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9

What Dicey Forgot

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For over a century, Dicey's account of the rule of law dominated constitutional scholarship and, like any successful academic exercise, has not lacked critics. Recently, that criticism has focused on the relationship between the rule of law and empire. Within the United Kingdom, or, more precisely, within Britain, the eulogisation of Dicey's rule of law was understandable, after all, the principle served as a guarantor of liberty. It ensured that limits on liberty were grounded in law and, crucially, those limits were knowable; people were free to act as they pleased, save in those areas in which the law proscribed conduct. Outside of Britain, within the British Empire, the rule of law played a very different role, justifying both the imperial project and particular acts of coercion by the imperial powers. Rather than protecting liberty, the rule of law became a tool of domination and oppression. This chapter argues that the imperial critique of Dicey is correct, but that the remedy can be found in Dicey's own work, in his discussion of sovereignty and in the hints he dropped about the social basis of the rule of law. In each case, a link is drawn between the community and the law that regulates it, a link that renders the rule of law morally defensible and efficacious. This chapter argues that Dicey's rule of law becomes radically less attractive when it is divided from the community the law governs, and that a fuller understanding of the rule of law shows that the principle weighs against the imperial project.

The chapter starts by outlining Dicey's principle of the rule of law, looking at its contents and at the understanding of law on which it rests. It argues that the concept of law and liberty that underpins Dicey's rule of law is drawn from the work of John Austin and JS Mill. The second section of the chapter examines the imperial critique of Dicey, and contends that it is Dicey's inheritance from Austin and Mill that validates this critique. The third section of the chapter argues that there is a richer, post-Austinian, understanding of law within Dicey's work, and that once the rule of law is interpreted in this light it can no longer be relied upon as a defence of imperial rule.

I. Dicey's Inheritance

Dicey divides his account of the rule of law into three parts.[1] The first two parts embody the demands of the rule of law, whilst the third sets out the benefits brought by the principle. The first part of Dicey's rule of law requires that individuals not be punished unless they have committed a distinct breach of the law.[2] Part of this requirement relates to the form laws should take: laws should be expressed in a manner that enables people to predict the actions that will lead to punishment. Dicey warns against laws that give people in positions of power 'wide, arbitrary, or discretionary powers of constraint'.[3] Individuals should not be subjected to the caprice of officials, even if that caprice had received legal sanction. But this part of Dicey's rule of law is not merely concerned with the mode of expression of legal rules; it also engages the application of those rules within the community. The rule of law does not just require that people can determine when the law permits or requires the infliction of a punishment; it also requires that people only suffer punishment when it has been mandated by the law. So, when Dicey recounts the story of Voltaire being beaten by the servants of the Duc de Rohan – or, as Dicey puts it, 'thrashed by lackeys in the presence of their noble master' – he is drawing attention to the failure of French law to constrain Rohan's capacity to inflict harm.[4] The legal rules did not permit the Duke to punish the author, but the punishment went ahead all the same; the social context in which the law operated allowed Voltaire to be punished even though the law did not permit this act. There is a pair of intertwined demands in Dicey's first element of the rule of law which combine to render the exercise of force predictable. The rules mandating punishment are expressed in a manner that allows people to predict the infliction of legally sanctioned punishment and, in addition, people can be confident that they will not be exposed to non-legally sanctioned punishment.

The second part of Dicey's rule of law is the mirror image of the first. It requires that everyone, including state officials, be bound by the 'ordinary law of the land and amenable to the jurisdiction of the ordinary tribunals'.[5] Once again, there is a formal aspect to this requirement: the rule of law is set in opposition to the grant of arbitrary legal immunities.[6] This does not mean that the same law applies, or should apply, to everyone: people who occupy specific legal offices have different legal duties and rights. Most obviously, state officials have special legal duties and special legal rights, but these legal offices also exist in the private sphere:

[1] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London, MacMillan, 1959) ch 4. The following four paragraphs are modified from NW Barber, *The United Kingdom Constitution: An Introduction* (Oxford, Oxford University Press, 2021) ch 20.

[2] Dicey, *Introduction to the Study of the Law* 188–93, 202.

[3] ibid 188.

[4] ibid 190.

[5] ibid 194.

[6] ibid 195, 204.

company directors, trustees, landlords, spouses – all take on distinct legal duties and rights when they take on their roles. Though Dicey does not make this explicit, it seems that the rule of law requires that these special rights and duties be justified and explained by the legal role occupied by an individual; when they can be so explained, these variations in legal rights and duties are not arbitrary.[7]

As well as not including arbitrary exceptions within the substance of the law, the rule of law further requires that there not be any practical immunities from the ordinary operation of the law; that the law is, in reality, applied to those who break its demands. Once again, there is a social dimension to this aspect of Dicey's rule of law. Returning to Voltaire, the Duke's capacity to inflict punishment stemmed from his practical immunity from the ordinary operation of the law. As Dicey puts it, the rule of law is imperilled where certain people can 'defy the law';[8] they enjoy immunities based on power, even though not recognised by law.

Dicey's two aspects of the rule of law are complementary, amounting to a broad demand that power be exercised through law. Dicey's third element of the rule of law is not a further requirement of the principle, but, instead, a conclusion: the benefits conferred by the rule of law. According to Dicey, the rule of law protects liberty by requiring the state to make explicit the limitations on people's allowed area of action; the legal order is structured such that whatever is not forbidden is permitted. The chapters that followed Dicey's account of the rule of law go on to discuss freedoms of the person, of discussion, and assembly, and, in each case, liberty is presented as the space left to the individual after the encroachments of the law.

Dicey's rule of law is a product of his time and shaped by the intellectual environment of his day. Perhaps the most important influence on Dicey's account of the rule of law is the work of John Austin.[9] Though Dicey's intellectual relationship with Austin is not simple and, as we shall see, Dicey departs from it in other parts of his work,[10] it seems that it is Austin's model of law that underpins Dicey's account of the rule of law, both in terms of the structure of the law and in its understanding of law's function.

In terms of the structure of law, in Austin's account, law is understood as the commands issued by a sovereign to their subjects, backed by sanctions.[11] We can identify the sovereign by looking at the behaviour of its subjects, as the sovereign's subjects are in a 'habit of obedience' towards it, following the

[7] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2001) 21–25.

[8] Dicey, *Introduction to the Study of the Law* 194.

[9] RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, University of North Carolina Press, 1980) 23–29.

[10] MD Walters, *A.V. Dicey and the Common Law Constitutional Tradition* (Cambridge, Cambridge University Press, 2020) 88–90.

[11] J Austin, *The Province of Jurisprudence Determined* (London, Weidenfeld and Nicolson, 1954) 13–16.

sovereign's commands.[12] Though the sovereign and subject are tied together in Austin's account, with each side needing the other for its existence, the model of law that this relationship generates is vertical and unidirectional. It is vertical, in that law is located within the interactions of sovereign and subject. Though laws are normally addressed to a wide group of people, the legal connection between the subject and sovereign is a personal one, and each individual encounters the law by themselves. This contrasts with a model of law in which the law is understood to regulate interactions within the community, where law has both a vertical aspect, between the institutions of the state and the recipients of law, and a horizontal aspect, between members of that community. Additionally, under Austin's model, law moves in one direction, it is unidirectional, flowing from the sovereign down to the subject. Law is then seen as something that happens to the people it addresses, something they experience and navigate. This contrasts with a model of law in which law is understood as bidirectional, where those who are the 'subjects' of the law also engage in its creation, interpretation, and application. Although Austin's account of law embeds law within a group, it does not embed law within a community: the group is defined solely by their shared submission to a political superior; how they relate to each other is, for the purposes of Austin's account of law, irrelevant.

In terms of the function of law, Austin's account is avowedly scientific, and seeks to move away from accounts of law that are tied to morality or divine will.[13] As such, Austin provides a 'positivist' account of law, in that his account purports to be morally inert. The reasons why we should want law within our society are excluded, and the moral evaluation of the law decoupled from questions of its existence. Whilst this is how Austin presents his account of law, it is impossible, when reading Austin, not to see Thomas Hobbes' shadow in his work.[14] Austin's sovereign is, essentially, that of Hobbes, and Hobbes' reasons for wanting a sovereign, Hobbes' moral arguments for the state, shape and inform Austin's work.[15] For Hobbes, we have a choice between the state of nature, where life is 'solitary, poore, nasty, brutish, and short', and living in the state, a polity characterised by order and comparative security.[16] And if we want to live in a state, we must accept the authority of a sovereign: the type of relationship that Austin presents as key to understanding law must be established. Though Austin sets aside the normative aspect of Hobbes' sovereign, his account of law is not morally inert. The moral basis of Hobbes' state is smuggled into Austin's work through the concept of the sovereign – it is the supposed moral value of order that enables Hobbes to identify and pick out the important features of law, like its commands and sanctions, and

[12] ibid 193–200.

[13] ibid 126–30; Cosgrove, *The Rule of Law* 25–25, 69–71; Walters, *A.V. Dicey and the Common Law* 60–61.

[14] Austin, *The Province of Jurisprudence* esp 260 n 23, 276 n 25.

[15] D Dyzenhaus, 'Austin, Hobbes, and Dicey' (2011) 24 *Canadian Journal of Law and Jurisprudence* 411, 415–17.

[16] T Hobbes, *Leviathan*, R Tuck (ed) (Cambridge, Cambridge University Press, 1991) 89.

enables Austin to make the same selection.[17] The suppression of moral evaluation in Austin's work, and, indeed, in that of many of his successors, permits controversial assumptions about law to remain unchallenged. When the significance of order within Austin's account is addressed directly, questions about its role emerge. Is order intrinsically valuable or instrumentally valuable? And, if it is instrumentally valuable, what is it instrumentally valuable for?[18] The answers to these questions have implications for the way we understand the purpose and nature of law.

A second figure standing behind Dicey is John Stuart Mill.[19] Mill's account of liberty is echoed both in Dicey's rule of law and in his discussion of the freedoms found within the Constitution.[20] Mill's liberty is a form of negative liberty, that is, liberty is present where a person is free to act without the interference of others; it consists in freedom from constraint rather than freedom to act.[21] The merit of liberty, for Mill, is that individuals are given space to decide for themselves how they want to live, they get some degree of control over their lives. Though this approach to liberty dominates Victorian discourse, work since that time has become more concerned with liberty as a capacity to act, whether that is being able to choose from a valuable range of options, or being free from the domination of others.

Drawing the preceding paragraphs together, there are four elements from the work of Austin and Mill which appear to have shaped Dicey's concept of the rule of law. First, within the confines of the principle of the rule of law, we are presented with an issuer of the law and a receiver of the law, and the two remain distinct. Dicey's rule of law does not speak to the ways in which the law is produced. Second, law is something that people navigate rather than engage. Dicey's rule of law rests on a model of law as a set of prohibitions and permissions, not as a tool they may utilise. Third, there is an unexplored assumption that the animating purpose of law is to establish order, and further questions over the purpose of establishing order are not explored. Dicey clearly thinks the rule of law is an attractive principle, one which those with power over the law should follow. Following Austin, the unarticulated assumption seems to be that the establishment of order is a good in itself. Finally, and building on these three elements, liberty is understood as the space between constraints, what is left over after the state has issued its demands. Liberty is presented as a side-effect of the rule of law, a feature that is an implication of the establishment of order.

[17] Dyzenhaus, 'Austin, Hobbes, and Dicey' 419–20; J Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Oxford University Press, 2011) 6–18.

[18] Jennings levels this charge against Dicey: I Jennings, *The Law and the Constitution*, 5th edn (London, University of London Press, 1959) 60; Cosgrove, *The Rule of Law* 82–84.

[19] Cosgrove, *The Rule of Law* 12–13; Walters, *A V. Dicey and the Common Law* 40–44.

[20] D Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81 *Modern Law Review* 739, 740.

[21] JS Mill, 'On Liberty' in JS Mill, *On Liberty and Other Essays* (Oxford, Oxford University Press, 2008); I Berlin, 'Two Concepts of Liberty' in I Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969) 169–70.

II. The Rule of Law as a Tool of Empire

It is this conceptual framework, inherited from Austin and Mill, that permitted the rule of law to be used as a defence of imperial rule. As Caroline Elkins argues, Dicey's rule of law played two justificatory roles within the British Empire. First, it provided an overarching justification for the imperial project. The application of imperial law within the territories brought order and, within the confines of Dicey's account, this order was, in and of itself, a benefit for which those subject to British rule ought to be grateful.[22] Through their control of a territory, the British were providing something of value to its people, a service, indeed. Allied to this, the creation of order created liberty.[23] By channelling power through law, the imperial structures left space to those subject to British rule; paradoxically, the domination of empire could be seen as a prerequisite to the creation of liberty. Second, breaching the law provided a justification for punishment within the territories.[24] One way of rationalising this through the rule of law would have been that the value of order justified the imposition of coercion, those who broke the law deserved to be punished because of their decision to undermine the efficacy of the law. But arguments about the moral purpose of law were deeply buried in the rule of law, and often the assumption may have been a far cruder claim, a caricature of legal positivism, that the only valid assessment of a sanction was legal – that is, if the sanction was legally justified no further assessment of its propriety was necessary or, indeed, acceptable.[25] Looked at squarely, such an argument is implausible, but it is a tempting one, a way of bringing quick closure to questions about the morality of state power. Once the assumption that breach of the law warrants punishment was permitted, this assumption then reflected back on the conduct that had been proscribed. If the sanction was warranted, the conduct must have been immoral: liberation struggles were transformed into mutinies, and campaigners for freedom became seditious rebels. Opposition to imperial rule was framed as opposition to the rule of law and, as such, conceptualised in morally negative terms.

Elkins' claim that Dicey's rule of law acted as a justification for, and facilitator of, empire is well made, and raises a worry about the principle. If the rule of law does provide such a broad defence of the imperial project and the violence used to realise it, the attractions of the principle are called into question. The rule of law, including Dicey's version of the principle, is presented as a moral principle, one which engages the question of how the state ought to exercise power and how its citizens should respond to this. If it generates immoral outcomes, this suggests that something has gone wrong further back in the account, either that the whole

[22] C Elkins, *Legacy of Violence: A History of the British Empire* (London, Bodley Head, 2022) 13, 100–101.

[23] Lino, 'The Rule of Law and the Rule of Empire' 20, 748–49, 758–59.

[24] Elkins, *Legacy of Violence* 50–51, 144.

[25] For a remarkable example of such reasoning, see N Biggar, *Colonialism* (London, William Collins, 2023) 223.

principle rests on a mistake, or something has gone wrong in our reasoning at some point. In the case of Dicey's model of the rule of law, the problems stem from the understandings of law he inherited from Austin and the model of liberty bequeathed by Mill discussed in the previous section. Drawing on this inheritance, law is seen as distinct from the society it serves. In his discussion of the rule of law, Dicey presents it as a tool of power rather than as a feature of a community. The manner in which the law is created or how it is developed is not directly relevant to the principle. Relatedly, law is understood in simple mandatory terms, it requires or forbids activities, and it is not presented as an institution that empowers and supports those it addresses. It is this division between law and community that permits the rule of law to be used as a defence of empire. In an empire, law is, ultimately, controlled by the metropole and applied to the imperial territories. Whilst those territories may be given some latitude in the creation of law, they only have limited and provisional control over it. By treating law as simply commands issued over a people, commands that bring the benefit of order and the possibility of a form of negative liberty, Dicey avoided engaging with questions about the creation and development of the law.

III. What Dicey Forgot

Although Dicey's rule of law may have been formulated in terms which split law from the community it regulated, there are elements of his work that point towards a richer understanding of law which links these together. Dicey's discussion of parliamentary sovereignty and his discussion of the social base of the rule of law move his work beyond the Austinian model of law.

Turning to Dicey's account of sovereignty, there are two elements in this part of his work which pull away from the simple command theory of law and push towards a concept of law, or at least of state law, in which law is tied to the community it serves. First, Dicey recognised, in a way which Austin did not, that sovereignty was a legal construction rather than simply a political fact; the law-making power of Parliament was created through the existence of legal rules, rather than existing separate from those legal rules.[26] Law had the capacity to create and empower, as well as to mandate and prohibit.[27] As Dicey noted, Austin's paradigm of law was essentially that of a rule found in a criminal law statute, one which forbade or required a given action, and was far removed from the type of law that established the law-making power of institutions.[28] In contrast to criminal law, parliamentary sovereignty was a facilitative legal structure, one which

[26] Dicey, *Introduction to the Study of the Law* 39–50; Walters, *A.V. Dicey and the Common Law* ch 8.

[27] Indeed, this can be seen in Dicey's wider discussion of the nature of law: Walters, *A.V. Dicey and the Common Law* 148–59.

[28] Dicey, *Introduction to the Study of the Law* 72.

enabled Parliament to legislate. Second, though Dicey's principal focus was on legal sovereignty, he linked legal sovereignty to popular sovereignty, contending that, ultimately, it was the people, the nation, that provided political legitimation to the system.[29] Indeed, as Rivka Weill has shown, Dicey believed that some legal changes were so significant that before they were undertaken this popular sovereignty ought to be re-accessed through referendum.[30] For most questions, though, Parliament acted as a medium through which the people were able to set the contents of the law, and parliamentary sovereignty provided a legal structure through which the popular will could determine the exercise of state power within the United Kingdom.[31] Negative liberty, of the type expounded by Mill, was valuable, but so too was the capacity of the law to create and facilitate, bringing opportunities to the community it served. Though Dicey's understanding of democracy was radically flawed, and his embrace of it was qualified,[32] his work on sovereignty established a connection between democracy and the law through the medium of parliamentary sovereignty.

In the *Law of the Constitution* sovereignty and the rule of law are kept distinct. But it is easy to spot the connections between the two, lying just under the surface of Dicey's work. It is parliamentary sovereignty, with its tie to democratic governance, that provides the justification for the rule of law, and it is a justification which extends beyond the mere establishment of Hobbesian order. In Dicey's account of the United Kingdom's Constitution, the assertions of authority made by the state, embodied in the law, have a democratic grounding. The law is not simply the commands of a sovereign but consists of the commands of a community mediated through a representative institution. The rule of law should be understood as located within this broader constitutional context. Within the United Kingdom's constitutional order, part of the legitimating narrative of the state is its vindication of democracy: people should support and obey the law because the law is underpinned by a democratic mandate, and because flouting those laws would undermine the democratic process. Given that all states should be democratic, or be in the process of becoming democratic, the justificatory link between democracy and the rule of law extends beyond the United Kingdom and is a general feature of the rule of law. Dicey's principle of the rule of law is attractive because it establishes a form of social control that is vindicated by, and which is necessary for, democratic government. The function of the rule of law is not simply to condition the exercise of power and, by so doing, to establish order and leave space for liberty; it also facilitates the establishment of democratic structures within the state. The relationship goes both ways. The rule of law needs democratic government to render the law legitimate and so justify the demands of the principle. Democratic government, on the other hand, requires the rule of law to enable

[29] ibid 75–77; Walters, *A.V. Dicey and the Common Law* 221–25.
[30] R Weill, 'Dicey was not Diceyean' (2003) 62 *Cambridge Law Journal* 474.
[31] Dicey, *Introduction to the Study of the Law* 59, 73–74.
[32] AV Dicey, *Letters to a Friend on Votes for Women* (London, John Murray, 1909).

a people, through elected institutions, to govern effectively. The two principles, democracy and the rule of law, are intimately connected.[33]

The first connection between the rule of law and the community advances a pair of normative arguments, contending that the rule of law is both necessary for, and partly legitimated by, the principle of democracy. A second link in Dicey's work is empirical in nature, contending that community support is necessary for the successful operation of the rule of law.[34] At various points in his writings, Dicey emphasises that the rule of law is tied to a particular community, the English people.[35] According to Dicey, it was their national character and habits that made the rule of law possible.[36] One way of reading this, and perhaps the way that Dicey intended, is as a piece of parochialism, a claim that only the English have the virtue and fortitude to create the rule of law.[37] Such a claim would be easy to disprove, as effective legal orders have developed in many countries at many points in time. But an alternative, perhaps charitable, reading would take this as recognition that law is not simply a top-down institution. To a degree, law's existence depends on the support of the community in which it operates. Whilst Austin and many of his successors in the legal positivist tradition sought to shut down the question of why people obey law, Dicey is willing to entertain the issue.[38] After all, the answers inform our understanding of law: there are limits to what can be accomplished with threats and force, and in a society where people decline to use legal institutions to resolve disputes and refuse to cooperate with state officials, the institution of law would swiftly collapse.[39] This minimum necessary level of support can be quite low, but to have a flourishing legal system, a legal system in which the rule of law is more fully realised, requires deep and broad community support. Tom Tyler has examined the reasons that lead to community support for law and has picked out two important factors about why people are more likely to obey rules: when they have been made in a manner they believe to be procedurally fair;[40] and when the contents of the law are seen as generally just.[41] These will often be connected: a process of law creation that the community regards as procedurally fair is likely to produce rules that track the values of the community – and, on the other hand, a process that produces laws that track the values of the community is likely to be regarded as procedurally fair.

[33] See further, NW Barber, *The Principles of Constitutionalism* (Oxford, Oxford University Press, 2018) esp chs 2 and 4.

[34] Dyzenhaus, 'Austin, Hobbes, and Dicey' 427–28.

[35] Dicey, *Introduction to the Study of the Law* 187; Cosgrove, *The Rule of Law* 78–80; Walters, *A.V. Dicey and the Common Law* 231–32.

[36] Walters, *A.V. Dicey and the Common Law* 95–96, 228–29.

[37] Dicey, *Introduction to the Study of the Law* 188; Lino, 'The Rule of Law and the Rule of Empire' 474.

[38] Dyzenhaus, 'Austin, Hobbes, and Dicey' 427–28.

[39] Dicey, *Introduction to the Study of the Law* 78–80; D Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 *Oxford Journal of Legal Studies* 751, 766–67.

[40] T Tyler, *Why People Obey the Law* (New Jersey, Princeton University Press, 2006) ch 12.

[41] J Jackson et al, 'Why Do People Comply with the Law?' (2012) 52 *British Journal of Criminology* 1051.

In the United Kingdom, Dicey's constitution, the two most important modes of law-making are through the legislatures and the courts. Each of these sets of institutions provides a legitimating narrative which grounds their development of the law in the community. The legitimating narrative of the legislature is obvious enough: as an elected institution, Parliament possesses a democratic mandate from the community to make law and, because of the connection established between the legislature and its people through elections, it is likely to be responsive to their values and concerns. Within the courts, the classic legitimating narrative of the common law is that the judges develop the common law out of the moral beliefs of the community in which they operate, articulating the values of the community within the legal order. The extent to which these legitimating narratives track reality can, and should, be disputed – Parliament is imperfectly representative, the courts are often far removed from those they regulate – but the narratives are important in themselves and, moreover, within the United Kingdom probably possess enough credibility to shape the way those subject to the legal orders of that state see the law. It could be that Dicey's claims about the empirical base of the rule of law are correct: the rule of law flourished within the United Kingdom because the law was grounded, and was seen to be grounded, in the community it served. Its institutions presented the law to their people in this way, these were the stories the state told about the law, and this legitimating story was sufficiently close to reality to be persuasive.

There are powerful criticisms that could be made of these legitimating narratives within the United Kingdom, especially at the time Dicey is writing, but outside of the United Kingdom, within imperial territories, these narratives are stripped of all plausibility. The essence of imperial rule is that one state, the metropole, controls territory outside of its borders. In the context of the British Empire, this means that laws which depend for their legitimacy and efficacy in their grounding in one community, the British community, are applied outside of that community to other peoples. To an extent, this was mitigated by the facilitation of some self-government within imperial territories, either by enabling local democratic structures to emerge or by the validation of local laws, but it is of the nature of imperial control that it impairs the governed community's engagement with its laws.[42] Whatever accommodations are made, the overarching structure is one of domination, control of one community by another.

IV. Conclusion: The Rule of Law and the Rule of Empire

Dicey's rule of law has rightly been criticised as a tool of empire, one which provided justifications both for the imperial project and for the punishment of

[42] Lino, 'The Rule of Law and the Rule of Empire' 770–73.

those who resisted imperial rule. That Dicey's rule of law was capable of being used in this way was due to the assumptions he inherited from other scholars about the nature of law and liberty, assumptions that are present in his discussion of the rule of law but absent from other parts of his work, in particular from his discussion of sovereignty. The seeds of an answer to the imperial critique made by Elkins and others can be found buried in Dicey's work. It is a defence which rests upon a more sophisticated understanding of the rule of law, one in which the rule of law, as a principle of constitutionalism, sits alongside other principles, such as state sovereignty and democracy, informing and being informed by these other principles. The links between the rule of law and self-government are then exposed. One of the reasons we have for valuing the rule of law, and, indeed, supporting the operation of the law, is that it makes democracy possible within a community. Severed from self-rule and democracy, the defensibility of the rule of law is impaired, and it cannot be fully realised within the state. Additionally, Dicey recognised the importance of community support for the flourishing of the rule of law. Some level of community support is necessary for law to function at all, but for the rule of law to flourish, people must support legal institutions. It is hard to see how imperial rule, based on the domination of one group by another, could ever establish the attitudes conducive to the flourishing of the rule of law within the dominated group. Those subject to imperial rule will argue, almost invariably correctly, that the process by which those laws that are applied to them were created is unfair, and that these laws are not responsive to their values and needs. That the rule of law was seen as a justification of empire was Dicey's fault, and one he did not seek to correct, but when the principle is interpreted in the wider context of his work, it is shown to require a connection between the law and the community it regulates, a connection antithetical to imperial rule. Properly understood, Dicey's rule of law stands in opposition to empire.