

ALBERT VENN DICEY



LECTURES ON THE
RELATION BETWEEN
LAW AND PUBLIC
OPINION DURING
THE 19TH CENTURY

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Between Law And Public
Opinion During The 19th
Century

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CONTENTS:

PREFACE TO THE FIRST EDITION

PREFACE TO THE SECOND EDITION

INTRODUCTION TO THE SECOND EDITION

LECTURE I: THE RELATION BETWEEN LAW AND PUBLIC OPINION

LECTURE II: CHARACTERISTICS OF LAW-MAKING OPINION IN ENGLAND

LECTURE III: DEMOCRACY AND LEGISLATION

LECTURE IV: THE THREE MAIN CURRENTS OF PUBLIC OPINION

LECTURE V: THE PERIOD OF OLD TORYISM OR LEGISLATIVE QUIESCENCE (1800-1830)

LECTURE VI: THE PERIOD OF BENTHAMISM OR INDIVIDUALISM

LECTURE VII: THE GROWTH OF COLLECTIVISM

LECTURE VIII: THE PERIOD OF COLLECTIVISM

LECTURE IX: THE DEBT OF COLLECTIVISM TO BENTHAMISM

LECTURE X: COUNTER-CURRENTS AND CROSS-CURRENTS OF LEGISLATIVE OPINION

LECTURE XI: JUDICIAL LEGISLATION

LECTURE XII: RELATION BETWEEN LEGISLATIVE OPINION AND GENERAL PUBLIC OPINION

APPENDIX

NOTE I: THE RIGHT OF ASSOCIATION

NOTE II: THE ECCLESIASTICAL COMMISSION

NOTE III: UNIVERSITY TESTS

NOTE IV: JUDGE-MADE LAW

FOOTNOTES:

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 Athenæum 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 Jéze. 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. André Colanéri, who has carefully examined recent French legislation in so far as it illustrates the development of socialistic ideas.

A. V. DICEY.

Oxford, 1914

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 understanding 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; Ref. 002 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. Ref. 003 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. 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. Ref. 004 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. Ref. 005 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 in 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 principles 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. ^{Ref. 006}

"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 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." Ref. 007

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, ^{Ref. 008} and it is probable that the late Lord Salisbury (then Lord Robert Cecil) would not on this 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 limiting 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.

Ref. 009

Contrast now with the dominant legislative opinion of 1859 the dominant legislative opinion of 1900, as described in Lectures VII. and VIII. ^{Ref. 010} 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 more force in the direction of collectivism, ^{Ref. 011} 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. ^{Ref. 012}

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 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 to certain disqualifications, 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. ^{Ref. 013}

This right to a pension is indeed subject to certain disqualifications, ^{Ref. 014} 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, ^{Ref. 015} 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." ^{Ref. 016} 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 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. ^{Ref. 017}—The attention of my readers ought to be directed exclusively to the aim of the Act and to the administrative methods of the Act. ^{Ref. 018} They each illustrate the influence of collectivism or socialism on English legislation.

Aim of Act.—The Act ^{Ref. 019} 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, ^{Ref. 020} 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, ^{Ref. 021} 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 ^{Ref. 022} shall be insured against unemployment, or, in other words, be secured support during periods of unemployment. ^{Ref. 023}

The whole drift of the statute, and especially the conditions, exceptions, and limitations contained therein, show ^{Ref. 024} 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 taxpayers, a far heavier responsibility than is anticipated 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 supported 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 regulations 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 Houses of 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. ^{Ref.}

⁰²⁵ 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 I., a regulation made by the Commissioners is in reality part of the Act, and noncompliance therewith is made an offence as if it were part of the Act. ^{Ref. 026}

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 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. ^{Ref.}

⁰²⁷ But the Board of Trade has a further and most important power of adding to the number of insured trades. ^{Ref.} ⁰²⁸ 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 unemployment insurance to every trade throughout the United Kingdom. ^{Ref.} ⁰²⁹

Judicial Authority.—As to many questions concerning health insurance which may arise under Part I. of the Act, the Insurance Commissioners have judicial authority. ^{Ref.} ⁰³⁰ 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. ^{Ref.} ⁰³¹ any claim by a workman for unemployment 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. ^{Ref.} ⁰³² 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) ^{Ref.} ⁰³³ 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.

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.

Ref. 034 Now administrative law has, it must be admitted, some distinct merits. A law Court is not a body well suited for determining the number ^{Ref. 035} 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 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 ^{Ref. 036} 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 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 members 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.” ^{Ref. 037}

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. ^{Ref. 038} 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 *B*, 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. ^{Ref. 039}

This enactment therefore confers upon a trade union a freedom from civil liability for the commission 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; ^{Ref. 040} 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 ^{Ref. 041} 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. 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 evidently 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." ^{Ref. 042} 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. ^{Ref. 043} 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 ^{Ref. 044} could not lawfully be applied to the furtherance of political objects. ^{Ref. 045} 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. ^{Ref. 046}

Acts fixing Minimum Rate of Wages.—Up to the last quarter of the nineteenth century 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 ^{Ref. 047} have wide powers for the establishment of minimum rates of wages in certain trades, ^{Ref. 048} *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. ^{Ref. 049} By the Coal Mines (Minimum Wage) Act, 1912, Parliament has itself fixed a minimum wage for workmen employed underground in coal mines. ^{Ref. 050}

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 called socialistic. Whether the Education Act, 1891, which practically relieved parents from the necessity of paying for any part of their children's elementary education, would have been approved of by the statesmen who passed the Education Act, 1870, may be open to doubt. It is certain that they would have condemned the Education (Provision of Meals) Act, 1906. No one can deny that a starving boy will hardly profit much from the attempt to teach him the rules of arithmetic. But it does not necessarily follow that a local authority must therefore provide every hungry child at school with a meal; ^{Ref. 051} still less does it seem morally right that a father who first lets his child starve, and then fails to pay the price legally due from him for a meal given to the child at the expense of the rate-payers should, under the Act of 1906, retain the right of voting for a Member of Parliament. ^{Ref. 052} Why a man who first neglects his duty as a father and then defrauds the State should retain his full political rights is a question easier to ask than to answer.

Take again *The Mental Deficiency Act, 1913*. Most of its provisions for the protection of defectives, both from themselves and from their neighbours, recommend themselves to common sense. They would probably have been welcomed by a humanitarian and a jurist, such as Bentham. Yet the Act would hardly have been passed by the Parliament, say of 1860. The interference which it involves with the dangerous liberty of defectives would at least have raised suspicion in the minds of men who had hailed the individualism of Mill's *Liberty* with indiscriminating applause. They would have felt that the measure was open to one serious objection. The Mental Deficiency Act is the