DICEY'S SPIRIT OF THE GAME: THE ASHES, MORAL VICTORIES AND THE CONSTITUTION OF THE UNITED KINGDOM

The Hon Justice Robert Beech-Jones*

2023: the horror

Just after tea on Friday 30 June 2023, on a smallish cricket ground near Regent's Park, a bowler charged in and let fly. It was a tired delivery. It passed well outside the off stump and through to the wicketkeeper. The batsman did not offer a shot. Perhaps it was a reflex but, whatever it was, the wicketkeeper immediately threw the ball at the stumps. Rule 20.1.2 of the Laws of Cricket provide that "[t]he ball shall be considered to be dead when it is clear to the bowler's end umpire that the fielding side and both batters at the wicket have ceased to regard it as in play".[1] As this ball approached the stumps, it was not dead. But the ball missed, and the batsman was anchored in his crease so there was no danger of a dismissal anyway. The incident passed without immediate comment.[2]

Two days later, just before lunch on Sunday 2 July 2023, at the same ground in the same match, that wicketkeeper was now batting. The atmosphere was tense because that ground was Lords, that wicketkeeper was the English wicketkeeper, that cricket game was the second Ashes Test, and that Test was coming to its dramatic denouement.[3] The Australian bowler charged in. He bowled a bouncer. The English batsman ducked under it comfortably and the ball went through to the Australian wicketkeeper. That wicketkeeper also threw the ball at the stumps but this time the English batsman had walked out of his crease and the ball hit the wicket. The Australian team then committed the most grievous of sins: they appealed! The English batsman was given out and the world as we know it came to an end.

The geological scale of the atrocity that appeal represented can only be gauged by the fact that some of the most well-bred of English gentlemen, being the members of

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* Justice of the High Court of Australia. This is a revised version of a speech given at the Society Breakfast of the Australian Chapter of the Anglo-Australasian Lawyers Society Inc on 17 December 2025, held at the Royal Automobile Club in Sydney.

1 Marylebone Cricket Club, *The Over, Scoring Runs, Dead Ball and Extra* (online, 2017) <https://www.lords.org/mcc/the-laws-of-cricket-2d35b4b95a4a67ae8f9c76f258a84aa8/dead-ball>.

2 The delivery can be viewed here: 'Watch: Did Jonny Bairstow Attempt Alex Carey-Like Dismissal in Lord's Test First', *NDTV* (online, 3 July 2023) < https://sports.ndtv.com/ashes-2023/did-jonny-bairstow-attempt-alex-carey-like-dismissal-in-lords-test-first-watch-4172919>.

3 England was 5-193, chasing 371.

the Marylebone Cricket Club ("the MCC"), were so affronted by the Australian team's actions that they felt duty-bound to hurl abuse and allegedly trip two of the Australian players as they passed through their clubhouse at the lunch break.[4]

Beyond those heightened passions, there also arose a nuanced jurisprudential debate about the concept of success and the revival of the doctrine of the "spirit of the game".

Thus, we had the introduction into the discourse of a new barometer of success known as the "moral victory". Ultimately the Test series was drawn 2-2 and Australia retained the Ashes. To the great unwashed amongst us, that is known as a "win". But we uneducated colonials were wrong. A former editor of the *Daily Mail*, a newspaper known for its commitment to strong moral values, corrected us by tweeting that England had won the "moral Ashes".[5] Not to be outdone, the Chief Sports Writer for *The Telegraph*[6] wrote an article entitled "England are clearly better than Australia – the moral victory is real".[7] The article opened with the memorable statement that "[m]oral victory has never tasted so exquisite"[8] — which only invites speculation as to how good an actual victory might taste. The article declared that, "while England did not quite win the right to the full Trafalgar Square Treatment, they still won the argument, cementing their place in public affections".[9] Well there is the full Trafalgar Square treatment, which I think means a parade, and then there is the *really* full Trafalgar Square treatment. I for one very much doubt that Admiral Nelson would have had a column dedicated to him in Trafalgar Square if all he had won against the French was an "argument", impressive as such an achievement would have been.

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4 See, eg, Harris, "MCC expels member at centre of Lord's altercation", *Sydney Morning Herald* (online, 5 October 2023) <https://www.smh.com.au/world/europe/mcc-expels-member-at-centre-of-lord-s-altercation-20231005-p5ea64.html>; "Australia claims spectators tried to trip players in the Lord's stands, as MCC suspends three members during heated Ashes Test", *ABC News* (online, 3 July 2023) <https://www.abc.net.au/news/2023-07-03/ashes-second-test-members-suspended-after-tripping-claims/102553524>.

5 Alston, "Piers Morgan claims England won the 'moral Ashes' as he slams 'whingeing Aussies' in series of hilarious messages after England drew series with win in the fifth Test", *Daily Mail* (online, 1 August 2023) <https://www.dailymail.co.uk/sport/cricket/article-12359561/Piers-Morgan-claims-England-won-moral-Ashes-slams-whingeing-Aussies-series-hilarious-messages-England-drew-series-win-fifth-Test.html>.

6 The UK *Telegraph* and not the *Daily Telegraph*.

7 Brown, "England are clearly better than Australia – the moral victory is real", *Telegraph* (online, 31 July 2023) <https://www.telegraph.co.uk/cricket/2023/07/31/england-australia-ashes-series-result-moral-victory/?msockid=301f54681f286dd92a6142411e356c57>.

8 Brown (n 7).

9 Brown (n 7).

Well, the best we can politely say about the current Test series is that to date the moral victories have kept on coming. But it was another aspect of this enthralling debate that resonated with me as a lawyer.

1933: the spirit of the game

After that fateful Test match in 2023, the two captains also debated whether the Australian team had acted in the "spirit of the game".[10] The same press commentators piled in about this concept although one of them did accept that "it's hard to define exactly what constitutes 'the spirit of the game'".[11]

And he was right — the spirit of the game, like the spirit of anything, is a tricky concept. Just under 90 years prior it had also proved elusive. At that time, local feeling in this country boiled over at the Test in Adelaide when a series of Australia batsmen were struck by balls rearing up on the leg side of a pitch with a crowd of English fielders waiting nearby, an approach that was given the pseudo-scientific moniker "leg theory" but is commonly known as "bodyline". One batsman was struck on the heart[12] and another near the temple.[13]

After that test was finished and England had secured an actual victory, but presumably not a moral one, on 18 January 1933 the Australian Board of Control sent the famous telegram to the Committee of the MCC, being the body whose members so distinguished themselves 90 years later. The telegram stated:

> "Bodyline bowling has assumed such proportions as to menace the best interests of the game, making the protection of his body by a batsmen his main consideration. It is causing intensely bitter feeling between players as well as

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10 "'Spirit of Cricket Reduced to Ashes': UK Press Blasts Australia Over Jonny Bairstow Incident", *NDTV* (online, 3 July 2023) <https://sports.ndtv.com/ashes-2023/spirit-of-cricket-reduced-to-ashes-uk-press-blasts-australia-over-jonny-bairstow-incident-4173055>; Ben Stokes questions 'spirit of the game' after controversial Lord's dismissal', *Jersey Evening Post* (online, 2 July 2023) <https://jerseyeveningpost.com/uksport/2023/07/02/ben-stokes-questions-spirit-of-the-game-after-controversial-lords-dismissal/>; 'Pat Cummins on Jonny Bairstow's stumping: "Spirit of cricket doesn't even come into a dismissal like that", *Firstpost* (online, 5 July 2023) <https://www.firstpost.com/firstcricket/sports-news/ashes-2023-england-vs-australia-pat-cummins-jonny-bairstow-stumping-spriti-of-cricket-stumping-12829432.html>.

11 Morgan, "The late, great Shane Warne had a phrase for what Australia did to Jonny Bairstow at Lord's", *Sky News* (online, 4 July 2023) <https://www.skynews.com.au/insights-and-analysis/piers-morgan-the-late-great-shane-warne-had-a-phrase-for-what-australia-did-to-jonny-bairstow-at-lords/news-story/040cf34d952df82ac561f8d29b1860b1>.

12 Bill Woodfull: Frith, *Bodyline Autopsy* (2002) at 179.

13 Bert Oldfield: Frith (n 12) at 200.

injury to them. In our opinion it is unsportsmanlike. Unless it is stopped at once it is likely to upset friendly relations existing between Australia and England."[14]

The reply from the Committee of the MCC was contemptuous:

> "We, the Marylebone Cricket Club, deplore your cable. We deprecate your opinion that there has been unsportsmanlike play. We have the fullest confidence in our captain, team and managers, and we are convinced they would do nothing to infringe the laws of cricket or *the spirit of the game*."[15]

The Times of London was all in on this response. It praised the "dignified *spirit* in which the [MCC] received and answered" the Australian telegram.[16] There's that spirit again.

The moral clarity of *The Times*' reporting was, I think, in no way compromised by the article that appears just to the right on the same page entitled "The New Face of Italy – Fascist Aims in Building: A Modern Creed".[17] That article suggested that many "excellent things" may emerge from the endeavours of Mussolini's fascists in their architectural, "artistic and literary fields". That article did not age well although its sentiment is having something of a revival of late.

1885 to 1908: The Spirit of the UK Constitution

But back to this idea of "spirit" as a restraining force, ameliorating or perhaps breathing life into the rules of the game; both an estoppel and an interpretive principle. Other than Dennis Denuto's famous dictum that "[i]t's the *Constitution*, it's *Mabo*, it's justice, it's law, it's the vibe",[18] is there a constitutional equivalent of the spirit of the game or for that matter a moral victory? Well, this brought to me the most authoritative source on the Constitution of the United Kingdom ("the UK Constitution"), that being the Vinerian Chair of English Law at Oxford from 1882 to 1909 and the author of the classic text, *Introduction to the Study of the Law of the Constitution*, one Professor Albert Venn Dicey.

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14 "Leg-Theory Bowling: Australian Protest", *The Times* (19 January 1933).

15 "MCC Reply to Australia: 'Fullest Confidence' in Jardine", *The Times* (24 January 1933) (emphasis added).

16 "The MCC Reply", *The Times* (24 January 1933) (emphasis added).

17 "The New Face of Italy – Fascist Aims in Building: A Modern Creed", *The Times* (24 January 1933).

18 *The Castle* (Working Dog Productions, 1997) at 58:01-58:09.

In 1885, Dicey published the first edition of his classic book. Nine more editions have been published.[19] By the time the seventh edition was published in 1908, the main text had been settled. Dicey wrote his last introduction, being the introduction to the eighth edition, in 1914, to which I will return later.

In *R (Miller) v Prime Minister* ("*Miller [No 2]*"), the Supreme Court of the United Kingdom ("the UK Supreme Court") observed that, "[a]lthough the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a constitution, established over the course of ... history by common law, statutes, conventions and practice"[20] and which includes numerous principles of law enforceable by the courts. Still, it is the Parliament of the United Kingdom that is supreme and ultimately that Parliament is not subject to any written document that specifies limits on its legislative authority; at least in that sense if not others, the UK Constitution can be properly described as "unwritten".

In his classic text, Dicey identified three guiding principles of this unwritten constitution. The first was the legislative sovereignty of the Parliament of the United Kingdom,[21] a principle to which I have adverted, and sometimes illustrated in the extreme by the speculated passage of a law being passed by an insane Parliament that "all blue-eyed babies should be murdered".[22] Provided that it is sufficiently clear, such a law would apparently be constitutional, even if not easily enforced.[23] In contrast, like a Bill of Attainder, a law of the Australian Parliament to that effect would not be constitutionally valid.[24]

Dicey described the United Kingdom as having a system of parliamentary sovereignty and not popular sovereignty. He said that "any expressions which attribute to

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19 Dicey wrote the first eight editions. The ninth and tenth edition were edited after Dicey's death.

20 *R (Miller) v Prime Minister* ("*Miller [No 2]*") [2020] AC 373 at 404 [39].

21 Dicey, *Introduction to the Study of the Law of the Constitution* (1908) at 37.

22 Dicey (n 21) at 79, citing Stephen, *Science of Ethics* (1882) at 143.

23 Dicey (n 21) at 79.

24 "It is a necessary implication of the adoption of the doctrine of the separation of powers in the *Constitution* that the [Australian] Parliament ... cannot enact such Bills" of Attainder: *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 70. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536, 649-650, 685-686, 721; *Haskins v Commonwealth* (2011) 244 CLR 22; *Duncan v New South Wales* (2015) 255 CLR 388.

Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law of the position of an elector".[25]

The second guiding principle identified by Dicey is familiar to us all: the supremacy of law (ie, the rule of law).[26]

The third guiding principle identified by Dicey was the dependence as a last resort of the proper working of the UK Constitution on constitutional conventions; that is, the customs, practices, maxims or precepts of constitutional or political ethics.[27] Dicey described these as "rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown".[28]

Dicey described the first two of these guiding principles as the concern of the lawyer, as they are legal rules capable of recognition and enforcement by a court. He said that the concern of the third was "not one of law but of politics, and need trouble no lawyer", except if the lawyer needed to address "the connection (if there be any) between the conventions of the Constitution and the law of the Constitution".[29]

Like the MCC and the English cricket press, Dicey was very much enamoured with the spirit of things. His discussion of the rule of law consistently invoked the "spirit of legality" or the "legal spirit" pervading the UK Constitution and the institutions of the United Kingdom.[30] With constitutional conventions, he endorsed a speech condemning Ministers staying in office despite a vote of no confidence as actions "at variance with the spirit of the Constitution".[31] Dicey referred to the constitutional conventions as being "in the main precepts for determining the mode and spirit" in which executive power, including the prerogatives, may be exercised.[32]

Dicey brought his thoughts about this smooth-working model of the UK Constitution and its pervading spirits together by declaring that such a model insulates against violence or revolutions, because "revolutionists ... generally believe themselves to be

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25 Dicey (n 21) at 57.
26 Dicey (n 21) at 179.
27 Dicey (n 21) at 413.
28 Dicey (n 21) at 422.
29 Dicey (n 21) at 30.
30 See Dicey (n 21) at 2, 127, 170, 191, 195, 248, 260, 261, 279, 409, 415, 421, 516, 533.
31 Dicey (n 21) at 415.
32 Dicey (n 21) at 421.

supported by the majority of the nation", and under the UK Constitution, a "party, however violent, who count on the sympathy of the people, can accomplish by obtaining a Parliamentary majority all that could be gained by the success of a revolution".[33]

Understandings of the UK Constitution have developed since Dicey's time in ways that are unnecessary to describe. That said, in *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* ("*Miller [No 1]*") in 2018, the UK Supreme Court referred to Dicey's book as (still) the "leading account" of constitutional law and principles in the United Kingdom.[34]

Irish home rule

So how did Dicey's spirit fly, or more accurately how did Dicey and some other prominent lawyers put that spirit into action? Most constitutional democracies have at least one persistent historical stress fracture in their constitutional arrangements, written or unwritten. For Australia, it is the dispossession and for the United States it includes slavery. England and Great Britain had a hand in both of those, but as soon as you start contemplating the differences between England, Great Britain and the United Kingdom, your gaze fixes upon Ireland. If you can excuse the pun, when it comes to Ireland, well, Dicey was a little dicey.

At the risk of extreme understatement, for decades direct rule from Westminster was not popular in at least three of the four Irish provinces.[35] Between 1886 and 1893 there were two failed attempts in the Parliament of the United Kingdom to enact Irish home rule;[36] not independence, just home rule not dissimilar to that achieved for Australia in 1901. The second attempt foundered when the House of Lords rejected the Bill.[37]

By April 1912, a third attempt was under way and conditions were more favourable for Irish home rule. Following a crisis over a blocked budget, the powers of the House of

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33 Dicey (n 21) at 447.

34 *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* ("*Miller [No 1]*") [2018] AC 61 at 74 [22].

35 By the parallel acts of the *Union with Ireland Act 1800* (UK) (39 & 40 Geo 3 c 67), and the *Act of Union (Ireland) 1800* (40 Geo 3 c 38 (I)), the separate kingdoms of Ireland and Great Britain were merged on 1 January 1801 to form the United Kingdom of Great Britain and Ireland.

36 Government of Ireland Bill 1886 (UK); Government of Ireland Bill 1893 (UK).

37 Loughlin, "The British Constitution and the Irish Question" (2024) 35(3) *Kings Law Journal* 395 at 400-401.

Lords had been cut back so that it could not reject a supply Bill and it could only reject other Bills twice and prevent them from passing for a maximum of two years.[38] The result of two elections led to a Liberal[39] government taking office dependent on cross-bench support. That cross-bench support included Members of Parliament representing electorates in pro-nationalist parts of Ireland (the Irish Parliament Party). They were led by the first of three barristers I will mention, John Redmond. The price of nationalist support was Irish home rule.

In 1912, a third Home Rule Bill passed the House of Commons but was rejected by the House of Lords. Time started counting down towards 1914, when the Bill could become law despite the House of Lords' opposition.

So, did all of this play out in the way that Dicey wrote about? Was it addressed in Parliament with fine speeches, cigars, excellent scotch and everybody acting decently in the spirit of the game, the spirit of legality or the spirit of the UK Constitution or whatever? Like hell it did.

Carson's army

When I said that at least three of the four Irish provinces resented direct rule from Westminster, the province I left out was Ulster, with its significant protestant population. Under the slogan "Home Rule is Rome Rule",[40] their representatives were determined to resist any form of Irish home rule, or, failing that, any suggestion of the Protestant north leaving the United Kingdom and forming part of a majority Catholic Ireland. When I say resist, I use that phrase in the strongest possible terms.

If this were a slide show I would at this point display a photograph taken in 1913 of the other two barristers I will mention, in fact two giants of the English Bar, walking between columns of men in military formation holding rifles.[41] One of those barristers was Sir Edward Carson KC, whose famous cross-examination of Oscar Wilde in his

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38 *Parliament Act 1911* (UK) (1 & 2 Geo 5 c 13); *Government of Ireland Act 1914* (4 & 5 Geo 5, c 90).

39 The more progressive of the two parties.

40 See, eg, O'Hagan, "'Home Rule is Rome Rule': exploring anti-Home Rule postcards in Edwardian Ireland" (2020) 35(4) *Visual Studies* 330.

41 The picture can be found here: Mulhall, "Roger Casement: 'High Treason' & the Politics of Hanging', *Century Ireland* (online) <https://www.rte.ie/centuryireland/articles/roger-casement-high-treason-the-politics-of-hanging>.

defamation trial led to Wilde's perjury charges and imprisonment.[42] Carson was a long-serving member of Parliament for a Dublin constituency, Solicitor-General for Ireland and then Solicitor-General for England. He became the leader of the Irish Unionist Party and galvanised Ulster's protestants to resist Irish home rule. In 1912, this upstanding man of the law formed the Ulster Volunteers as a paramilitary organisation. In January 1913 that paramilitary force became the Ulster Volunteer Force ("the UVF"), of 100,000 strong.[43] The picture to which I referred was not some quaint barrister ceremony but Carson and the other barrister inspecting this UVF insurrectionary force.

Any doubt that Carson's army meant business was dispelled in April 1914 when the UVF imported approximately 25,000 rifles and between 3 and 5 million rounds of ammunition from Germany.[44] You don't import 25,000 rifles and all that ammunition unless you have at least 25,000 men ready to use them. To make matters worse, less than a month before, dozens of British Army officers stationed in Ulster offered to resign or accept dismissal rather than enforce Irish home rule, if the Home Rule Bill passed into law.[45] The Irish nationalists could see where this organisation of paramilitary forces was heading. They formed their own force of Irish Volunteers to help enforce Irish home rule if it passed.[46]

Carson was no Robinson Crusoe in his insurrectionary efforts. The leader of the Conservative opposition, Andrew Bonar Law, fully supported this muster of arms and men. Bonar Law sought to use the UVF's threat of civil war to force a dissolution of Parliament and have an election solely on the issue of Irish home rule. He told the Parliament that, if the then Prime Minister[47] won that election, then the Unionist party would "cease all unconstitutional opposition",[48] which in the world of crime we call both

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42 See, eg, Marjoribanks, *Carson the Advocate* (1932) 213.

43 Martin, *Leaders and Men of the Easter Rising: Dublin 1916* (1967) at 72; Lee, *Ireland 1912-1985: Politics and Society* (1989) at 17.

44 The "Larne Gun running"; Bowman, "The Ulster Volunteers 1913-1914: Force or Farce?" (2002) 10(1) *History Ireland* 43-47.

45 The so-called Curragh Mutiny: Beckett, *The Army and the Curragh Incident 1914* (1986).

46 Apparently reaching almost 200,000 in size: Martin, *The Irish Volunteers 1913-1915* (1963) 71. In June 1914, 900 German guns were imported for these volunteers (ie, the Howth gun running).

47 Hebert Henry Asquith.

48 United Kingdom, House of Commons, *Parliamentary Debates* (Hansard), 25 March 1914 at col 428 (Bonar Law); see also Smith, "Bluff, Bluster and Brinkmanship: Andres Bonar Law and the Third Home Rule Bill" (1993) 36(1) *The Historical Journal* 161 at 166, 168; Loughlin (n 37) at 402-403.

an admission that you are currently engaging in unconstitutional opposition and a lie because Bonar Law had no intention of stopping that unconstitutional opposition.

Dicey's rebellion

What about Dicey? Well, he also drank the Kool Aid. In 1913 he published his call to arms, literally a call to arms, in his book *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912*.[49] One chapter of that book is entitled "The Duty of Unionists" and it ain't the work of a "constitutionalist".[50] According to Dicey, the content of this "duty" included an obligation upon all Unionists and patriots to ensure that ("at all costs")[51] the Home Rule Bill never passed into law.[52] His explanation of what that duty entailed must be considered in the context of the tens and perhaps hundreds of thousands members of the UVF and Irish nationalist volunteers that were armed to the teeth and ready to act on the word of Bonar Law and Carson, or the nationalist leaders, respectively.

Describing the "hateful measure" of Irish home rule as "threaten[ing] us all with the outbreak of civil war in Ireland",[53] Dicey accepted that "[e]very loyal citizen of the United Kingdom o*ught in general* ... to obey the law of the land"[54] but declared that this duty was *qualified* because the law had to be the "will of the nation"[55] and "there may exist acts of oppression on the part of a democracy, no less than of a king, which justify resistance to law ... in other words, rebellion"[56] or as he also described it, "technically [a] conspiracy".[57] You will not find anything like that in the discussion of the rule of law or the "spirit of the Constitution" in Dicey's work as published until that point.

According to Dicey, the Unionist and the patriot had to resist the Home Rule Bill until a general election was called. Just like Bonar Law's proposal, this was not meant to be just any general election. Instead, Dicey would only countenance an election in

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49 Dicey, *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912* (1913).

50 Dicey (n 49) at Ch III.

51 Dicey (n 49) at 115.

52 That is, the "Second Duty" of Unionists: Dicey (n 49) at 115.

53 Dicey (n 49) at 113.

54 Dicey (n 49) at 113 (emphasis added).

55 Dicey (n 49) at 113-114.

56 Dicey (n 49) at 114.

57 Dicey (n 49) at 125.

which "the sole and real issue before the electors" was the approval or disapproval of the Home Rule Bill.[58] Perhaps as cover, Dicey stated that, "*[u]ntil* a General Election, resistance to the so-called Home Rule Act should be carried out by legal and moral means";[59] but what if the election were to go the other way? Well, on that, Dicey was coy, saying: "I have not formed, any certain opinion as to the right course to be pursued should the British electorate sanction the monstrous iniquity of depriving the men of Ulster ... of their right to remain subject only to the Government of the Imperial Parliament at Westminster".[60] This was clearly a fib. Dicey had formed an opinion and the balance of his message was clear: resist the Bill until we have forced an election on our terms with the threat of civil war that we created hanging over the electorate. That would be a fun little election. And if, despite the threat, the election were not to go Dicey's way, then in his words the "acts of oppression ... seem, not unreasonably, to justify rebellion", a "principle which must, to a great extent, control the action of Unionists".[61] I think that some have tried to spin Dicey a favour and say that he was only advocating vigorous, peaceful resistance.[62] I disagree. I have drawn a few inferences to the criminal standard in my time and this one is pretty easy.

Letters to Bonar Law

Throughout this time, Dicey was also pen pals with Bonar Law. I will just mention two letters he sent to Bonar Law, both dated 28 March 1914.[63]

In the first of those letters, Dicey came straight to the point, saying that "it is absolutely essential that we should either get rid of the [g]overnment or ensure an appeal to the people by way of dissolution or a referendum before the Home Rule Bill passes into law".[64] While stating that he was "a believer in the [r]eferendum as a permanent change in the Constitution",[65] he said that he did not favour it in this instance because

58 Dicey (n 49) at 117.

59 Dicey (n 49) at 127 (emphasis added).

60 Dicey (n 49) at 127.

61 Dicey (n 49) at 114.

62 See, eg, Tulloch, 'A.V. Dicey and the Irish Question', (1980) 15(1) *Irish Question* at 161.

63 I thank the Parliamentary Archives of the United Kingdom for providing me with some of the correspondence.

64 Letter from AV Dicey to Bonar Law dated 28 March 1914 at 1.

65 Dicey (n 64) at 1-2.

he did not trust the then Prime Minister[66] to frame the question properly.[67] The referendum as a permanent change to the UK Constitution? Well, there's a turn up. In such a short time Dicey had come far: from parliamentary sovereignty to popular sovereignty and then, when you throw in arms and fighting words, to all out populism.

So, if no referendum, how did Dicey suggest that Bonar Law "get rid" of the government? Dicey set this out in his other letter dated 28 March 1914 to Bonar Law: a build-up of public pressure for a dissolution of Parliament, of course with the threat of insurrection to back it up, and the opposition led by Bonar Law announcing it was ready to take office solely to advise the King to dissolve Parliament "even if this involves taking [office] in the face of a hostile majority in the House of Commons".[68] Dicey said that this would make matters "clear to the King".[69] Well, of course, this could only work if the King sacked the existing government, which was backed by that hostile majority in the House of Commons, and then commissioned the new government, which would not have the confidence of that majority; a scenario with which we have some familiarity in this country. I am not going to comment on what happened here but it suffices to state that Dicey and Bonar Law, with an armed militia in the background, effectively plotted to intimidate the King and country to effect a coup.[70]

August 1914 to Easter 1916

The time limit on the House of Lords' opposition to the Home Rule Bill continued to tick down throughout 1914. At one point, consideration was given to amending the Bill by excluding some of the Ulster counties,[71] but then the chain of events that started in Sarajevo in late June took their course. After the First World War started, a Home Rule Bill for all of Ireland passed into law.[72] So, did the nationalists succeed? No. The operation of the *Home Rule Act* was suspended for 12 months and then for the duration of the War.[73]

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66 Herbert Henry Asquith.

67 Letter from AV Dicey to Bonar Law dated 28 March 1914.

68 Dicey (n 67) at 2.

69 Dicey (n 67) at 3.

70 As for Bonar Law: see Smith (n 48) at 168.

71 United Kingdom Parliament Historic Hansard, "United Kingdom, House of Commons, Parliamentary Debates, Hansard, 21 May 1914, vol 62 2121-2" (online) <https://api.parliament.uk/historic-hansard/commons/1914/may/21/ulster-exclusion>.

72 *Government of Ireland Act 1914* (UK) (4 & 5 Geo 5 c 90) ("the Home Rule Act").

73 *Suspensory Act 1914* (UK) (4 & 5 Geo 5 c 88).

To bolster the case to lift the suspension of the *Home Rule Act,* Redmond came out in support of the War and encouraged Irish nationalists to enlist, but in Ireland support for him and the other nationalist parliamentarians at Westminster drained away.[74] For nationalists in Ireland, the promise of home rule came to seem like a mirage; yet another cruel trick.[75]

The next round of Irish history is beyond the scope of this talk to develop.[76] In short it begins with the uprising by the Irish Republican Brotherhood in Dublin at Easter 1916. The Easter uprising and the execution of many of those involved despite Redmond's protestations stripped Redmond of what remained of his authority. The last attempts to find a parliamentary solution after the uprising failed in the House of Lords and all of Redmond's efforts came to nothing.[77] From that point on, he was yesterday's man. He had been thoroughly deceived by a false promise of constitutionalism.

Carson and FE Smith get their reward

There was an all-party coalition cabinet formed in 1915 and, as fate would have it, Carson became Attorney-General for the United Kingdom. He was soon succeeded by the other leading barrister in that picture to which I referred, FE Smith. As Attorney-General, Smith personally prosecuted a knight of the realm[78] who was arrested in Ireland after stepping off a German submarine just prior to the Easter uprising. The knight was tried, convicted and hanged for treason with one of his principal acts being importing rifles and ammunition from Germany to aid the uprising.[79] It seems that attitudes to importing arms from Germany had changed with the outbreak of the First World War. Treason can be a matter of dates.

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74 See Lyons, "Dillon, Redmond, and the Irish Home Rulers" in Martin (n 43) at 38-41; Loughlin (n 37) at 403.

75 Lee (n 43) at 23.

76 For that reason, I have now delved into the differences between those who sought home rule and those who sought a republic.

77 See Lyons, "Dillon, Redmond, and the Irish Home Rulers" in Martin (n 43) at 38-41; Loughlin (n 37) at 403.

78 Sir Roger Casement. Casement was knighted in 1911 for his efforts in relation to human rights abuses in Peru. In 1905 he was appointed a Companion of the Order of St Michael and St George for exposing the horrors of Belgian rule in the Congo. He was hanged after his trial: See "Roger Casement: Ten facts about the Irish patriot executed in 1916" *The Irish Post* (online, 3 August 2016) <https://www.irishpost.com/news/roger-casement-ten-things-know-human-rights-activist-british-diplomat-irish-nationalist-executed-century-ago-today-96334>.

79 *R v Casement* [1917] 1 KB 98 at 101.

As many of you know, FE Smith later became Lord Birkenhead, Lord Chancellor of England[80] and Carson became a Law Lord.[81] Two more examples of brilliant lawyers who should never have been made judges. By these means these giants of the English Bar had their tawdry rule of law credentials thoroughly laundered.[82] This was the early 20th century equivalent of encouraging a mob to storm the Capitol Building one day and then returning to government four years later.

Dicey's last introduction

In 1915, another edition of Dicey's classic text on the UK Constitution was published;[83] this time with a new introduction, the last written by Dicey himself. In this introduction, Dicey addressed Irish home rule but in the context of arguing why the United Kingdom should not become a federation.[84] His introduction included a revealing but completely incoherent rant against women getting the vote[85]

But let's not judge Dicey by our standards, let's judge him by his own. Dicey's last introduction to his classic book lamented that veneration for the rule of law was showing a marked decline.[86] Simultaneously seething with hatred of the suffragettes while also using gender neutral language for the first and only time in his life, Dicey railed against a "new doctrine as to lawlessness"[87] by which he meant that "large classes of otherwise respectable persons now hold the belief and act on the conviction that it is not only allowable, but even highly praiseworthy, to break the law of the land if the law-breaker is pursuing some end which to him or *to her* seems to be just and desirable".[88]

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80 "Crown Office", *The London Gazette* (24 February, 1919) 2735.

81 That is, a Lord of Appeal in Ordinary. "Crown Office", *The London Gazette* (1 June 1921) 4425.

82 FE Smith was elevated to the House of Lords in early 1919 becoming the Earl of Birkenhead and Lord Chancellor: Tribe, "Frederick Edwin Smith, 1st Earl of Birkenhead", *University of Liverpool* (Web Page) <https://www.liverpool.ac.uk/law/130-year-anniversary/our-history/liverpool-law-school-luminaries/frederick-edwin-smith/>. He left that office in 1922 and participated in the negotiations over the Anglo-Irish treaty: McGreevy, "Who was who during the Treaty negotiations", *The Irish Times* (online, 4 December 2021) <https://www.irishtimes.com/culture/heritage/who-was-who-during-the-treaty-negotiations-1.4743799>.

83 Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (1915).

84 Dicey (n 83) at lxxxii-xci.

85 Dicey (n 83) at lxii-lxxiii.

86 Dicey (n 83) at xli.

87 Dicey (n 83) at xli.

88 Dicey (n 83) at xli (emphasis added). Although Dicey also now added a rule of law escape clause: "[n]*o sensible man can refuse to admit that crises occasionally, though very rarely, arise when armed rebellion against unjust and oppressive laws may be morally justifiable"*: Dicey (n 83) xliii.

Well, "hear, hear" I say unless, of course, the respectable persons are a former Vinerian Professor of English Law at Oxford and two of the nation's leading silks, the end being pursued is opposition to Irish home rule and the law being broken concerns planning and inciting armed resistance and insurrection. In that case, huzzah.

By now you may have the sneaking suspicion that in preparing for this talk I came to dislike Dicey. To be clear I do not mean to suggest that either Dicey or his work should be removed from history or to use modern parlance "cancelled". To the contrary, his work should be studied but needs to be placed in context and, anyway, sometimes bad people write good books.

The price

Dicey's public words were not the ramblings of an academic that no one listened to. They were an important part of a propaganda wall of sound, which has its modern day counterparts.

One thing the Irish home rule crisis does illustrate is the price that is paid when constitutional principles are abandoned and the sad fact that such a price is usually not paid by those responsible. It would be futile to attempt to reconstruct what would have transpired if the Home Rule Bill had been implemented before the First World War or if Bonar Law, Carson, Dicey and others had acted and spoken constitutionally. What can be said is that the Irish home rule for all but the six Ulster counties that was obtained was not truly the product of any exercise of any parliamentary sovereignty by the Parliament of the United Kingdom. It was achieved by other means and achieved by those who saw constitutionalism in the United Kingdom as a prolonged deception. The path to home rule and the form of home rule that was achieved ultimately cost many lives. And, as for the six counties that now constitute Northern Ireland? As Winston Churchill observed, if Ulster had confined herself simply to constitutional agitation, it is extremely improbable that she would have escaped inclusion in a Parliament based in Dublin.[89] I will not even attempt to describe the relationship, if any, between events in Ulster since the 1960s and proper constitutional principles and practice. It is a story too long and too painful to tell so close to Christmas.

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89 Bromage, *Churchill and Ireland* (1964) at 63.

It is well beyond the scope of this speech to survey current understandings of the UK Constitution other than to note the clarity of the exposition by the UK Supreme Court in the *Miller [No 1]*[90] and *Miller [No 2]*[91] are an example to all of us who write judgments for a living. I can say two things, one being the bleeding obvious that the UK Constitution is still (relevantly) unwritten and the second being that those cases reconfirm that parliamentary sovereignty, and the necessity to ensure its functioning, is the bedrock of the constitutional arrangements in the United Kingdom.[92] However, that parliamentary sovereignty means that the common law, statutes, conventions and practices[93] that form part of the UK Constitution are always subject to the actions of a sufficiently large majority of the House of Commons determined to get its way.

And what about the spirit of the Australian *Constitution* and those constitutional "conventions and practices"? From the perennial debates that come around 11 November each year, we know that the existence, scope and application of conventions are hotly debated with all of the political actors, their successors and surrogates disputing whose actions were in accordance with constitutional practice and whose were not. Some have suggested that such conventions and practices be codified, including if necessary codified in the *Constitution* itself, to resolve or at least to minimise disputes about their existence, scope and application. Others resist this, pointing to the need for flexibility to deal with changing circumstances.[94]

But the type of problems that can arise in identifying and applying constitutional conventions and practices are not those that arose during the home rule crisis. During that crisis, there was no pretence of constitutionality by Bonar Law and the lawyers I have mentioned. They were utterly brazen in their unconstitutional actions and words. They threatened King and the country, and that threat only receded when the First World War threatened everyone. And right now, many countries, including democratic countries, confront that kind of situation or worse. They are either governed or closed to being governed by similarly venal characters to whom the suggestion of acting in accordance with practices or conventions is a joke; a pathetic sign of weakness.

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90 *Miller [No 1]* [2018] AC 61.

91 [2020] AC 373.

92 *Miller [No 1]* [2018] AC 61 at 74-76 [20]-[31]; *Miller [No 2]* [2020] AC 373 at 404-405 [41]-[44].

93 *Miller [No 2]* [2020] AC 373 at 404-405 [39].

94 See, eg, Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (2018) at 23, 27-28.

The operation of both our written *Constitution* and the unwritten UK Constitution still rests on the proper performance of constitutional conventions and practices. Crucially, however, our *Constitution* does not rely on them to the same extent and that difference can matter. A written constitution along with independent and constitutionally guaranteed courts and other similarly robust institutions can hold off the challenges presented by determined unconstitutional actors for a time; although, as daily events demonstrate, if a country breaks bad enough, hard enough and for long enough, nothing can stop irreparable harm. But, if these venal types control a parliamentary majority and the levers of power in a country with an unwritten constitution and only conventions and practices stand in their way, then what's worth preserving can be lost in the blink of a parliamentary eye; blue eyed babies and all that. Just like a moral victory, the spirit of the Constitution won't matter much then. I will leave it to you to judge whether there is any person or group on the United Kingdom's political horizon who presents such a risk. Suffice to say that the distance across the Atlantic is a lot shorter than the distance across the Pacific. Going forward the United Kingdom may need a few more John Redmonds and a few less Sir Edward Carsons, FE Smiths and AV Diceys.

Thank you for listening.