

LECTURES
ON
THE RELATION BETWEEN
LAW & PUBLIC OPINION
IN ENGLAND
DURING THE NINETEENTH CENTURY

BY
A. V. DICEY, K.C., HON. D.C.L.

OF THE INNER TEMPLE; FORMERLY VINERIAN PROFESSOR OF ENGLISH LAW
FELLOW OF ALL SOULS COLLEGE, OXFORD; HON. LL.D. CAMBRIDGE, GLASGOW, AND EDINBURGH
AUTHOR OF 'INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION'

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AS A MEMORIAL
OF A HAPPY VISIT TO THE UNITED STATES
THESE LECTURES ARE DEDICATED
TO
C. W. ELIOT
PRESIDENT EMERITUS OF HARVARD UNIVERSITY
WHO SUGGESTED THEIR DELIVERY
AND TO THE
PROFESSORS OF THE HARVARD LAW SCHOOL
WHOSE FRIENDLY RECEPTION ENCOURAGED THEIR PUBLICATION

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.

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 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: "Après avoir beaucoup crié, nous finimes par en appeler tous les deux à l'avenir, juge éclairé et intègre, mais qui arrive, hélas! 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 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 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 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