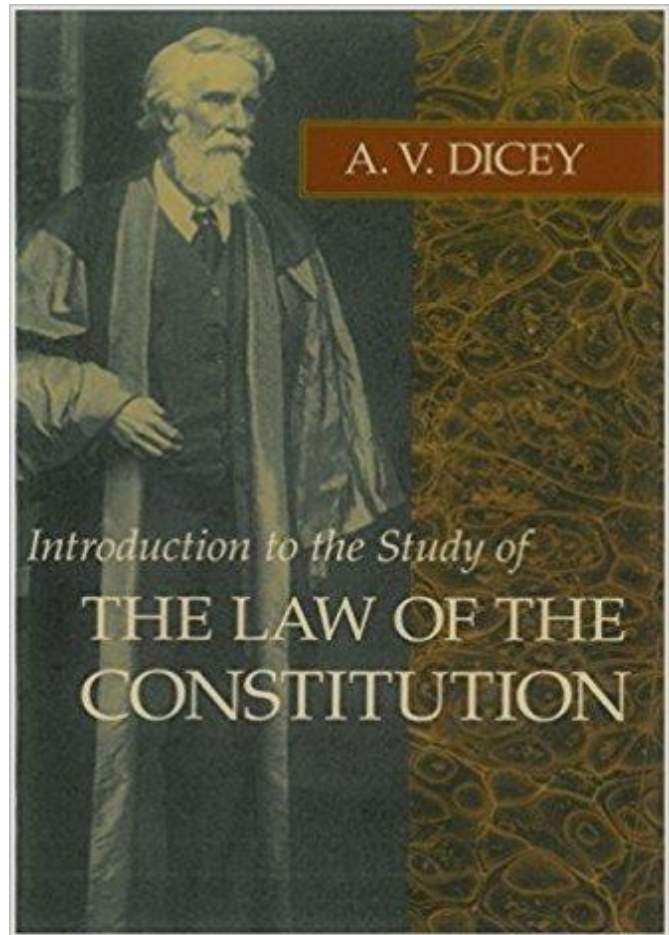
Title: INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION

Author: A.V. Dicey (Albert Venn)

Publication info: First published in 1885; completely revised 8th edition published in 1915. Reprint of that edition published in 1982 (*available on Amazon, click on cover image for link*)

Keywords: Constitutional Law, rule of law, sovereignty of parliament, French administrative law

Reviewer: Ian Mitchell, 9 March 2013



Reason to read: This is the first, the classic and the definitive study of constitutional law in the Anglo-American context. Although it is outdated in some details, it is not really a book of details. It is a grand overall vision which is as valid today as it was when published a century ago. The rule of law is under threat these days, especially internationally, and this book describes its origins and operation in the context of the developing idea of the sovereignty of parliament. It also makes clear the difference between the Anglo-American, common law approach to governance and the Continental, code-based, semi-administrative one. In the context of the Brexit debate, the significance of their mutual incompatibility can hardly be over-stated.

Main talking points:

1. The Anglo-American idea of the separation of powers means ensuring that the legislature, the executive and the judiciary are independent of each other. Under French law as laid out in the *Code Napoleon*, and mirrored in many ways (though not all) in the EU today, the separation of powers means that the administration is separate in all its functions from the rest of society, *which it controls*. “The supremacy of the law of the land means in the last resort the right of the judges to control executive government, whilst the *séparation des pouvoirs* means, as construed by Frenchmen, the right of the government to control the judges. The authority of the Courts of

Law as understood in England can therefore hardly coexist with the system of *droit administratif* as it prevails in France.” (p. 315)

2. In his Introduction to the 1915 edition, Dicey wrote, “The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline.” (p. *lv*) Part of the reason for this was because of the constant efforts by government—an ominous tendency not entirely absent from Scotland today—to turn courts in instruments of government. When there are laws for everything, and “zero tolerance” for many things, the public’s attitude to law inevitably changes. It becomes an instrument for control rather than a method of regulating relations between individual citizens, and between citizens and their government. “Respect for law easily degenerates into legalism which from its very rigidity may work considerable injury to the nation.” (p. 260)
3. The fundamental doctrine of Continental law a century ago, like EU law today, is that “administrative questions must be determined by administrative bodies.” (p. 244) By contrast, in the 1640s “Parliament destroyed, and destroyed forever, the arbitrary authority of the Star Chamber and of the [King’s] Council, and did not suffer any system of administrative Courts or administrative law to be revived or developed in England. The French liberals, on the expulsion of the Bourbons, neither destroyed the *tribunaux administratifs* nor made a clean sweep of *droit administratif*.” (p. 249-50)

Incidental interest: Students of Russian political practice through the ages, and of Scottish practice as appears to be developing today, will be interested to learn that “the law of France has always recognised an indefinite class of acts, i.e. acts of State, which, as they concern matters of high policy or of public security, or touch upon foreign policy or the execution of treaties, or concern dealings with foreigners, must be left to the uncontrolled discretion of the government, and lie quite outside the jurisdiction of any Court whatever.” (p. 226)

“The French Penal Code protected, as it still protects, an official from the penal consequences of any interference with the personal liberty of fellow citizens when the act complained of is done under the orders of his official superior.” (p. 226)

Dicey quotes de Tocqueville’s book, *The Ancien Regime and the Revolution* (“by far the most powerful and mature of his books”), on the political effects of abandoning the rule of law: “The intervention of the Courts of Justice into the sphere of government only impedes the management of business, whilst the intervention of government in the administration of justice depraves the citizens and turns them at the same time both into revolutionists and slaves.” (p. 233)

Style: Easy, readable and clear.

Surprising points: “The word Referendum is a foreign expression derived from Switzerland. Thirty years ago it was unknown in England.” (p. *viii*) “In England the introduction of the referendum means, it is urged, the transfer of political power from knowledge to ignorance.” (p. *cxii*)

Dicey quotes one of the pioneers of legal history, Sir Henry Maine (a son of the manse, incidentally, from Kelso), on the subject of democracy and its dangers when applied in an aggressively majoritarian manner. In his book, *Popular Government* (1885), Maine wrote: “All that has made England famous, all that has made England wealthy, has been the work of minorities, sometimes very small ones. It seems to me quite certain that, if for [the last] four centuries there had been a very widely extended franchise and a very large electoral body in this country, there would have been no reformation of religion, no change of dynasty, no toleration of Dissent, not even an accurate Calendar. The threshing-machine, the power-loom, the spinning-jenny, and possibly the steam-engine, would have been prohibited... We may say generally that the gradual establishment of the masses in power is the blackest omen for all legislation founded on scientific opinion, which requires tension of mind to understand it, and self-denial to submit to it.” (p. *cxi*)

Link(s): This is not to Dicey, but to a fascinating discussion about Magna Carta, which is the foundation document of Anglo-American constitutional law, and much else besides. The recording was made on the 800th anniversary of its promulgation, in 2015. The two participants are Lord Judge, who was Lord Chief Justice of England from 2008-13, and John Roberts, who has been the Chief Justice of the United States since 2005: <https://www.youtube.com/watch?v=45Y7bN7ZwaY>

Negative issue(s): Out of date on the details.

Overall recommendation level: Very high indeed for anyone interested in our constitutional past, and even higher for anyone concerned about our future as a society living under the rule of law.