Chapter XXI

The Drive towards Legislative and Social Centralisation and Uniformity

The gathering of the essential powers of administration into the hands of the sovereign is completed when there is unity and uniformity of judicial administration, especially of the criminal side; for this is intimately connected with the maintenance of order and internal peace. And it is, besides, necessary for the ruler to have the criminal judicial authority in his hands so that he may use it to crush all rebellion against himself as treason and even, so far as may be possible, to stifle criticism and opposition and penalise that free thought and free speech which, by their continual seeking for a more perfect social principle and their subtle or direct encouragement to progress, are so dangerous to established powers and institutions, so subversive of the dominant thing in being by their drive towards a better thing in becoming. Unity of jurisdiction, the power to constitute tribunals, to appoint, salary and remove judges and the right to determine offences and their punishments comprise on the criminal side the whole judicial power of the sovereign. A similar unity of jurisdiction, power to constitute tribunals administering the civil law and the right to modify the laws relating to property, marriage and other social matters which concern the public order of society, comprise its civil side. But the unity and uniformity of the civil law is of less pressing and immediate importance to the State when it is substituting itself for the natural organic society; it is not so directly essential as an instrument. Therefore it is the criminal jurisdiction which is first absorbed in a greater or less entirety.

Originally, all these powers belonged to the organic society and were put into force mainly by various natural devices of a loose and entirely customary character, such as the Indian
panchayat or village jury, the jurisdiction of guilds or other natural associations, the judicial power of the assembly or convocations of the citizens as in the various Roman comitia or large and unwieldy juries chosen by lot or otherwise as in Rome and Athens, and only to a minor extent by the judicial action of the king or elders in their administrative capacity. Human societies, therefore, in their earlier development retained for a long time an aspect of great complexity in their judicial administration and neither possessed nor felt any need of a uniformity of jurisdiction or of a centralised unity in the source of judicial authority. But as the State idea develops, this unity and uniformity must arrive. It accomplishes itself at first by the gathering up of all these various jurisdictions with the king as at once the source of their sanctions and a high court of appeal and the possessor of original powers, which are exercised sometimes as in ancient India by judicial process but sometimes in more autocratic policies by ukase—the latter especially on the criminal side, in the awarding of punishments and more particularly punishments for offences against the person of the king or the authority of the State. Against this tendency to unification and State authority there militates often a religious sense in the community which attaches as in most countries of the East a sacrosanct character to its laws and customs and tends to keep the king or State in bounds; the ruler is accepted as the administrator of justice, but he is supposed to be strictly bound by the law of which he is not the fountain but the channel. Sometimes this religious sense develops a theocratical element in the society, a Church with its separate ecclesiastical authority and jurisdiction, a Shastra in the keeping of Brahmin jurists, a law entrusted to the Ulemas. Where the religious sense maintains its predominance, a solution is found by the association of Brahmin jurists with the king or with the judge appointed by him in every State tribunal and by maintenance of the supreme authority of the Pundits or Ulemas in all moot judicial questions. Where, as in Europe, the political instinct is stronger than the religious, the ecclesiastical jurisdiction comes in time to be subordinated to the State’s and finally disappears.
Thus eventually the State — or the monarchy, that great instrument of the transition from the organic to the rational society — becomes the head of the law as well as the embodiment of public order and efficiency. The danger of subordinating the judiciary entirely to an executive possessed at all of arbitrary and irresponsible powers is obvious; but it is only in England — the one country always where liberty has been valued as of equal importance with order and not considered a lesser necessity or no necessity at all — that there was a successful attempt from an early period to limit the judicial power of the State. This was done partly by the firm tradition of the independence of the tribunals supported by the complete security of the judges, once appointed, in their position and emoluments and partly by the institution of the jury system. Much room was left for oppression and injustice, as in all human institutions social or political, but the object was roughly attained. Other countries, it may be noted, have adopted the jury system but, more dominated by the instinct of order and system, have left the judiciary under the control of the executive. This, however, is not so serious a defect where the executive not only represents but is appointed and controlled by the society as where it is independent of public control.

Uniformity of the law develops on different lines from the unity and uniformity of judicial administration. In its beginnings, law is always customary and where it is freely customary, where, that is to say, it merely expresses the social habits of the people, it must, except in small societies, naturally lead to or permit considerable variety of custom. In India, any sect or even any family was permitted to develop variations of the religious and civil custom which the general law of the society was bound within vague limits to accept, and this freedom is still part of the theory of Hindu law, although now in practice it is very difficult to get any new departure recognised. This spontaneous freedom of variation is the surviving sign of a former natural or organic life of society as opposed to an intellectually ordered, rationalised or mechanised living. The organic group-life fixed its general lines and particular divergences by the general sense
and instinct or intuition of the group-life rather than by the stricter structure of the reason.

The first marked sign of a rational evolution is the tendency of code and constitution to prevail over custom. But still there are codes and codes. For first there are systems that are unwritten or only partly written and do not throw themselves into the strict code form, but are a floating mass of laws, *decreta*, precedents, and admit still of a large amount of merely customary law. And again there are systems that do take the strict code form, like the Hindu Shastra, but are really only an ossification of custom and help to stereotype the life of the society but not to rationalise it. Finally, there are those deliberately ordered codes which are an attempt at intelligent systematisation; a sovereign authority fixes the *cadres* of the law and admits from time to time changes that are intelligent accommodations to new needs, variations that do not disturb but merely modify and develop the intelligent unity and reasonable fixity of the system. The coming to perfection of this last type is the triumph of the narrower but more self-conscious and self-helpful rational over the larger but vaguer and more helpless life-instinct in the society. When it has arrived at this triumph of a perfectly self-conscious and systematically rational determination and arrangement of its life on one side by a fixed and uniform constitution, on the other by a uniform and intelligently structural civil and criminal law, the society is ready for the second stage of its development. It can undertake the self-conscious, uniform ordering of its whole life in the light of the reason which is the principle of modern socialism and has been the drift of all the Utopias of the thinkers.

But before we can arrive at this stage, the great question must be settled, who is to be the State? Is the embodiment of the intellect, will and conscience of the society to be a king and his counsellors or a theocratic, autocratic or plutocratic governing class or a body which shall at least seem to stand sufficiently for the whole society, or is it to be a compromise between some or all of these possibilities? The whole course of constitutional history has turned upon this question and to all appearance wavered obscurely between various possibilities; but in reality,
we can see that throughout there has been acting the pressure of a necessity which travelled indeed through the monarchical, aristocratic and other stages, but had to debouch in the end in a democratic form of government. The king in his attempt to be the State—an attempt imposed on him by the impulse of his evolution—must try indeed to become the fountain as well as the head of the law; he must seek to engross the legislative as well as the administrative functions of the society, its side of efficient thought as well as its side of efficient action. But even in so doing he was only preparing the way for the democratic State.

The king, his council military and civil, the priesthood and the assembly of freemen converting itself for the purposes of war into the host, were perhaps everywhere, but certainly in the Aryan races, the elements with which the self-conscious evolution of society began: they represent the three orders of the free nation in its early and elementary form with the king as the keystone of the structure. The king may get rid of the power of the priesthood, he may reduce his council to an instrument of his will or the nobility which they represent to a political and military support for his actions, but until he has got rid of the assembly or is no longer obliged to convocate it,—like the French monarchy with its States-General summoned only once or twice in the course of centuries and under the pressure of great difficulties,—he cannot be the chief, much less the sole legislative authority. Even if he leaves the practical work of legislation to a non-political, a judicial body like the French Parliaments, he is bound to find there a centre of resistance. Therefore the disappearance of the assembly or the power of the monarch to convocate it or not at his pleasure is always the real mark of his absolutism. But when he has succeeded, when his decrees are laws, when he has got rid of or subordinated to himself all the other powers of the social life, there at that point of his highest success his failure begins; the monarchical system has fulfilled its positive part in the social evolution and all that is left to it is either to hold the State together until it has transformed itself or else to provoke by oppression the movement towards the sovereignty of the people.
The reason is that in engrossing the legislative power the monarchy has exceeded the right law of its being, it has gone beyond its dharma, it has undertaken functions which it cannot healthily and effectively fulfil. Administration is simply the regulation of the outward life of the people, the ordered maintenance of the external activities of its developed or developing being, and the king may well be their regulator; he may well fulfil the function which the Indian polity assigned to him, the upholder of the “dharma”. But legislation, social development, culture, religion, even the determination of the economic life of the people are outside his proper sphere; they constitute the expression of the life, the thought, the soul of the society which, if he is a strong personality in touch with the spirit of the age, he may help to influence but which he cannot determine. They constitute the national dharma,—we must use the Indian word which alone is capable of expressing the whole idea; for our dharma means the law of our nature and it means also its formulated expression. Only the society itself can determine the development of its own dharma or can formulate its expression; and if this is to be done not in the old way by a naturally organic and intuitive development, but by a self-conscious regulation through the organised national reason and will, then a governing body must be created which will more or less adequately represent, if it cannot quite embody, the reason and will of the whole society. A governing class, aristocracy or intelligent theocracy may represent, not indeed this but some vigorous or noble part of the national reason and will; but even that can only be a stage of development towards a democratic State. Certainly, democracy as it is now practised is not the last or penultimate stage; for it is often merely democratic in appearance and even at the best amounts to the rule of the majority and works by the vicious method of party government, defects the increasing perception of which enters largely into the present-day dissatisfaction with parliamentary systems. Even a perfect democracy is not likely to be the last stage of social evolution, but it is still the necessary broad standing-ground upon which the self-consciousness of the social being can come
to its own.\footnote{It does not follow that a true democracy must necessarily come into being at some time. For man individually or collectively to come to a full self-consciousness is a most difficult task. Before a true democracy can be established, the process is likely to be overtaken by a premature socialistic endeavour.} Democracy and Socialism are, as we have already said, the sign that that self-consciousness is beginning to ripen into fullness.

Legislation may seem at first sight to be something external, simply a form for the administration, not part of the intimate grain of the social life like its economic forms, its religion, its education and culture. It so appears because in the past polity of the European nations it has not been like oriental legislation or Shastra all-embracing, but has confined itself until recently to politics and constitutional law, the principles and process of administration and so much only of social and economic legislation as was barely necessary for the security of property and the maintenance of public order. All this, it might seem, might well fall within the province of the king and be discharged by him with as much efficiency as by a democratic government. But it is not so in reality, as history bears witness; the king is an inefficient legislator and unmixed aristocracies are not much better. For the laws and institutions of a society are the framework it builds for its life and its dharma. When it begins to determine these for itself by a self-conscious action of its reason and will within whatever limits, it has taken the first step in a movement which must inevitably end in an attempt to regulate self-consciously its whole social and cultural life; it must, as its self-consciousness increases, drive towards the endeavour to realise something like the Utopia of the thinker. For the Utopian thinker is the individual mind forerunning in its turn of thought the trend which the social mind must eventually take.

But as no individual thinker can determine in thought by his arbitrary reason the evolution of the rational self-conscious society, so no executive individual or succession of executive individuals can determine it in fact by his or their arbitrary power. It is evident that he cannot determine the whole social life of the nation, it is much too large for him; no society would
bear the heavy hand of an arbitrary individual on its whole social living. He cannot determine the economic life, that too is much too large for him; he can only watch over it and help it in this or that direction where help is needed. He cannot determine the religious life, though that attempt has been made; it is too deep for him; for religion is the spiritual and ethical life of the individual, the relations of his soul with God and the intimate dealings of his will and character with other individuals, and no monarch or governing class, not even a theocracy or priesthood, can really substitute itself for the soul of the individual or for the soul of a nation. Nor can he determine the national culture; he can only in great flowering times of that culture help by his protection in fixing for it the turn which by its own force of tendency it was already taking. To attempt more is an irrational attempt which cannot lead to the development of a rational society. He can only support the attempt by autocratic oppression which leads in the end to the feebleness and stagnation of the society, and justify it by some mystical falsity about the divine right of kings or monarchy a peculiarly divine institution. Even exceptional rulers, a Charlemagne, an Augustus, a Napoleon, a Chandragupta, Asoka or Akbar, can do no more than fix certain new institutions which the time needed and help the emergence of its best or else its strongest tendencies in a critical era. When they attempt more, they fail. Akbar's effort to create a new dharma for the Indian nation by his enlightened reason was a brilliant futility. Asoka's edicts remain graven upon pillar and rock, but the development of Indian religion and culture took its own line in other and far more complex directions determined by the soul of a great people. Only the rare individual Manu, Avatar or prophet who comes on earth perhaps once in a millennium can speak truly of his divine right, for the secret of his force is not political but spiritual. For an ordinary political ruling man or a political institution to have made such a claim was one of the most amazing among the many follies of the human mind.

Yet the attempt in itself and apart from its false justifications and practical failure was inevitable, fruitful and a necessary step
in social evolution. It was inevitable because this transitional instrument represented the first idea of the human reason and will seizing on the group-life to fashion, mould and arrange it according to its own pleasure and power and intelligent choice, to govern Nature in the human mass as it has already learned partly to govern it in the human individual. And since the mass is unenlightened and incapable of such an intelligent effort, who can do this for it, if not the capable individual or a body of intelligent and capable individuals? That is the whole rationale of absolutism, aristocracy and theocracy. Its idea is false or only a half-truth or temporary truth, because the real business of the advanced class or individual is progressively to enlighten and train the whole body consciously to do for itself its own work and not eternally to do things for it.² But the idea had to take its course and the will in the idea, — for every idea has in itself a mastering will for self-fulfilment, — had necessarily to attempt its own extreme. The difficulty was that the ruling man or class could take up the more mechanical part of the life of society, but all that represented its more intimate being eluded their grasp; they could not lay hands on its soul. Still, unless they could do so, they must remain unfulfilled in their trend and insecure in their possession, since at any time they might be replaced by more adequate powers that must inevitably rise up from the larger mind of humanity to oust them and occupy their throne.

Two principal devices alone seemed adequate and have been employed in all such attempts at complete mastery. One was chiefly negative; it worked by an oppression on the life and soul of the community, a more or less complete inhibition of its freedom of thought, speech, association, individual and associated action, — often attended by the most abominable methods of inquisition and interference and pressure on the most sacred relations and liberties of man the individual and social being, — and an encouragement and patronage of only such thought and

² It is not meant that in a perfect society there would be no place for monarchical, aristocratic or theocratic elements; but there these would fulfil their natural function in a conscious body, not maintain and propel an unconscious mass.
culture and activities as accepted, flattered and helped the govern-
ing absolutism. Another was positive; it consisted in getting a
control over the religion of the society and calling in the priest
as the spiritual helper of the king. For in natural societies and
in those which, even if partly intellectualised, still cling to the
natural principles of our being, religion, if it is not the whole
life, yet watches over and powerfully influences and moulds
the whole life of the individual and society, as it did till recent
times in India and to a great extent in all Asiatic countries. State
religions are an expression of this endeavour. But a State religion
is an artificial monstrosity, although a national religion may well
be a living reality; but even that, if it is not to formalise and kill
in the end the religious spirit or prevent spiritual expansion, has
to be tolerant, self-adaptive, flexible, a mirror of the deeper soul
of the society. Both these devices, however seemingly successful
for a time, are foredoomed to failure, failure by revolt of the
oppressed social being or failure by its decay, weakness and
death or life in death. Stagnation and weakness such as in the
end overtook Greece, Rome, the Mussulman nations, China,
India, or else a saving spiritual, social and political revolution
are the only issues of absolutism. Still it was an inevitable stage
of human development, an experiment that could not fail to be
made. It was also fruitful in spite of its failure and even by reason
of it; for the absolutist monarchical and aristocratic State was
the father of the modern idea of the absolutist socialistic State
which seems now to be in process of birth. It was, for all its
vices, a necessary step because only so could the clear idea of an
intelligently self-governing society firmly evolve.

For what king or aristocracy could not do, the democratic
State may perhaps with a better chance of success and a greater
security attempt and bring nearer to fruition,—the conscious
and organised unity, the regularised efficiency on uniform and
intelligent principles, the rational order and self-governed per-
fectioning of a developed society. That is the idea and, however
imperfectly, the attempt of modern life; and this attempt has
been the whole rationale of modern progress. Unity and uni-
formity are its principal trend; for how else are the incalculable
complexities of the vast and profound thing we call life to be taken hold of, dominated, made calculable and manageable by a logical intelligence and unified will? Socialism is the complete expression of this idea. Uniformity of the social and economic principles and processes that govern the collectivity secured by means of a fundamental equality of all and the management of the whole social and economic life in all its parts by the State; uniformity of culture by the process of a State education organised upon scientific lines; to regularise and maintain the whole a unified, uniform and perfectly organised government and administration that will represent and act for the whole social being, this is the modern Utopia which in one form or another it is hoped to turn, in spite of all extant obstacles and opposite tendencies, into a living reality. Human science will, it seems, replace the large and obscure processes of Nature and bring about perfection or at least some approach to perfection in the collective human life.