

Constitutional Law, by J. D. B. MITCHELL, LL.B., PH.D. (London), Professor of Constitutional Law in the University of Edinburgh, (W. Green & Sons Ltd, Edinburgh, 1964), pp. i-xxxv, 1-293. Australian Price £4 11s. 6d.

This book is written primarily as an exposition of constitutional law from the viewpoint of the Scots lawyer and as one of a series of treatises restating the main branches of the law of Scotland for the practitioner and the advanced scholar. It must be said at once that this work does these things very well and with a commendable comprehensiveness of reference and documentation, but to the student or lawyer who has been

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trained under a written constitution particularly of a federal character its major chapters contain little which would normally be identified as coming within the field of constitutional law.

Whilst one cannot but agree with the opening statement in the text that 'the primary concern of constitutional law is with the creation and regulation of power within the state', the author's observation in the preface that 'there are both universal and local aspects of constitutional law' would not be so readily accepted by lawyers in many countries having written constitutions, particularly if they possess a federal character. Even 'colonial lawyers', as we in Australia are still described so frequently in the Halls of the Inns of Court, will admit a debt to the doctrines of Dicey, despite his misconceptions of some aspects of legislative, judicial and administrative power and, in a large measure, it is Dicey's classical work which has defined the scope of constitutional law as a subject of study by lawyers.

With the embellishments that the passage of time and modernity have compelled, the content of this work is the same as Dicey adopted. Such matters as the conventions of the constitution, the sovereignty of Parliament, the structure of and relations between the Houses of Parliament, the functions of the executive and the courts as well as the scope of the prerogative are discussed in detail and in a clear and lucid style thoroughly documented by authorities widely collected from the courts of the Dominions as well as those of Scotland, though oddly enough the author does not seem to have picked up the decision of the High Court (approved by the Privy Council) in *R. v. Richards ; Ex parte Fitzpatrick and Browne*.¹

Whilst this work covers for the most part well-trodden ground in the field of constitutional law, the last half dozen chapters, representing about a third of the book, succeed in providing a good deal of new material and posing fresh approaches to the modern problems of government which were not evident to Dicey and many of those who followed him in writing about constitutional law. The subjects embraced in these chapters include Public Boards and Corporations, Local Government, the Place of the Courts in the Modern Constitution, Delegated Legislation, Administrative Tribunals, Public Authorities in the Courts and Fundamental Liberties. In discussing these matters the author shows a high degree of perception of the present day problems of integrating legislative, executive, administrative and judicial power. It is seldom indeed, for instance, that a writer on constitutional law has had the courage to point to these problems and to suggest where error lies as Professor Mitchell does in the following passage (page 226)—

Law, in modern statutory forms, is more than ever an instrument of policy, and of policy upon which opinion may be sharply divided, and this fact may again provoke judicial reticence. All the difficulties which surround courts are aggravated by the fact that the law in many important areas is changing from a law of obligations to a law of standards. Questions of land use are, for example, today

¹ (1955) 92 C.L.R. 157, 171.

as important as questions of land ownership, yet they cannot be decided by similarly objective rules. Hence, as will appear, many matters of vital concern to particular citizens have been withdrawn from the ordinary courts and entrusted to administrative tribunals. Thus courts do not assume the dominant place in the thoughts of citizens (other than criminals) that they once did. Issues which concern citizens are determined elsewhere, either in the first instance or finally. This fact too has its influence upon the place of courts. These matters will be elaborated in the following chapters, but in assessing the constitutional position of the courts allowance must also be made for what has already been said in relation, for example, to prerogative or local government. The doctrine of the separation of powers, if it is to have value, must involve more than a formal separation. There must also be a distribution or balance of power. While the formal separation is preserved, it is for the reader to consider whether the distribution or balance is correct at the moment.

Much of what follows this statement in relation to delegated legislation, administrative tribunals and administrative law and the fundamental liberties may not be original but it is set in an imaginative if not original mould which cannot fail to stimulate students of law and politics, if not the practising lawyer of traditionally conservative bent, to a more critical understanding of the problems of government and governmental power regardless of whether it be characterised as executive, administrative, legislative, judicial or quasi-judicial. Not the least of these problems is that of striking and maintaining a balance between the interests of the individual and those of the group which we understand to be the State. The author certainly does not see the State as Hobbes or Locke did for he regards the purpose of striking a balance as the 'achievement of the dignity of man' and the law as the mechanism for striking and maintaining that balance; to this end he regards the State as nothing more than 'a legal device which is used both to embody and to achieve the communal interests with a society' (page 293).

It is gratifying to know that such views as these are gaining some acceptance in the United Kingdom, for they rather seem to be more typical of realistic thought in some American and Dominion schools of jurisprudence; whatever their origin, however, they have been expounded with ability and lucidity by Professor Mitchell in this critical work.

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