Albert Venn Dicey

LECTURES on the RELATION BETWEEN LAW and PUBLIC OPINION in ENGLAND DURING the NINETEENTH CENTURY

with a new introduction by Richard A. Cosgrove

Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century

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A.V. DICEY

With a New Introduction by
Richard A. Cosgrove

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Introduction to the Transaction Edition

Richard A. Cosgrove

Albert Venn Dicey was born in 1835, two years before the accession of Queen Victoria, and lived until 1922 when Great Britain had survived the ordeal of World War I and David Lloyd George served his last year as prime minister. Educated at Balliol College, Oxford, Dicey read for the bar at the Inner Temple but his work as a barrister did not attain professional eminence. He turned to an academic career and won election to the Vinerian professorship of English law at Oxford in 1882. This post, whose inaugural holder was Sir William Blackstone, had ffdlen into decay; Dicey revived its prestige and contributed important services to legal education until his retirement in 1909. The success of his *Introduction to the Study of the Law of the Constitution* (1885) made Dicey the most famous constitutional authority of his day. The publication of *Conflict of Laws* (1896) added greatly to his legal reputation, for his treatise helped pioneer a field of study whose significance has increased substantially in the twentieth century. In addition to his academic scholarship, Dicey devoted much energy to political affairs, particularly his outspoken opposition to Home Rule for Ireland. Dicey had considered himself a strong Liberal until 1886 when the intro-

duction of the first Home Rule bill by Liberal prime minister William Gladstone thrust him into the ranks of political unionism. The latter part of his life he devoted to increasingly bitter attacks on the direction of public policy, especially attempts to abrogate the union with Ireland.

In 1897 Dicey received an invitation from President Charles William Eliot of Harvard to deliver a series of lectures at the Harvard Law School. These lectures, delivered in the fall of 1898, formed the basis of the subsequent book published in 1905 as *The Relation Between Law and Public Opinion in England During the Nineteenth Century,* When Dicey visited Harvard his reputation stood at its zenith; in addition, the supremacy of that law school in the United States, owing to the efforts of Dean Christopher Columbus Langdell since 1870, had earned wide recognition. The affinity of American academic lawyers for English legal history, and the tendency to trace the course of American law back to its source in common law, created an ambience of mutual respect and admiration within the Anglo-American legal community. Dicey praised the Harvard Law School, often contrasting its lively case method classes to the soporific lectures that passed for legal education at Oxford. The sentiment of a shared legal heritage made both Dicey and his audience sympathetic, and ensured the success of his visit to America. Upon publication seven years later the lectures earned widespread praise for their clarity of expression and breadth of interpretation.

The reprint of a work from as long ago as 1905 requires justification. *Law and Opinion* remains a classic, happily devoid of jargon and still a pleasure to read. Four different categories support the claim

to classic status of Dicey's arguments. First, *Law and Opinion* has proved of enduring interest to several generations of scholars and students who have looked to it as a guide to the history of ideas in the nineteenth century, whose conclusions transcended the confines of academic disciplines. The attempt to survey the history of legislation in a context of broader currents of opinion made the book accessible to readers who ordinarily would not have taken notice. Dicey attempted to map intellectual relationships within the complex tapestry of an age when crosscurrents of doctrine abounded. The discussion of humanitarianism and Benthamism, for example, in spite of its flaws, still stands as a major interpretation that scholars must note even if it no longer commands acceptance.

In a more limited sense *Law and Opinion* has spawned an academic debate whose spirit shows no sign of diminution. Establishment of the welfare state in Great Britain after 1945 led to a rigorous examination of antecedents to this social outcome. Dicey believed that change in the Victorian era stemmed primarily from permutations in the world of ideas. Some historians have looked to *Law and Opinion* as the source of the "revolution in government" controversy that sought to delineate the historical process by which increased government involvement in social and economic affairs had become commonplace and eventually demanded by a majority of the population. Dicey had strong opinions about the genesis of these developments and their advisability, as the following pages will make clear.

Today Dicey's authority has been invoked by contributors to political and economic discussion. *Law and Opinion* has focused attention on the conflict (as

Dicey perceived it) of individual liberty versus the growth of corporate associations, whether private trade unions or public organs of government. In the complex social environment of the late twentieth century, the relationship of human freedom to the economic marketplace and the resulting social order has attracted considerable philosophical speculation. Dicey did not indulge in idle theory but sought to illustrate his conclusions from the welter of Victorian legislation; he provided a forthright examination of liberty in classic terms of negative freedom or absence of government constraints. On this point he had no doubts: government interference was inimical to individual freedom. Every society has debated the problem of liberty versus order, and Dicey has contributed to the divergent points of view that persist on the resolution of this dilemma.

Time has demonstrated how the book serves as a symbolic Edwardian document. Though Dicey purported to survey the interaction of legislation and opinion throughout the nineteenth century, the issues of 1905 lurked behind every paragraph. Joseph Chamberlain's campaign for tariff reform, trade union militancy, the advent of the Labor party, the appearance of social legislation, and industrial consolidation comprised some of the threats to the World of his youth that Dicey perceived. He despaired of trends prevalent in 1905, especially as they deviated from the norms of 1860 he fervently embraced. Part of the argument in *Law and Opinion* emerged from the attempt to describe how and why England had strayed from the path of true individualism. The erosion of values since the days of his youth remained a theme central to his polemical and scholarly writings from 1886 to his death.

INTR0Bm?$bN

Several aspects of *Law and Opinion* require special explanation to understand its purpose correctly. For example Dicey used the word *law* literally, for it indicated precisely what he intended to cover. *Law* did not mean the set of social regulations that determine conduct but rather those statutes passed by Parliament. The greater part of the book covered the passage of legislation and assumptions behind individual laws; rules of conduct not enforced by the courts did not interest him. As a barrister and constitutional commentator Dicey naturally looked to statutes and judicial decisions to interpret trends of English law. Here Dicey succeeded, for his acquaintance with legislation proved greater than that of subsequent historians. When he discussed the climate of opinion behind the enactment of specific laws, his knowledge did not reach the same level of expertise.

Dicey used the word *opinion* in a more idiosyncratic fashion. He did not mean "democratic expression," but tried to elicit the prevailing assumptions of the best people in English society. He premised this argument on the jurisprudence of John Austin. Dicey's approach in the definition of *opinion* followed the Austinian tradition; a debt usually overlooked in attempts to evaluate the book. Austin had founded the school of analytic jurisprudence, one of whose major topics concerned the nature of sovereignty. Dicey had modified the Austinian canon by distinguishing between legal and political sovereignty, and locating political sovereignty not in the people but in Parliament* which was ultimately responsible to the people. In Austinian fashion Dicey assumed a law that aroused great disapproval would not command obedience, and therefore would cease

to be law. *Opinion,* for Dicey, meant those politically influential individuals whose support or opposition mattered within Parliament. Those who counted, a readily identifiable group in the context of Victorian politics, constituted the only true source of public opinion.

In the historical portions of the book Dicey admitted that his reflections were based on inference, not research. The lectures he delivered at Harvard Law School in 1898 were prepared ad hoc. *Law and Opinion* did not pretend to meet standards of historical research; Dicey thought his task the more modest one of weaving together readily available facts. The personal nature of this testament becomes more obvious when the seven years' revision prior to 1905 is considered, for this interval permitted a search for evidence to support the preconceived notions of 1898. Though possessing many intellectual skills, Dicey lacked an appreciation of history. Unless the past could provide proof for beliefs he already held, it had no interest for him.

Dicey adhered to a unique system of definition that blurred rather than sharpened his language. In the analysis of individualism versus collectivism, for example, Dicey divided the protagonists into mutually exclusive camps of those who favored legal reform and those who favored state intervention for the benefit of the many. Several problems resulted. Individualism as a matter of law was contrasted to collectivism in social and economic terms—a case of comparing apples and oranges. Worse, Dicey regarded as collectivists all those who strayed in the slightest from the path of individualism. The most glaring example of this attempt to destroy any middle ground between the two is his identification of

tariff reformers as part of collectivist (or socialist) opinion; whatever might be said about tariff reform as an economic theory, it did not condone socialism under any guise. Refusal to recognize gray areas between competing interests robbed Dicey of the clarity he prized. At best he was indifferent to the ebb and flow of Edwardian intellectual tides.

Despite manifest shortcomings, *Law and Opinion* remains a classic because it articulates Dicey's assumptions and in the process bares one contributory element to the ideological underpinnings of mid-Victorian England. The essence of liberalism (or Benthamism, in Dicey's terms) lay in the application of a market model to the problems of private and public law. Every man was the best judge of his own interests and, within reasonable limits, should possess the measure of liberty sufficient to attain that object. Dicey's approval of a limited government role in private law in conjunction with a stronger presence in public law led him to quintessential positions in the liberal tradition. Seldom has a work expressed so vividly Victorian liberalism as a living faith. In any era political attitudes, no matter how principled the holders believed them, lead to paradoxical positions. Victorian liberalism in its pristine form was no exception. Dicey understood that the state incurred heavy obligations in the area of public law; national defense and foreign policy are obvious examples. But liberalism also stressed in the area of private law state responsibility for enforcement of contractual freedom and protection of private property. Dicey even remarked in *Law and Opinion* on the ambiguity of testamentary freedom; to depend upon the power of the state to regulate the disposal of property after one's death hardly re-

fleeted a market model. Yet, as Dicey asserted, these examples sustained individual rights in public law even as a noninterventionist state sufficed in private law.

State action aimed at the support of class privilege or group aggrandizement defined collectivism, an ideal anathema to liberal principles. In private matters government should possess minimal powers of interference. In the latter half of his life Dicey noted with increasing discomfort the steady stream of legislation that impinged upon freedom of contract. The state had no reason, Dicey believed, to impose additional obligations upon either party to a contract other than those procedural elements already contained within common law. Use of state authority to enhance or secure individual rights appeared a logical impossibility to Dicey because by definition the state must limit freedom. Throughout *Law and Opinion* he scattered dicta indicating his utter amazement that serious writers might entertain a positive view of the state.

Scholarly interest in *Law and Opinion* has also centered on its role in the continuing controversy on the interpretation of government growth in the Victorian era. In 1948 historian J.B. Brebner challenged Dicey's equation of Benthamism with laissez-faire by arguing that Benthamism heralded an age of state activism. The problem with this explanation arose from Dicey's explicit recognition, especially in lecture IX, that Benthamism had elements conducive to the growth of collectivism. Brebner's attempt to reverse the traditional picture of Benthamism caused him to exaggerate his thesis and distort Dicey's views on Bentham. A decade later Oliver MacDonagh published an article in the

Historical Journal in which he suggested that Dicey had intellectualized the evolution of government activism, and he presented a model in five stages dependent upon pragmatic causation as a more valid approach to the problem of state growth in an era supposedly dominated by laissez-faire. Two years later, in 1960, Henry Parris rejected MacDonagh's hypothetical model and replaced it with a reaffirmation of intellectual influences in the formulation of policy. Since that time numerous studies of statutes, regulations, and government offices have appeared that purport to validate the assertions of either MacDonagh or Parris. In the midst of this debate *Law and Opinion,* though partly responsible for its genesis, has receded into the background.

Its role in this context requires reappraisal to retain a proper perspective on the issues. Three areas need additional elucidation on the relationship of the book to the "revolution in government" controversy. The most vulnerable aspect of Dicey's work is the famous tripartite periodization of the nineteenth century: old Toryism, Benthamism, and Collectivism. That Dicey's divisions no longer satisfy should come as no surprise, given the time elapsed, significant advances in historical understanding of nineteenth-century England, and the fickleness of historical trends; Historians rightly disavow the simplistic labels that Dicey hoped would define an entire generation. Yet these misleading generalizations provide evidence for the 1905 considerations in reconstructing the Victorian past. For all other purposes, Dicey's interpretation should be discarded.

The characterization of Jeremy Bentham and his influence remains important. It is now accepted that

Benthamism meant different things to different people, for the principle of utility could lead, depending upon circumstances, to laissez-faire or increased state regulation. Many critics have noted this duality in the reception of Benthamite doctrine, yet in partial defense of Dicey, *Law and Opinion* treated Bentham primarily as a legal reformer, not an economist or politician. Dicey never made an extensive study of economics nor was his exposition of laissez-faire particularly sophisticated. But when he covered the results of Benthamite legal reform, especially in the attempts to rationalize the law, Dicey pointed correctly to the removal of inherited privilege and ancient restriction on liberty as the heart of Bentham's activities. Dicey assumed that the economic consequences of Benthamism must have followed those of legal reform. Scholars have failed to distinguish between the legal and economic background of Dicey's lectures, and this has flawed many discussions of Dicey's contribution. The greatest good for the greatest number often had collectivist implications in addition to support for individualism; though Dicey recognized this fact, his intense attachment to laissez-faire prevented him from an objective evaluation of Benthamism.

The field where Dicey deserves exoneration is that of administration, in which *Law and Opinion* has served as a focal point of debate. Nothing bored Dicey more than details of government bureaucracy, enforcement of regulations, and functional analysis of departments. Confusion between Dicey's assessment of the interaction of law and ideas and a practical description of what actually happened has led to unjustified criticism of Dicey for doing erroneously what he had never intended in the first place.

Administrative history represents an important field of inquiry but it is not one to which Dicey contributed. Modern accounts of Victorian administrative development have an air of artificiality in which Dicey has become a straw man for attack. Technical studies of administration have a place in the pattern of historical explanation, yet *Law and Opinion* should no longer provide a springboard for the "revolution in government" controversy. That debate will continue but Dicey should not remain a part of it.

The significance of *Law and Opinion* for the 1980s, particularly for students seeking an introduction to the historical background of contemporary discussion, lies in its straightforward discussion of laissez-faire and collectivism. The problems have become more complex and the terms of reference have changed, but there is no better expression of the issues. Dicey's conclusions need no longer require adoption; still they retain a vitality drawn from the clarity of his discourse. As long as the role of government in relation to the individual continues to arouse political passion, *Law and Opinion* will endure as a living document whose argument will attract readers in each new generation. In an age when the intricacy of social science often repels the student, the book keeps a simplicity and charm that has guaranteed its durability.

The contribution of *Law and Opinion,* the overriding element that makes it a classic, lies in the idealized world of 1860 Dicey portrayed. That this mid-Victorian society never existed in the form Dicey believed does not detract from the book's importance as an historical document. Based on a politics of nostalgia, *Law and Opinion* bared the assumptions of the mid-Victorian generation. The sec-

ond edition (1914) makes this point plainer, for the long introduction prepared in 1913 sharpened the litany of discontents he denounced in the contemporary political scene. Shortcomings in the account of individualism versus collectivism are not as **important** as his belief that such an antithesis existed. The **passionate** bond to the **Utopia** of individualism of Dicey's youth has rarely been equalled and never surpassed. By the Edwardian age new men and policies had obscured the values of his own generation; Dicey found this process painful as the world he had cherished seemingly crumbled before his eyes. The romanticized world of 1860 has had no better exponent than Dicey—:*Law and Opinion* is the Edwardian monument to that vision.

Suggested Readings

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PREFACE TO THE FIRST EDITION

IN 1898 I accepted an invitation to deliver to the students of the Harvard Law School a short course of lectures on the History of English Law during the last century. It occurred to me that this duty might best be performed by tracing out the relation during the last hundred years between the progress of English law and the course of public opinion in England. This treatment of my subject possessed two recommendations. It enabled me to survey the law of England as a whole, without any attempt to go through the whole of the law; it opened, as I hoped, to my hearers a novel and interesting view of modern legislation; a mass of irregular, fragmentary, ill expressed, and, as it might seem, illogical or purposeless enactments, gains a new meaning and obtains a kind of consistency when seen to be the work of permanent currents of opinion.

The lectures delivered at Harvard were the basis of courses of lectures which, after having undergone sometimes expansion and sometimes curtailment, have

been during the last five years delivered at Oxford. Of the lectures originally given in America, and thus reconsidered and rewritten, this book is the outcome. To them it owes both its form and its character.

The form of lectures has been studiously preserved, so that my readers may not forget that my book pretends to be nothing but a course of lectures, and that a lecture must from its very nature present a mere outline of the topic with which it deals, and ought to be the explanation and illustration of a few elementary principles underlying some subject of interest.

The character of my book may require some explanation, since it may easily be misconceived. Even for the nineteenth century the book is not a history of English law; still less is it a history of English opinion. It is an attempt to follow out the connection or relation between a century of English legislation and successive currents of opinion. The book is, in fact, an endeavour to bring the growth of English laws during a hundred years into connection with the course of English thought. It cannot claim to be a work of research; it is rather a work of inference or reflection. It is written with the object, not of discovering new facts, but of drawing from some of the best known facts of political, social, and legal history certain conclusions which, though many of them obvious enough, are often overlooked, and are not

without importance. If these lectures should induce a student here and there to study the development of modern law in connection with the course of modern thought, and to realise that dry legal rules have a new interest and meaning when connected with the varying current of public opinion, they will have attained their object.

If this end is to any extent reached its attainment will be due in no small measure to the aid I have received from two authors.

To Sir Roland K. Wilson I am indebted for the conception of the way in which the growth of English law might during the last century be linked with and explained by the course of public opinion. Thirty years have passed since, on its appearance in **1875,** I read with care his admirable little manual, *The History of Modern English Law.* From its pages I first gained an impression, which time and study have deepened, of the immense effect produced by the teaching of Bentham, and also a clear view of the relation between the Blackstonian age of optimism or, to use an expression of Sir Roland Wilson's, of "stagnation," and the Benthamite era of scientific law reform. In **1875** the progress of socialism or collectivism had hardly arrested attention. It had already begun, but had only begun, to enter the sphere of legislative opinion; Sir Roland Wilson could not, therefore, describe its

effects. It would be a happy result of my book should it suggest to him to perform the public service of re-editing his treatise and bringing it up to date, or at any rate to the end of the nineteenth century.

To my cousin, Leslie Stephen, I am under obligations of a somewhat different character. For years past I have studied all his writings with care and admiration, and, in common, no doubt, with hundreds of other readers, have derived from them invaluable suggestions as to the relation between the thought and the circumstances of every age. Ideas thus suggested have aided me in almost every page of my book. Of his *English Utilitarians* I have made the utmost use, but, as the book was published two years after my lectures at Harvard were written and delivered, and the lines of my work were finally laid down, I gained less direct help from his analysis of utilitarianism than I should have done had it appeared at an earlier date. The fact, however, that I found myself in substantial agreement with most of his views as to the utilitarian school, much strengthened my confidence in already-formed conclusions. There is a special satisfaction in dwelling on the help derived from Leslie Stephen's thoughts, for I feel there is some danger lest his skill and charm as a biographer should for the moment conceal from the public his originality and

profundity as a thinker. But it is a pain to reflect that delays in the completion of my task have prevented me from expressing my obligation to him at a time when the expression might have given him pleasure.

To the many persons who have in various ways furthered my work I tender my thanks. To one friend for the service rendered by reading the proofs of this work, and by the correction of errors and the suggestion of improvements, whilst it was going through the press, I owe an obligation which it was as pleasant to incur as it is impossible to repay. I have special reason to feel grateful to the kindness of Sir Alfred de Bock Porter for information, courteously given and hardly to be obtained from books, about the history and the working of the Ecclesiastical Commission; to my friend Mr. W. M. Geldart for reading pages of my work which refer to parts of the law of which he is in a special sense a master; to Mr. E. H. Pelham, of the Board of Education; to Mr. G. Holden, Assistant Librarian at All Souls; and to Mr. H. Tedder, Secretary and Librarian of the Athenaeum Club, for the verification of references which during an absence from books I could not verify for myself.

A. V. DICEY.

OXFORD, *May* 1905.

PREFACE TO THE SECOND EDITION

THE body of this work is a second edition, or a corrected reprint of the first edition, of my treatise on *Law and Public Opinion in England during the Nineteenth Century*. It is accompanied by a new Introduction, the object of which is to trace and to comment upon the rapid changes in English law and in English legislative opinion which have marked the early years of the twentieth century. In the attempt to perform a somewhat difficult task I have been much assisted by aid from many friends. Acknowledgments for such help are specially due to Professor Geldart, my successor as Vinerian Professor of English Law in the University of Oxford; to Professor Kenny, of Cambridge; and to Mr. **A.** B. Keith, of the Colonial Office. Nor can I omit to mention suggestions as to alterations in the modern law of France made to me by and also derived from the writings of Professor Duguit, and Professor Jeze. More information about recent French enactments than I have been able to use in a treatise which touches only incidentally on

French law, has been obtained for me by my friend, Mr. Andre Colaneri, who has carefully examined recent French legislation in so far as it illustrates the development of socialistic ideas.

A. V. DICEY.

OXFORD, 1914.

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INTRODUCTION TO THE SECOND EDITION

Aim of Introduction

THIRTEEN years have passed since the nineteenth century came to an end. In England they have been marked by important legislation of a novel character. The aim of this Introduction is to trace the connection, during these opening years of the twentieth century, between the development of English law and the course of English opinion. The task is one of special difficulty. An author who tried to explain the relation between law and opinion during the nineteenth century undertook to a certain extent the work of an historian, and yet was freed from many of the impediments which often beset historical inquiry. His duty was to draw correct inferences from admitted facts, or at any rate from facts easily to be discovered. They could be ascertained by a careful study of the Statute Book and of legal decisions, and also of the letters and memoirs written by statesmen, teachers, or writers who had affected the legal doctrines of their time. Then, too. such an author, writing of a time not long past, was almost delivered from the difficulty with which an historian of eras removed by the lapse of many years from his own time often struggles in vain, the difficulty, namely, of understand-

ing the social and intellectual atmosphere of bygone ages. The writer, on the other hand, who deals with the development of law and opinion in England during the earlier years of the twentieth century feels, all but instinctively, that he has entered upon a new kind of work which is encompassed with a new sort of perplexity; he is no longer an historian, he is in reality a critic. He is compelled to measure by conjecture the sequence and the tendency of events passing before his eyes, and of events in which he is to a certain extent an actor. Also he cannot as to contemporary events possess knowledge of their ultimate results; yet this knowledge is the instrument on which an historian of good sense mainly relies in forming his judgments of the past. Time tests all;[1] but this criterion cannot be applied by the contemporary critic of his own country and its laws. A little research will soon prove to him that few indeed have been the men who have been able to seize with clearness the causes or the tendencies of the events passing around them.[2] Rare indeed are the anticipations before **1789** of the revolution impending over France. Among modern writers known to Englishmen, three alone occur to me who can justly claim to have foreseen the course of contemporary history.

[1] Tocqueville thus sums up the result of a vehement discussion immediately after the Revolution of February 24, 1848, between himself and an intimate friend: "Apres avoir beaucoup crie, nous "finimes par en appeler tous les deux a Tavenir, juge eclaire et integre, "mais qui arrive, helas ! toujours trop tard."—*Souvenirs d?Alexis de Tocqueville,* p. 98.

[2] Tacitus, it has been pointed out, though endowed with extraordinary sagacity, exhibits little or no insight into the progress of the gigantic revolution which culminated in the establishment of Christianity throughout the Roman Empire.

They are Burke, Tocqueville, and Bagehot. Burke assuredly studied the contest between England and her American Colonies with an insight, and therefore with a foresight, unknown to his generation. He saw through the follies and foresaw the crimes of French Revolutionists with all but prophetic power. But his argument throughout the conflict with the Colonies is weakened by his blindness to the fact, visible to men of far inferior genius to his own, that American independence would not deprive England of her trade with America; and, while he saw all that was contemptible and detestable in the revolutionary movement, his eyes were closed to most of its causes and to all that may now be said in favour of its effects. Tocqueville uttered in January 1848 words which are strictly prophetic of the Revolution of February 1848.[1] He, at least forty years ago, predicted that socialism, derided in his own day, might in later years assume a form in which it would obtain a wide and favourable hearing.[2] But his unrivalled power of analysis did not reveal to Tocqueville the intellectual capacity of Louis Napoleon, at any rate as a conspirator, or the hold which the Napoleonic tradition had on the memory and the sympathy of the French peasantry and of the French army. Bagehot *iA* early manhood grasped by his power of thought, what, by the way, Palmerston had also perceived through his experience in affairs, the readiness with which an ordinary Frenchman would condone or applaud the crime of December 1851. Bagehot again analysed the prin-

[1] See Tocqueville, *Souvenirs,* pp. 15, 16, and *Law and Opinion,,* p. 255, *post.* [2] Tocqueville, *Souvenirs,* p. 111.

ciples and the working of the English Constitution during the mid-Victorian era with an insight not attained by any Englishman or by any foreigner during the nineteenth century. But Bagehot, even in 1872, did not, as far as I can perceive, fully anticipate that rapid growth or misgrowth of the party system which has now been admirably described and explained by A. L. Lowell in his monumental *Government of England.* Who can hope to attain anything like success in contemporary criticism of English legislation and opinion when he knows that such criticism has, in the hands of Burke, Tocqueville, and Bagehot, produced only partial success, and success in some cases almost overbalanced by failure ? This question supplies its own answer. My aim in forcing this inquiry upon the attention of my readers is to make them perceive that an Introduction, which may appear to be simply a lecture added to my speculations on Law and Opinion during the nineteenth century, is written under conditions which make it rather an analytical than an historical document, and introduce into every statement which it contains a large element of conjecture. In the treatment of my subject I have pursued the method to which any readers of my *Law and Opinion* have become accustomed. I treat of (A) The state of legislative opinion at the end of the nineteenth century ; (B) The course of legislation from the beginning of the twentieth century; (C) The main current of legislative opinion from the beginning of the twentieth century; (D) The counter-currents and cross-currents of legislative opinion during the same period.

(A) Legislative Opinion at the end of the Nineteenth Century

Let the reader who wishes to realise the difference between legislative opinion during the period of Benthamite liberalism and legislative opinion at the end of the nineteenth century first read and consider the full effect of a celebrated passage taken from Mill's Essay *On Liberty,* and next contrast it with the description of legislative opinion in **1900** to be gathered from Lectures VII. and VIII. of the present treatise.[1]

"The object of this Essay," writes Mill in **1859,** "is to assert one very simple principle, as entitled "to govern absolutely the dealings of society with "the individual in the way of compulsion and "control, whether the means used be physical "force in the form of legal penalties, or the moral "coercion of public opinion. That principle is, that "the sole end for which mankind are warranted, "individually or collectively, in interfering with "the liberty of action of any of their number, is "self-protection. That the only purpose for which "power can be rightfully exercised over any member "of a civilized community, against his will, is to "prevent harm to others. His own good, either "physical or moral, is not a sufficient warranty. He "cannot rightfully be compelled to do or forbear "because it will be better for him to do so, because it "will make him happier, because, in the opinions of "others, to do so would be wise, or even right."

"These are good reasons for remonstrating with

[1] **See pp. 211-302,** ***post.***

" him, or reasoning with him, or persuading him, or " entreating him, but not for compelling him, or " visiting him with any evil in case he do otherwise. " To justify that, the conduct from which it is desired " to deter him must be calculated to produce evil to " some one else. The only part of the conduct of " any one, for which he is amenable to society, is " that which concerns others. In the part which " merely concerns himself, his independence is, of "right, absolute. Over himself, over his own body " and mind, the individual is sovereign." [1]

The importance of this " simple principle," whatever its intrinsic worth, arises from the fact that at the time when it was enunciated by Mill it obtained, at any rate as regards legislation, general acceptance, not only by youthful enthusiasts, but by the vast majority of English Liberals, and by many Liberal Conservatives. It gave logical expression to convictions which, though never followed out with perfect consistency, were shared by the wisest among the writers and the statesmen who, in the mid-Victorian era, guided the legislative action of Parliament. In regard to interference by law with the liberty of individual citizens, it is probable that a Benthamite Radical, such as John Mill conceived himself to be, differed little from a Whig, such as Macaulay, who certainly did not consciously subscribe to the Benthamite creed,[2] and it is probable that the late Lord Salisbury (then Lord Robert Cecil) would not on this

[1] **Mill, *On Liberty,* pp. 21 and 22.**

[2] **Compare Mill, *On Liberty,* with Macaulay's review of *Gladstone on Church and State.* Mill indeed entertained in his later life a sympathy with socialistic ideals foreign to Macaulay's whole mode of thought. Leslie Stephen, *English Utilitarians,* iii. pp. 224-237.**

matter have disagreed essentially with either the typical Benthamite or the typical Whig.

Mill himself tacitly, though grudgingly, admitted that there was little in the law of England which in 1859 encroached upon individual liberty. The object of his attack was the alleged tyranny, not of English law, but of English habits and opinion. Macaulay laid down no rigid rule Kmiting the sphere of State intervention, but he clearly held that, as a matter of common sense, government had better in general undertake little else than strictly political duties. English statesmanship was at the middle of the Victorian era, in short, grounded on the *laissez faire* of common sense. From this principle were drawn several obvious inferences which to enlightened English politicians seemed practically all but axiomatic. The State, it was thought, ought not as a matter of prudence to undertake any duties which were, or which could be, performed by individuals free from State control. Free trade, again, was held to be the only policy suitable for England, and probably the only policy which would in the long run benefit the inhabitants of a modern civilised State. It was further universally admitted that for the Government, or for Parliament, to fix the rate of wages was as futile a task as for the State to undertake to fix the price of bread or of clothes. In harmony with these views one principle was not only accepted but rigidly carried out by every Chancellor of the Exchequer according to his ability; it was that taxation should be imposed solely for the purpose of raising revenue, and should be imposed with absolute equality, or as near equality as was possible, upon rich and poor

alike. Hence the ideal Chancellor of the Exchequer was the man who, after providing for the absolutely necessary expenditure of the State, so framed his Budget as to leave the largest amount possible of the national wealth to " fructify," as the expression then went, " in the pockets of the people." Gladstone exactly satisfied this ideal. In **1859,** hardly any man who occupied a prominent position in public life (except here and there a few belated Protectionists, among whom Disraeli must not be numbered) dissented greatly from Mill's simple principle, at any rate as regards legislation. In other words, Benthamite liberalism, as interpreted by the rough common sense of intelligent politicians, was, when Mill published his treatise *On Liberty,* the predominant opinion of the time.[1]

Contrast now with the dominant legislative opinion of **1859** the dominant legislative opinion of **1900,** as described in Lectures VII. and VIII.[2] The general effect of these lectures may be thus summed up : The current of opinion had for between thirty and forty years been gradually running with more and

[1] **It is a curious question how far Bentham's own beliefs were directly or logically opposed to the doctrines of sane collectivism. He placed absolute faith in his celebrated "Principle of Utility." He held that, at any rate in his time, this principle dictated the adoption of a policy, both at home and abroad, of *laissez faire.* But it is not clear that Bentham might not in different circumstances have recommended or acquiesced in legislation which an ardent preacher of *laissez faire* would condemn. (See Lect. IX. p. 303, *post.)* It may be suggested that John Mill's leaning towards Socialistic ideals, traceable in some expressions used by him in his later life, was justified to himself by the perception that such ideals were not necessarily inconsistent with the Benthamite creed, which was his inherited, and to his mind unforsaken faith. See pp. 426-432, *post.***

[2] **See pp. 211-302, *post***

more force in the direction of collectivism,[1] with the natural consequence that by 1900 the doctrine of *laissez faire,* in spite of the large element of truth which it contains, had more or less lost its hold upon the English people. The laws affecting elementary education, the Workmen's Compensation Act of 1897, the Agricultural Holdings Acts, the Combination Act of 1875, the whole line of Factory Acts, the Conciliation Act, 1896, and other enactments dwelt upon in the lectures to which I have referred, though some of them might be defended on Benthamite principles, each and all if looked at as a whole prove that the jealousy of interference by the State which had long prevailed in England had, to state the matter very moderately, lost much of its influence, and that with this willingness to extend the authority of the State the belief in the unlimited benefit to be obtained from freedom of contract had lost a good deal of its power. It also was in 1900 apparent to any impartial observer that the feelings or the opinions which had given strength to collectivism would continue to tell as strongly upon the legislation of the twentieth century as they had already told upon the later legislation of the nineteenth century.[2] To any one further who had studied the weight given to precedent by English Parliaments, no less than by English Courts, it must have been, or perhaps rather ought to have been, certain in 1900 that legislation already tending towards collectivism would in the earlier years of the twentieth century produce laws

[1] **Compare especially Lect. IV. pp. 64-69, and Lect. IX. p. 303, *post.***

[2] **See pp. 259-279, *post.***

directly dictated by the doctrines of collectivists, and this conclusion would naturally have been confirmed by the fact that in the sphere of finance there had occurred a revival of belief in protective tariffs, then known by the name of a demand for "fair trade." With the perennial controversy between free-traders and protectionists a student of law and opinion has no necessary concern; he may however note that socialism and protection have one feature in common: they both rest on the belief that the power of the State may be beneficially extended even though it conflicts with the contractual freedom of individual citizens. The protectionist and the socialist each renounces the trust in *laissez faire*. From whatever point of view our subject be looked at, we reach the conclusion that by 1900 the doctrine of *laissez faire* had already lost its popular authority.

(B) *Course of Legislation from Beginning of Twentieth Century*

My immediate object is to show that certain well-known Acts of Parliament belong in character to, and are the signs of the power exercised by, the collectivist movement during the first thirteen years of the twentieth century. I venture indeed here to remind my readers that throughout this Introduction, as throughout the whole of this treatise, I am not primarily concerned with stating or commenting upon the often complicated provisions of definite statutes, *e.g.* the Old Age Pensions Act, 1908, or the National Insurance Act, 1911; my aim is always to trace,

and as far as I can demonstrate, the close connection between English legislation and the course of legislative opinion in England.

The laws which most directly illustrate the progress of collectivism are the following Acts, taken in several cases together with the amendments thereof: The Old Age Pensions Act, 1908. The National Insurance Act, 1911. The Trade Disputes Act, 1906. The Trade Union Act, 1913. The Acts fixing a Minimum Rate of Wages. The Education (Provision of Meals) Act, 1906. The Mental Deficiency Act, 1913. The Coal Mines Regulation Act, 1908. The Finance (1909-10) Act, 1910.

The Old Age Pensions Act, 1908.—By the Old Age Pensions Act, 1908, any man or woman who has attained the age of 70 years, and who has been a British subject for 20 years up to the date of the receipt of the pension, and who has resided in the United Kingdom for at least 12 years in the aggregate out of such 20 years, and whose yearly means do not exceed £31:10s., is, subject %o certain disquahfications, entitled to receive at the cost of the State a weekly pension of an amount which varies according to his or her means of from one shilling to five shillings a week.[1]

[1] **The scale is as follows:**

Where the yearly means of the pensioner as calculated under this Act –	**Rate of Pension per week. s. d.**
Do not exceed £21	**5 0**
Exceed £21, but do not exceed £23:12 : 6	**4 0**
Exceed £23 : 12 : 6, but do not exceed £26: 5: 0	**3 0**
Exceed £26 : 5 : 0, but do not exceed £28 :17 : 6	**2 0**
Exceed £28:17 : 6, but do not exceed £31:10:0	**1 0**
Exceed £31: 10:0	**No pension.**

See sects. 1, 2, and Schedule.

This right to a pension is indeed subject to certain disqualifications,[1] the principal of which are that a person is in general not entitled to a pension when he is actually in receipt of poor relief, or while he is actually *undergoing* imprisonment for some serious crime,[2] or for ten years after the date on which he has been released from imprisonment for such crime, and that a person is not entitled to a pension if before he becomes so entitled "he has habitually failed to "work according to his ability, opportunity, and "need, for the maintenance or benefit of himself "and those legally dependent upon him."[3] This disqualification, if strictly pressed, might beneficially cut down the number of qualified pensioners, but one may doubt whether, under the present condition of popular feeling, this disqualification will be often enforced.

From the provisions and the tendency of the Old Age Pensions Acts several conclusions worth attention may be drawn: A person, in the first place, may have a full title to a pension though he is an habitual pauper in frequent receipt of poor relief, but prefers to vary the monotony of the poorhouse by occasionally, say in the summer, coming out of the house and relying for support upon his pension and his casual earnings. Then, again, the Old Age Pensions Acts inculcate, by the force both of precept and of example, the belief that the pensioner is in a very different position from a pauper; for sect. 1, sub-sect. 4, enacts that "the receipt of an old age pension under this Act

[1] For the details as to disqualification see Old Age Pensions Act, 1908, sect. 3, and Old Age Pensions Act, 1911, sect. 4.

[2] Sect. 3, sub-sect. 1 (c), and sub-sect. 2.

[3] Sect. 3, sub-sect. 1 (6).

" shall not deprive the pensioner of any franchise, " right, or privilege, or subject him to any disability." An old age pensioner, therefore, may even now in conceivable circumstances be entitled to vote for a Member of Parliament and join with friends who are counting on old age pensions after the age of **70,** in voting that the title to a pension shall commence with the age of **60.** Nor does the evil end with such an exceptional case. It is reasonable to anticipate the establishment in England, as now in our self-governing colonies, in the United States of America, in France, and in the German Empire of Manhood or Universal Suffrage. Now the Old Age Pensions Act is the bestowal by the State of pecuniary aid upon one particular class of the community, namely, the poorer class of wage-earners. It is in essence nothing but a new form of outdoor relief for the poor. Surely a sensible and a benevolent man may well ask himself whether England as a whole will gain by enacting that the receipt of poor relief, in the shape of a pension, shall be consistent with the pensioner's retaining the right to join in the election of a Member of Parliament?

The amendments, further, of the Old Age Pensions Act, **1908,** tend towards relaxing the terms under which a person becomes entitled to an old age pension. Residence in the United Kingdom for **20** years is now reduced to residence for an aggregate of **12** years during such **20** years; and in some cases residence outside the United Kingdom is sufficient. Hence the following important result: The title to an old age pension hardly depends at all upon the character of the pensioner. The Old Age Pensions Acts, as they now stand, are based upon the belief that in the

United Kingdom a really poor man, if he is permanently resident here, is morally entitled to outdoor relief at the rate of five shillings a week on attaining the age of 70. This may or may not be sound moral doctrine, but it is absolutely opposed to the beliefs of the Benthamite Liberals, who, by the enactment in 1834 of the New Poor Law, saved the country districts of England from ruin.

The National Insurance Act, 1911.[1]—The attention of my readers ought to be directed exclusively to the aim of the Act and to the administrative methods of the Act.[2] They each illustrate the influence of collectivism or socialism on English legislation.

Aim of Act.—The Act[3] aims at the attainment of two objects: The first is that, speaking broadly, any person, whether a man or a woman, whether a British subject or an alien,[4] who is employed in the United Kingdom under any contract of service, shall, from the age of 16 to 70, be insured against ill-health,[5] or, in other words, be insured the means for curing illness, *e.g.* by medical attendance. The second object is that any such person who is employed in certain employments specified in the Act[6] shall be

[1] Students who need information on the details of the Act should consult the *Law relating to National Insurance,by G.* H. Watts.

[2] The mode in which the cost of health insurance and unemployment insurance is in part undertaken by the State, and in part imposed upon employers and upon the workmen or servants who are insured, has a socialistic character. But this feature in the Insurance Act has been amply noticed, and it is hardly worth while here to insist upon it.

[3] As amended by the National Insurance Act, 19.13. and applied by numerous regulations.

[4] An alien does not in all cases get the same advantage from insurance as a British subject. See Act, sect. 45, and Watts, *National Insurance,* pp. 45, 46.

[5] See Act, Part I. sects. 1-83.

[6] *Ibid.* sect. 84, and Sixth Schedule.

insured against unemployment, or, in other words, be secured support during periods of unemployment.[1]

The whole drift of the statute, and especially the conditions, exceptions, and limitations contained therein, show[2] that the Act founds a system of insurance solely for the advantage of persons who, in popular language, would be described as servants or workmen. The Act is, therefore, on the face of it a piece of legislation which is intended to benefit wage-earners, and especially the poorer classes of wage-earners, who have no income sufficient for their support independent of their power to earn it by personal labour.

Thus under the National Insurance Act the State incurs new and, it may be, very burdensome, duties, and confers upon wage-earners new and very extensive rights. The State in effect becomes responsible for making sure that every wage-earner within the United Kingdom shall, with certain exceptions, be insured against sickness, and, in some special cases, against unemployment. Now before **1908** the question whether a man, rich or poor, should insure his health, was a matter left entirely to the free discretion or indiscretion of each individual. His conduct no more concerned the State than the question whether he should wear a black coat or a brown coat.

But the National Insurance Act will, in the long run, bring upon the State, that is, upon the tax-payers, a far heavier responsibility than is anticipated

[1] For unemployment insurance see Part II. sects. 84-107.

[2] *E.g.* by the fact that the Act does not in general, at any rate as to health insurance, benefit any one who has an income of £160 a year and upwards, though it does apply to any person who by way of manual labour earns an income however large, *e.g.* £200 a year. See First Schedule, Part TI. *(g),* and Watts, *National Insurance,* p. 280.

by English electors. Part I. of the Act, which creates a system of national health insurance, has excited much attention and attack. Part II. of the Act, which introduces for a few trades a system of unemployment insurance, has been little noticed by the public, and has met with little censure; yet national unemployment insurance may well turn out to be a far more hazardous and a far more important experiment than is national health insurance. The risks of ill-health are calculable, the risks of unemployment are hard to calculate. No man prefers illness to health, but many men may prefer unemployment money to wages for hard work. But the importance of unemployment insurance does not end here. It is in fact the admission by the State of its duty to insure a man against the evil ensuing from his having no work. This duty cannot be confined permanently to workmen employed in some seven kinds of work. The authors of the Insurance Act know that this is so; they have provided the means by which the Government of the day can, at any moment, without the need for any Act of Parliament, increase the number of the insured trades. The National Insurance Act admits the so-called "right to work." There are men still living whose political memory carries them back to 1848. They will recollect that the *droit au travail* was then one of the war-cries of French socialists, and was in England deemed to be one of the least reasonable of their claims. Nor is it easy to forget the saying attributed to Archbishop Whately, "When a man begs for work he asks not for work but for wages." However this may be, the statesmen who have introduced unemployment insurance sup-

ported by the State have, whether they knew it or not, acknowledged in principle the *droit au travail* for the sake of which socialists died behind the barricades of June 1848. The National Insurance Act is in accordance with the doctrines of socialism, it is hardly reconcilable with the liberalism, or even the radicalism of 1865.

Administrative Methods of Act.—The methods by which the objects of the Act are to be obtained is marked by characteristics which harmonise with the principle or the sentiment of collectivism.

The National Insurance Act greatly increases both the legislative and the judicial authority of the Government or of officials closely connected with the Government of the day.

Legislative Authority.—Under Part I. of the Act the administration of national health insurance is ultimately placed in the hands of, or controlled by, a new body of insurance commissioners who are appointed by the **Treasury.** These governmental officials have the power to make regulations for the carrying out of the Act which, if not annulled by the King in Council, become part of the Act itself. The width of this authority can only be realised by considering the language of the National Insurance Act, sect. 65, which runs as follows :

" The Insurance Commissioners may make regula-
" tions for any of the purposes for which regulations
" may be made under this Part [I.] of this Act or the
" schedules therein referred to, and for prescribing
" anything which under this Part of this Act or any
" such schedules is to be prescribed, and generally
"for carrying this Part of this Act into effect, and

"any regulations so made shall be laid before both "Housesof Parliament as soon as may be after they "are made, and shall have effect as if enacted in this "Act."

This power to make regulations is probably the widest power of subordinate legislation ever conferred by Parliament upon any body of officials, and these officials, namely, the Insurance Commissioners, are appointed by the Treasury, *i.e.* by the Government, and are part of our whole governmental system. The regulations made by them come into force immediately after they are made. Any regulation indeed must be laid before each House of Parliament for twenty-one days, and may be annulled by the King in Council on a petition that it shall be annulled being presented within that twenty-one days by either House.[1] But **any one** will note that even such annulling is without prejudice to the validity of anything previously done under the annulled regulation. Practically, and with regard to any matter within the terms of Part L, a regulation made by the Commissioners is in reality part of the Act, and non-compliance therewith is made an offence as if it were part of the Act.[2]

Part II. of the Act contains the law as to unemployment insurance. The administration and management of this part of the Act are placed in the hands of the Board of Trade, or, in other words, of the Government. Now the Board of Trade has a power of making regulations for any of the purposes for

[1] **See sect. 65, proviso.**

[2] **Sect. 69, sub-sect. 2. Compare further as to legislative powers of the Commissioners, Act, sects. 7, 15, 27, and Insurance Act, 1913, sect. 19.**

which regulations may be made under that part as wide as the power conferred upon the Insurance Commissioners for making regulations with regard to health insurance.[1] But the Board of Trade has a further and most important power of adding to the number of insured trades.[2] Hence it follows that the Government of the day can of their own authority increase indefinitely the number of insured trades, and apparently extend the provisions as to imemployment insurance to every trade throughout the United Kingdom.[3]

Judicial Authority.—As to many questions concerning health insurance which may arise under Part I. of the Act, the Insurance Commissioners have judicial authority.[4] Any person aggrieved by their decision may appeal to the County Court, with a further right of appeal on any question of law to a judge of the High Court. But this right of appeal has, I am told, been made little or no use of. Under Part II.[5] any claim by a workman for unemploy-

[1] See sect. 91.

[2] See sect. 103, and Sixth Schedule. Nor does the proviso to sect. 103 materially restrict the power of the Government to make an order including a new trade, unless indeed it should happen that the person holding an inquiry with relation to the order reports that the order should not be made.

[3] See sect. 113 as to the necessity of the order being laid before either House of Parliament.

[4] See sects. 66, 67. Compare, however, Regulations of June 5, 1912, in App. I, Watts, p. 299.

[5] "All claims for unemployment benefit under this part of this Act, and all questions whether the statutory conditions are fulfilled in the case of any workman claiming such benefit, or whether those conditions continue to be fulfilled in the case of a .workman in receipt of such benefit, or whether a workman is disqualified for receiving or continuing to receive such benefit, or otherwise arising in connection with such claims, shall be determined by one of the officers appointed [under Part II.] of this Act for determining such claims for benefit (in this Act referred to as ' insurance officers')." Act, sect. 88 (1).

ment benefit, and any question arising in connection with such claim, are, in the first instance, to be decided by one of the insurance officers, *i.e.* by officials appointed by and in the service of the Board of Trade. Such decision is subject to an appeal, on the part of the workman making the claim, to a Court of Referees.[1] A Court of Referees consists in general of three persons—one drawn by rota from a panel of employers' representatives, another drawn by rota from a panel of workmen's representatives, and a Chairman (who must be neither an employer nor a workman in an insured trade)[2] appointed by the Board of Trade. On an appeal the Court of Referees may make to the insurance officer such recommendation as they may think proper. The insurance officer, unless he disagrees with the recommendation, must give effect to it. If he disagrees he must, if requested by the Court, refer the recommendation to the umpire. The umpire is a permanent official appointed by His Majesty, *i.e.* by the Government of the day. The decision of the umpire is final and conclusive, *i.e.* the jurisdiction of the law Courts is apparently excluded. One such umpire has now been appointed for the whole United Kingdom. An insurance officer however may, if he considers it expedient, instead of determining any claim or question, refer it at once to a Court of Referees, whose decision will be final and conclusive. The result seems to be that this course of procedure by the insurance officer excludes both the jurisdiction of the umpire and of the law Courts.

[1] **Act, sect. 88, proviso *(a)*. There are about seventy such Courts constituted under the Act.**

[2] **See Act, sect. 90, and Parliamentary Paper (B 16).**

Neither the Chairman of a Court of Referees, nor even the Umpire, has the security of tenure conferred on every judge of the High Court under the Act of Settlement.

These summary statements of the authority, both legislative and judicial, given to persons or bodies either closely connected with, or subject to, or part of the Government of the day, are enough to prove that the Insurance Act creates in England a system bearing a marked resemblance to the administrative law of France.[1] Now administrative law has, it must be admitted, some distinct merits. A law Court is not a body well suited for determining the number[2] of disputes or claims which are certain to arise under the National Insurance Act. Legal proceedings, even in the County Courts, must always be slow and relatively expensive. Official proceedings may be rapid and may be rendered not costly to litigants. But administrative law has two defects which have till very recent years forbidden its existence in England. Administrative tribunals always tend to exclude the jurisdiction of the ordinary law Courts. Administrative Courts are always more or less connected with the Government of the day. Their decisions are apt to be influenced by political considerations. Governmental officials cannot have the thorough independence of judges. Both these defects are apparent in the administrative system framed by the authors of the National Insurance Act. We may be certain that the Regulations made or sanctioned

[1] See, as to French *droit adminisiratif, Law of the Constitution,* ch. xii.

[2] The number of claims to unemployment benefit may vary from, e.gr., 20,000 to 40,000 claims in each week, involving payments at the rate of seven shillings for each week of unemployment.

by the Government of the day will, whatever party be in office, be occasionally dictated by the desire of every English Ministry to conciliate the goodwill of the electors. It is incredible that quasi-judicial decisions pronounced by the Insurance Commissioners or by the Courts of Referees will not sometimes be influenced by the same desire. There exists special reason to fear the effect of political bias on decisions with regard to unemployment insurance. The question whether workmen are or are not entitled to unemployment benefit may conceivably become very closely connected with their power to carry on a strike with success. A slight legislative change in the terms of one enactment in the National Insurance Act[1] might make it possible for strikers to support a contest with their employers by means of money in part supplied by the State. The constitution of the Court of Referees shows that Parliament felt the difficulty of obtaining an impartial decision of the questions which might come before such a Court. It is not equally clear that Parliament has excluded the risk that the action of such an official Court may be swayed by the political principles of the Government which takes part in constituting the Court. An administrative Court is never a completely independent tribunal.

The Trade Disputes Act, 1906.—To a student interested in the course of law and opinion during

[1] See sect. 87 (1), and as to the claim made by workmen to unemployment benefit during a strike, the *Times,* January 27, 30, and February 3,1914. The insurance officer in this case did not allow the claim, and his decision was, rightly it would seem, upheld by the Court of Referees. Note further that from an insurance officer's decision in favour of a claim by a workman to unemployment benefit there is no appeal.

the twentieth century the character and scope of this statute is summed up in an enactment which runs as follows:

" An action against a trade union, whether of " workmen or masters, or against any members or "officials thereof on behalf of themselves and all " other m^jnbers of the trade union in respect of any " tortious act alleged to have been committed by or " on behalf of, the trade union, shall not be entertained " by any Court." [1]

The direct effect of this enactment is that a trade union, whether of workmen or masters (which may be a very wealthy society), is now absolutely protected from liability to an action for any tort or wrong by or on behalf of the trade union.[2] Thus if a trade union possessed, say, of **£20,000,** causes a libel to be published of *A,* an employer of labour, or of *B,* a workman who refuses to join the union, or excites some fanatical ruffians to assault *A* or **J5,** neither *A* nor *B* can maintain an action against the union for the tort, and thereby either vindicate his character or recover a penny of damages.[3]

This enactment therefore confers upon a trade union a freedom from civil liability for the commission

[1] **Sect. 4 (1). I have purposely criticised the Trade Disputes Act solely with reference to this enactment. Sections 1, 2, and 3 are (it is submitted) based on an erroneous principle, but one's judgment of the Act must depend upon one's approval or condemnation of sect. 4.**

[2] **Whether an action might not be maintained against trustees of the Union? (see *Linaker v. Pitcher* (1901), 17 T.L.R. 256). But the funds could not be got at if the tort was committed in contemplation or furtherance of a trade dispute.**

[3] ***Vacher* v. *London Society of Compositors* [1913], A.C. 107. He might possibly vindicate his character by bringing an action against the actual publisher, *e.g.* a penniless printer, from whom he could recover neither damages nor the costs of the action.**

of even the most heinous wrong by the union or its servants, and in short confers upon every trade union a privilege and protection not possessed by any other person or body of persons, whether corporate or unincorporate, throughout the United Kingdom. This is assuredly a very extraordinary state of the law;[1] it points towards indirect results which have not yet been fully apprehended by the English public.

(1) It makes a trade union a privileged body exempted from the ordinary law of the land. No such privileged body has ever before been deliberately created by an English Parliament.

(2) It is highly probable that the legal immunities conferred upon trade unions[2] may soon be claimed by, and must be conceded to bodies which may not be now technically within the definition of a trade union. Suppose that a tenants' union were created for the purpose of lowering rents, or a labourers' union for the purpose of raising the wages of agricultural labourers. It would be difficult indeed to give any sound reason why such union should not, in common with trade unions, be protected against actions for libel or for any other tort.

(3) A tort will sometimes, though not always, involve the wrongdoer in the commission of a crime.

[1] **My learned friend, Professor Geldart, who is one of the ablest and the fairest of the commentators upon our Combination law, and who does not agree with most of my strictures upon the Trade Disputes Act, has expressed his opinion that the enactment in question *(i.e.* sect. 4, sub-sect. 1) is "contrary to justice and expediency." (See the *Times,* March 18, 1912.)**

[2] **See the Trade Union Act, 1913, sect. 2, for a new definition of trade union and for power of Registrar of Friendly Societies to register a combination as a trade union, and to give a conclusive certificate that a trade union is a trade union within the meaning of the Act.**

A sufferer who finds that he cannot bring an action against a trade union for a gross libel, may be tempted to try whether he may not obtain at least protection by substituting a prosecution for an action. Nothing could from a public point of view be more disastrous. Criminal proceedings are, as compared with civil proceedings, ineffective. For their very severity detracts from their utility. A jury will often hesitate to convict an offender who may have acted from more or less good motives where they would be ready to make him pay damages for the injury done, *e.g.* by a libel, to an innocent person, and judges rightly frown upon the attempt to turn a tort into a crime. Then, too, punishment for crime falls inevitably within the control of the Crown, or in other words of the Government. Suppose that the leaders of a trade union were convicted as criminals of libel: Is it at all certain that a Government fearing the displeasure of a Labour Party, might not use the Crown's prerogative of pardon to put an end to the imprisonment of men whom trade unionists held to be martyrs ?

(4) An enactment which frees trade unions from the rule of equal law stimulates among workmen the fatal delusion that workmen should aim at the attainment, not of equality, but of privilege. The Trade Disputes Act as a whole, and especially the fourth section thereof, is best described in the words of Sir Frederick Pollock: " Legal science has evi- " dently nothing to do with this violent empirical " operation on the body politic, and we can only look " to jurisdictions beyond seas for the further judicial " consideration of the problems which our Courts [up " to **1906]** were endeavouring (it is submitted, not

" without a reasonable measure of success) to work out " on principles of legal justice."[1] This is the conclusion of an impartial jurist. Historical fairness requires me to add one reflection. Our Combination law has been from beginning to end vitiated by the delusion that the relation of workmen and masters ought to be regulated by exceptional legislation.[2] The unjust severity towards workmen which was embodied in the Combination Act, **1800,** is the explanation, though not the excuse, for the unjust favouritism enjoyed by trade unionists under the Trade Disputes Act, **1906.**

Every objection which lies against the Trade Disputes Act has received increased force from the passing of—

The Trade Union Act, **1913.** In **1909** the Courts unhesitatingly decided that the funds of a trade union[3] could not lawfully be applied to the furtherance of political objects.[4] This judgment, though approved of by sound lawyers, excited the censure of trade unions. The Trade Union Act, **1913,** was passed to reverse or to annul that decision. A trade union has thus power to become an avowedly political association. It is difficult to suppose that men of justice and common sense could maintain that such an association can prudently be relieved from all liability to an action for tort, *e.g.* for the publication during an election of some gross libel on a candidate whose politics meet with the disapproval of a trade union.[5]

[1] **Pollock,** *Law of Torts* **(8th ed.), p. v.**

[2] **See pp. 266-273,** *post.*

[3] **The position of an unregistered union is not quite clear.**

[4] ***Amalgamated Society of Railway Servants* v. *Osborne* [1909], A.C. 87.**

[5] **The Act of 1913 not only authorises trade unions under considerable restrictions to pursue political objects, but authorises them without any restriction to devote their funds to any other lawful objects what-**

Acts fixing Minimum Rate of Wages.—Up to the last quarter of the nineteenth cefitury it was the firm conviction of English economists, and of English Liberals, that any attempt to fix by law the rate of wages was an antiquated folly. This belief is no longer entertained by our Parliamentary statesmen. Under the Trade Boards Act, **1909,** Trade Boards[1] have wide powers for the establishment of minimum rates of wages in certain trades,[2] *e.g.* the trade of ready-made and wholesale bespoke tailoring, and the Board of Trade has power by an order which needs confirmation by Parliament, to extend the Act to other trades.[3] By the Coal Mines (Minimum Wage) Act, **1912,** Parliament has itself fixed a minimum wage for workmen employed underground in coal mines.[4]

The influence of collectivism on legislation in the twentieth century is curiously traceable in laws enacted since **1900,** which, though to a certain extent defensible on Benthamite grounds, would hardly have been passed when Benthamite liberalism was the dominant opinion of the day. The meaning of this statement can be best shown by a few illustrations.

The Education (Provision of Meals) Act, **1906.**— The Elementary Education Act, **1870,** was the work of Liberals, and even of Conservatives, who were not consciously influenced by any ideas which could be

ever. In the pursuit of these objects they would be entitled to the immunity given them by the Trade Disputes Act, 1906, sect. 4, from actions for torts.

[1] **Trade Boards Act, sect. 1.**

[2] ***Ibid.* sect. 4.** [3] ***Ibid.* sect. 1, sub-sect. 2.**

[4] **I have purposely omitted details as to the mode in which minimum wages are to be fixed by law. For my present purpose the importance of any Minimum Wage Act is the admission of Parliament that wages can rightly be fixed by law and not by the mere haggling of the market.**