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THE BASIS OF LEGISLATIVE POLICY
IN
MODERN STATES.

INAUGURAL ADDRESS

DELIVERED BY

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"Freedom without unity is a delusion ;

Unity without freedom a snare."

(Pythagoreans.)

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THE BASIS OF LEGISLATIVE POLICY

IN

MODERN STATES.

The object of the Indian Liberal Club is set out in our rules to be "to promote the scientific study of politics in general and Indian politics in particular in all their aspects." These aspects may be, generally speaking, classed under three heads.

First, we have the metaphysical method of political study, of which Aristotle and Plato among the ancient Greeks, Cicero among the ancient Romans, Jean Jacques Rousseau in France, and Kautilya and other Hindu writers on politics, and Jeremy Bentham, the father of English utilitarianism, may serve as some striking examples. They belong to the class of political reformers who dealt with political questions, especially the question of legislation as affecting the political constitution of a country, by an analysis of human nature in general, without any reference to differences of climate, custom, race, and tradition. This is the *a priori* method of reasoning in politics, the advantage of which

is that, emphasising the eternal and immutable spirit in man over and above what is conventional and customary, it points to the ideal in humanity. Such expressions as these, "human nature is the same everywhere," "one touch of Nature makes the whole world kin," एको देवः सर्वभूतान्तरात्मा ("One God resides in, as the soul of, all beings"), which have been among the current coins of proverbial philosophy, are the outcome of this method. Its pursuit has led to the brotherhood of international relations and served to emphasise the law of right as against might. Its advantage is that it brings out more or less prominently the points of human nature which make for the unity of mankind. But its defect is that it is apt to make a student of politics who becomes its servant, not its master, a mere visionary who has no hold on the practical side of politics. Exclusively pursued, this metaphysical method of political study fails to take into account the whole of human nature and the conditions which either make for or retard political development among a people.

Man is not pure reason or mind. He is what the history of his race behind him has made him. He is a creature of the past with all his inherited beliefs, customs, prejudices, and traditions which have all gone to make the State or the society, of which he is a unit; and these have to be taken into account by the light of their history. This is the historical method of political study, which represents that both man and his society,

as they are, have been evolved from the past, that they are natural organisms, made and developed by a process of law that has regulated their development. This method of study emphasises the practice of man, as distinguished from the theory of human nature, to which the metaphysical method mainly looks. Its best exponents are Montesquieu and Maine. It is invaluable to a student of politics in that it checks fancy, corrects the dreams of mere theory, and lights the path of a political reformer along lines which are feasible and safe to adopt. It gives a warning against hasty reforms, which are as much the foes of progress as stagnation. But this historic method of political study has also its disadvantage. When exclusively pursued and turned into a *fetish*, it is apt to make the student live too much in the past and become its slave. Man under it becomes, to borrow an expression from Bagehot, an antiquity; it becomes a plea for the stand-still system of Government. It inclines men, especially those charged with the duties of administration, to deal with society as a mere machine, and to think of and value more *the methods* of Government than its *aims*. It exalts routine and red-tape as making for administrative efficiency, by caring more for the security and stability of Government than of the public welfare and the changing phases of society and their needs. History must be heightened by philosophy or else it narrows our vision and outlook. In this connection I would invite you to read Maine's *Popular Government* and the criticism on it by Lord Morley.

The third method of political study is what for want of a better and strictly precise term I might call the humanistic or people's method, which deals with political questions as they strike the average man or rather the man in the street of the times in which we live. This indeed seems a very low kind of study; it is not really speaking worth the name of study, much less is it anything approaching a scientific study of politics; but for a practical politician, who wishes to influence materially the political conditions of his time, it has its advantage. It consists in acquainting oneself with the thoughts and feelings of the masses, the view they take, and why, of the political and economic situation around them, what they speak about it and so forth. The advantage of this method is that, while, on the one hand, the metaphysical method teaches you to theorise—and sound theory is always the pabulum of sound practice—and broadens your outlook by presenting to you the ideal in man, while, on the other, the historical method prevents your becoming a mere dreamer, this third method by sending you among the people, gives a real, living, human interest to your study, and develops the spirit of practical sympathy. The man in the street may not be able to know wisely the nature of the political conditions around him. If he has a grievance, it may be fancied, not real. But all the same it is worth knowing what he feels and how he feels and whether and in what respect according to his lights the administrative shoe pinches him. The late John Bright attached great, though not exclusive,

weight to this method. Before making up his mind on any political problem of his time and delivering his speech on it in either the House of Commons or on the platform, he would not only study the blue-books and other materials bearing on it, but he would also talk it over with farmers and labourers and get to the popular view of the question. The wisdom of law-givers, says Cardinal Newman, lies in finding a safe outlet for natural impulses and sentiments which are sure to be found in their subjects and which are hurtful only in excess; to direct, to moderate, and variously influence what they cannot extinguish. Towards that purpose the law-giving statesman and administrator must develop in himself the *human* side of political study by intercourse with the people, as did Mountstuart Elphinstone and Sir John Malcolm in India with their virtue of accessibility and movement among the peasants and *coolies* in their daily routine of administrative life. Equally the publicist who desires to be an effective force in the politics of his country should *humanise* his study of political questions by acquainting himself with the views, thoughts, and feelings of the masses, and turning on them the light afforded to him by the metaphysical and historical methods. It may seem perhaps a strange thing to say, what was said by the *Spectator* of London in its number of Sept. 22, 1916, that "it is from the unlettered mass that we must look for the beginnings of wisdom; the masses have a cynicism which is their own;" but it is the masses who made ballads and the ballads became histories.

And this has been true of India. What is the *Mahabharata* but the ballads of the people turned into an epic? The Maratha saint, who is justly regarded as the father of modern Marathi literature and of the spirit of Maratha nationality which gave birth to Shivaji and the unification such as it was of the Maratha race, speaks in his commentary on the *Gita*, called the *Jnaneshwari*, of the civilised man as one who lives on the ends of a city (नगरांतरीं नागरीक). What does that mean? It means that civilization comes from not merely urban life or high life—the life of the upper classes, upper whether in point of wealth or intellect,—but from contact with and movement among both the high and the low. Shri Jnaneshwar's own life was of that kind. He was born of Brahmin parents, who having been excommunicated, were not allowed to live in his city; so they lived on the borders of the city and Shri Jnaneshwar had the lifelong advantage of knowing both high and low life intimately. That movement among the less favoured classes of his people enabled him to lay the foundation of his work which by its spiritual and literary influence laid the seeds of political thought and nationality among the Marathas and formed the initial stage in the welding process. It is, therefore, necessary for a student of politics to humanise his metaphysical and historical methods of study by this people's method. The former two methods enlighten his mind; the latter touches his heart and enables the student to realise what John Bright has

rendered to us familiar as a political truth that "the nation dwells in the cottage."

This threefold study of political questions is all the more necessary because in these days of the 20th century all political problems have become more complex than in the past and are not, as was the case in the Middle Ages, influenced mainly by religious problems, or chiefly by economical considerations as was the case in the 19th century. They are now intermixed with all the varied and growing interests of human nature; and every word that we use to represent a political problem of these days has a biography which must be studied before we can handle that problem effectively. In this connection we may well bear in mind a profound observation made by Sir Henry Sumner Maine. Of political theories he wrote that "they are endowed with the faculty possessed by the hero of the Border-ballad. When their legs are smitten off, they fight upon their stumps. They produce a host of words and of ideas associated with those words which remain active and combatant after the parent speculation is mutilated or dead." The meaning of that is that a political theory originated by its author loses in process of time, stage by stage, the meaning and force which the author intended and in course of time comes to have a meaning and application which would startle the author himself as being opposed to the ideas which he had identi-

fied with his theory. Were Sir Henry Sumner Maine living in our own days, he would perhaps look aghast at the transformation which the political formula which he cast into the well-known aphorism "that the movement of all progressive societies is from *status* to contract" has undergone since his time and come to have a meaning which he probably had not in mind when he wrote. I will later on deal with that political formula to show the transformation such as it is in our days, but in the meantime if we turn to the political theories, associated with certain words which are in our own time familiarly heard from day to day in all political discussions—words such as "Liberty," "Equality" "Democracy," "Nationality," and "Self-government"—and trace the history of each of these words, we shall find that, undergoing a series of changes of meaning, while retaining the name or word, it has come in our days to receive an interpretation which is the result of the combined methods of political thought and study I have mentioned above. Take, for instance, the word *Liberty*. We learn that we owe the idea originally to the ancient Greeks who discovered it in the times of the Sophists and Socrates about the 6th century before Christ. Without tracing the history of its successive fortunes in ancient Greece, Rome, the Middle Ages, the Renaissance, the Reformation and the Puritan period and coming to the more modern times, we find that Jefferson's idea of liberty was a Government which governed its people least. Under Lincoln it meant "a Government of the people, by the people, for the people"

which has been found in practice to be a Government that, instead of governing least, governs most. When Froude thought about 40 years ago that *liberty* meant one thing for Europe and America, another for Asia and Africa, one thing for the white and another for the dark races, he reflected an opinion which in those days was presumably shared largely in Europe by even the best minds. That opinion was that liberty for the white man meant the right which he claimed to govern himself and for which he was ready to sacrifice all his life and property, while liberty with the dark man meant the right which he claimed to be governed by another and for the denial of which he was prepared to put that other to death. We hardly hear that meaning of liberty in our days. Rather the thought of the day has been centring more and more round the view that each nation should be left free to work out its own destiny and self-government is its birth-right. Take that with another thought of the present day, to which the American Ambassador in London, Mr. Page, gave pointed expression but the other day, that liberty for the individual meant equality of opportunity for all and you come to an idea which reflects the ages from the time of ancient Greece down to now and means that men are free and nations are free only when they serve one another. It is only in the spirit of the Lord that there is liberty. Was it a mere rhetorical phrase of the Radical, which the late Sir Henry Campbell-Bannerman uttered, when he said that "good Government is no substitute for self-government?" Trace the history of the idea by

the three-fold method of political study and you find that what Sir Henry Campbell-Bannermann meant was not that self-government, however bad, oppressive, cruel, and barbarous, is preferable under any circumstances to a foreign government, however good and just, for European history shows how in the earlier years but for foreign influences the people of England, of France, of Germany, of Italy &c., would have degenerated into discordant elements and failed to secure the basis of self-government. For instance, to take one notable example, it was foreign power, the power of the foreign Church which materially helped the English barons to secure from King John the *Magna Charta*. What Sir Henry Campbell-Bannermann meant was that no government, however good and sympathetic, is worth the name of Government unless it rules by law and unless that law leads and prepares the people subject to it to self-government *i. e.* prepares it by its principles and policy to govern itself instead of keeping it under the leading strings of a paternal government whether foreign or otherwise. That is the meaning of a Government by law and constitution.

All good and progressive Government, then, means a Government which rules by legislation and law reflecting the opinions of its subjects and so leads that opinion as to make the administration representative. Its character and its aims are best reflected in the proceedings of its Legislatures and the tendencies of the laws it enacts on the one

hand and of the members who compose it, both those members who hold their places in the Legislature as representing the executive authority of the Government and those who participate in its deliberations and the enactment of its laws as popular representatives. Those of you who followed with attention the proceedings of the meetings of the last session of the Imperial Legislative Council of India will remember a resolution proposed by the Hon. Pandit Madan Mohan Malaviya to the effect that the meetings of the said Council should be much more frequent than they have been. The resolution was either supported by or had the sympathy of most of the non-official members of the Council, but those who opposed it took the main ground that such frequent meetings as the Hon. Pandit called for would throw an unbearable burden of work on the officials and diminish the time for executive government. One of the members of the Council, in resisting the proposal, remarked that, if effect were given to it, it would serve no useful purpose but would only result in increasing the loquacity of the non-official lawyer-members of the Council. Similar criticism is directed against the increasing tendency of interpellation among the elected members of our Legislative Councils. Now, without going into the merits of the criticism in either case, but taking the two facts—the fact of the resolution for more frequent meetings of the Council proposed by the Hon. Pandit Madan Mohan Malaviya and the fact of the increasing tendency of the elected members of our Legislative Councils to multiply the number of their

interpellations on questions of administration—taking these two facts by themselves as typical of the attitude of the popular representatives of the Council towards the legislative function of Government on the one hand and its executive function on the other, I ask myself: Does that attitude present a phenomenon peculiar to the mental constitution and political leanings of these popular representatives in this country, or is it symptomatic of a tendency which is observable under every civilised Government that regulates its administration by means of legislation and is therefore called a Government which is orderly because it reigns by law? A careful study of the history of all such Governments from the ancient times to modern will satisfy every student of politics that the people living under it and developing in the civic virtues have always showed at every advancing stage of their progress, a growing desire to influence and get hold of the executive authority of Government through and by influencing its Legislature first. That is the political phenomenon everywhere. "It is the history of all countries that people are not jealous of the judicial power while they are extremely anxious to seize the legislative and executive power." It has been the same with the *Witeganemot* of the earlier history of England which developed subsequently into the present Parliament, with the ancient *Punchayet* system in India, when it was in its state of vitality, with the Chamber of Deputies in France, the *Reichstag* of Germany, or the Duma of Russia, or Congress of the United States of America.

If the Legislature of a Government, then, forms in the history of all progressive countries, the pivot of its executive and judiciary, and is calculated to affect the tendencies and aims of that Government, it is the duty of an earnest student of politics and of all publicists to study the principles which form the motive power of contemporary legislation by the light of the three methods of political study mentioned above. What are those principles underlying modern legislation? Whence and how have those principles been derived? What is their history? Whither are they tending? What for are they tending? And lastly, what is of immediate concern to us in this country, how far and in what way have those principles influenced and affected the course of legislation in British India?

Modern legislation, looked at broadly, presents two features or tendencies, which at first sight seem a paradox of the principle of liberty and democracy regarded as the dominant keynote of all progressive Governments in these days. The first feature or tendency is the emancipation and elevation of the individual, resting on the political theory that every man is free and that all men are equal. It is as resting on and flowing from that theory that modern States deemed to be democratic have been either passing or aiming at laws which have for their object the securing to every individual within their realm the benefit of education, of sanitation, of places of recreation, of the chances of employment, of the living wage, of

safeguards against accidents, and old age pensions. All this goes under the name of what is called socialistic legislation but *socialistic* is not the right word, because *socialism* as ordinarily understood is something which is hostile to the idea of individual liberty and means a kind of social slavery. The word *social* is perhaps more appropriate to use to describe the nature of the legislation, which has in it the element of individualism also, inasmuch as its object is to emancipate by elevating the individual, whatever his status or class, with a view to make him a free citizen of the State for social ends. No man can be said to be a free citizen as long as he is handicapped in the race of life by poverty or ignorance or disease. That is the idea associated with liberty nowadays. While a modern democratic State seeks by its legislation to secure liberty to him, we have alongside of that the curious phenomenon that it passes laws which fetter his liberty to an extent unknown in less democratic times or less democratic countries, by strengthening the executive and lessening the powers of the ordinary judiciary who have been regarded as the palladium of the liberties of the people and to whom the subjects of the State have been accustomed to look as the redresser of wrongs and the supporter of the right of individual freedom. To this tendency of modern democratic legislation attention has been frequently called. About a year ago *Blackwood's Magazine* pointed to it in these words:—

“The danger is all the greater because of an evil habit which has impressed itself upon recent legisla-

tion, which, if unnoticed and given free course, may insidiously undermine the very essentials of constitutional government. We refer to the pernicious and constantly increasing practice of entrusting what are really legislative and judicial power to the executive departments. An Act of Parliament nowadays leaves it to the departments to legislate by orders and withdraws from Law Courts matters which properly belong to them, in order to hand them over to a State Department whose decision is to be final. There is no more vicious part of the hurtful work that ten years of Radical Administration has wrought for us. And these far-reaching irresponsible powers are entrusted to a new and irresponsible bureaucracy chosen at haphazard." (*Blackwood's Magazine* for March 1916, pp. 356-57, on The Civil Service, Old and New.)

The complaint that English legislation striking at the liberty of the individual as the result of Radical or democratic Government has been prevalent only these ten years ignores the fact that the tendency dates from a period much anterior. Instances of this class of legislation characterised as *socialistic* are given by Mr. Dicey in the 8th Lecture in his "Law and Opinion in England," which is instructive reading. As pointed out there, the tendency was referred to by Lord Morley in his *Life of Cobden* in 1881 and since then it has grown with the growth of the British democracy with its watchwords of liberty and equality. It is the same with the democracy of the

United States of America, of which an American writer says: "At present the American people have a craze for efficiency, even at the expense of constitutional government. Distrust in legislatures, greater trust and power reposed in individual heads and a much greater power entrusted to more or less permanent boards and commissions usually not elective and often clothed with vast powers not expressly submitted to the scrutiny of Courts of law."

The comment generally made on this increasing tendency of legislation at the present day, whether in Great Britain or the United States of America or other democratic countries, is that it has falsified Blackstone's prediction made in his Commentaries on Common Law that a democratic form of Government is more competent to make good and sound laws for the welfare and liberties of the people than any other. As a matter of fact, it is pointed out, legislation by the people has resulted in the enactment of laws more subversive of the liberty of the individual and of society than laws made by a despotic monarch.

The justice or injustice of this criticism can be properly tested only by a careful study of the problem in the three-fold manner I have recommended at the outset of this address. I will now indicate with some particularity the lines on which that study may, in my humble opinion, be followed.

At the outset I would ask you to bear in mind each of the following principles, which either by itself embodied or led to a political theory and has

profoundly influenced legislation and through it the principles of administration.

First: there are the two principles of Bentham viz. (1) *Each head counts for one and no more than one*, meaning that every single individual ought to have a vote and voice in the legislation of his State. This forms the political theory of individualism. (2) *The greatest happiness of the greatest number*, which has formed the principle of the social theory of Government and legislation.

Second: Darwin's biological principle of Natural Selection, which Herbert Spencer put into the well-known formula of "*the survival of the fittest*" as the law of evolution and which Darwin adopted as expressing aptly his biological theory.

Third: Sir Henry Sumner Maine's political theory suggested by Darwin's principle of Evolution and propounded in his *Ancient Law* that "the movement of the progressive societies has hitherto been a movement *from status to contract*."

Fourth: Prof. Huxley's theory of Rational Selection which he propounded in his Romanes Lecture on "Evolution and Ethics" at Oxford in 1893, affirming that social progress is the result of "*the ethical process*."

<p>Nature of each Theory.</p>	<p>Bentham's political theory that "each head counts for one", Darwin's biological theory of "the survival of the fittest," and Maine's of the progress of societies from <i>status</i> to <i>contract</i>, were all <i>individualistic</i>:</p>
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and led to the *laissez faire* or "let alone" doctrine of legislation and executive government, with *competition* as the motive power of human progress. On the other hand, Huxley's theory of *Rational, not Natural, Selection*, embodied in his formula that social progress is the result of the *ethical process* is more social than individualistic and has profoundly influenced the tendencies of modern legal and political development and given a fresh aspect of life and vigour to, by bringing out the real meaning of, the other theories above-mentioned. It is only by tracing the biography of each of these theories that we shall be able to appreciate the ideals, aims, and conditions of present-day legislation and politics.

That biography will, I venture to think, be best understood, if we trace as follows the development of the idea of law and of the political theories which have successively flowed hitherto from it, in British legislation and politics in particular:—

1. The different stages of the theory of law as the basis of Government and of the political development of its subjects.
2. How the feudal principle of law has silently marked all those different stages.
3. How the different stages of law and the consequent political development, and the silent operation of the feudal principle, have led to the organisation of nations on the basis of both the individualistic and social principles combined at the present time.

First, then, as to how the idea of law as the basis of Government and the political and social development of its subjects has been evolved from the earliest conditions of society down to modern. The patriarchal condition of society which was preceded, as history shows, by the matriarchate, is the earliest form to notice and in it there was no law in the sense in which we now understand it as a rule imposed by a sovereign authority upon its subjects with a penalty for breach of it, because such society was composed merely of families or kindred clans. The law that governed such societies was family usage and social customs regulating the intercourse of one family with another belonging to the clan. The patriarch of a family held almost unlimited power over its members. He regulated the intercourse of his family with other families and entered into transactions with families outside his own. The king did not interfere for breach of those family and social customs as between family and family except when there was a breach of the public peace. He made no laws. Those customs were unwritten religious, social, moral and economic rules, a breach of which was punished by social sanctions and penalties such as excommunication, penance, &c. The patriarchal society was thus more of a social than a political organisation. The customs became unwritten, unrecorded laws, which every member of the society was supposed to know. Hence the origin of the legal maxim which forms the fundamental and primary rule of govern-

Stages of Legis-
lation (1) Patriarchal.

ment that "every man is expected to know the law." It is instructive to note in this connection how the Witenagemote of earlier England, and the village and town Panchayets of India exhibited the same feature of Government by law. Neither was in its earlier stage a legislative body; both were partly executive and partly judicial as to their functions in the beginning. The reason is that in the beginnings of society law was social, not political, morality.

As the society grew and became more complex, as the power of the head of the family diminished, and each individual gained in independence, social life emerged from *status* to contract *i. e.* from family pupilage to individual emancipation. The individual, till then in the leading strings of the head of his family, was absolved from the restrictions of the *patria potestas* and became free to deal in transactions with others as and for himself. The State took the place of the head of the family. The idea of civil or secular law as distinguished from social morality came into being. Such was the law known as the *Nomos* of the ancient Greeks, the *Jus Strictum* of the ancient Romans, the Common Law of the English, and the *Vyavahara Shastra* or secular law of the Hindus. The law in this second stage of social progress was merely a body of rules borrowed from the customs which had grown into tradition from the primitive stage of the society concerned. When the State gave them the sanction of its law, it did not purport to make the law but

expressly declared the customary law that had existed and had been handed down by the force of usage and tradition. Another feature of this second stage of social progress is that the idea of civil or secular law with the State as its upholder was confined to but matters strictly relating to person and property and the most urgent economic needs of the society.

As the society advanced in intelligence and inter-
 course with the outward world
 and in its economic, social, and
 moral conditions, the idea of law
 and the theory of political development again became
 a union of legal and moral interests. *Law* was no
 longer *secular custom*, confined to a few matters of
 person and property, but became morality and legality
 combined and fostered the spirit of individualism.
 Such was the period of the Stoics and Socrates in
 ancient Greece and the classical period in ancient
 Rome from Augustus to the 3rd century before Christ.

It is more to our purpose, to dwell at some length
 on this third stage of legislative
 and political development in
 England. This third stage of English law and political
 progress is described by some juristic historians as
 having been entered upon in England when the law of
 equity began to be laid down by the King's Lord
 Chancellor to correct and soften the rigours, inequalities,
 and uncertainties of the English Common Law.
 Its roots, however, lay deeper than that. The law of
 Equity, as we all know, was the law of God, which as

the law of nature or reason is eternal, and therefore, above the common law made by man out of customary usages and traditions. It was the Stoics and Socrates in ancient Greece who originated the idea of the existence of such a law of nature according to which all men are equal in the eyes of God. The Romans borrowed the idea from the ancient Greeks. For instance, Aristophanes in his "Spirit of The Unjust Argument" is cited as voicing the Greek idea of the law of nature as the law of righteousness:—

Hear'st thou Heaven? Sleepest Thy thunder?

Right divine declared for rapine, laws invoked to sanction
plunder?

Take a warning in thy triumph—godless power is frail to
last.

(See the *London Spectator*, July 29, 1916, from which these lines, applied to Germany now, are taken).

And so also Cicero later on :

"There is indeed a veritable law, a true rule of reason in harmony with Nature, unchanging and eternal, which by its command should summon us to our duty and by its prohibition warn us from doing wrong; but though it does not command or dissuade good men in vain, it fails to move the wicked by command or prohibition. This law may not be counteracted, nor repealed as to any part nor wholly annulled, Nor again can we by senate or people be exempted from this law. And we seek none other to explain to us or to interpret this law; nor will it be one law at

Rome, another at Athens; one law in our time and another law in time to come; but one law, eternal and imperishable, it will bind all peoples in every age." (See this quoted in an article on *Nature in Morals and Politics* in the number of the *International Journal of Ethics*, April 1910, Vol. XX. No. 3, as a fragment from a lost work of Cicero preserved by one of the Christian fathers).

The Jews of the Old Testament spoke of this law as "the still small voice within,"
 Law of Righteous- the law written on the tablet of
 ness. each man's heart. That law of
 Nature as the law of God, eternal and imperishable making for the moral order of the Universe and therefore binding on Governments, was familiar to ancient India, of which Max Muller says that when after Alexander's discovery of India the Greeks first became acquainted with this country, they found that the Aryans recognised *law* in the natural world, watching over the order of the moral world, and embodied in the word *rita*, which means righteousness, the conquest of right over might.

This law which made for individualism and the equality of all men was emphasised by Christ and his apostles as "the Kingdom of God within us" and a new and more living interpretation was given to it which not only survives to our own day but has been steadily working itself into the fabric of modern polity. When the Roman Empire decayed and gave way to the Middle Ages, the social conditions were

such that all idea of individualism was obscured. When the Middle Ages gave way to the Renaissance in the 13th century, and brought in the idea of nationality, that idea centred round Sovereignty. But the Renaissance by reviving the study of the classics of Greece and Rome prepared the way for the gradual egress of the idea of the law of Nature. It is just about that time that the idea of Equity as the law of God, supreme above, and, therefore, entitled to supersede, when necessary, the Common Law, began to rise in the sphere of English law and politics. Sir Isaac Newton's discovery of the law as to the centre of gravity confirmed people's belief in the law of Nature as the law of Reason, because, Newton taught by his discovery that Nature was more Reason than Reason itself. The Puritan period followed and sharpened the individualistic spirit of law and morality combined. The Puritans taught that "Government and institutions pass but the soul remains and that, therefore the sphere of enforced command" by the law and legislation of the State "should be restricted within fixed limits". In other words, Government by law came to mean, according to the Puritans, a Government which governs least.

This was the *laissez faire* theory of legislation which, taken up by Locke, travelled to France, was there taken up by Rousseau and became the battlecry of the French Revolution. The individual was considered to be free by Nature, the State or society a mere artificial creation. Legislation again in this state of society

Laissez faire Theory.

became individualistic. That was the condition of law in the nineteenth century, when the State ruled on the principle of individual liberty, restricting it within narrow limits only for the purposes of police. Darwin's theory of Evolution with its biological law of the survival of the fittest only gave added force to that individualistic spirit of law and Government. The legislative principle and the principle of Government following from it as a logical conclusion, which dominated State policy in England may be shortly stated as follows:—(1). Every man has the right to freedom (2). Leave every man to himself and he knows where his interest lies. (3). Leave men to the field of competition, because competition is the law of nature and leads to industrial and other social progress.

This was the *laissez faire* theory of Government in England largely influenced in the 19th century by the biological law of Darwin. It prevailed in full force as the dominating keynote of English legislation and political development until about 1872.

From 1872 the *laissez faire* theory of politics in general and legislation in particular began to disappear and since then the social theory has gone on gaining ground. As a matter of fact that social theory owes its birth to the very champions in England of the *laissez faire* theory who hated socialism. That is one of the paradoxes of English history and politics and one of the results of the fact that the British constitution, being partly *unwritten*, is elastic and makes for growth adapted to

each succeeding stage of the people's life. The keynote of the individualistic theory was that every man should be free. Its champions in England in the 18th and the 19th century found that the Negroes in West Indies were not free but were held as slaves. English public opinion was moved to indignation at that sight. And when the English public sought to abolish West Indian slavery, their attention was called to the fact that there was slavery in England itself because of the condition of English children in English factories. That led to the factory laws as the result of the humanitarian movement due to Robert Southey and Lord Shaftesbury. And, as Mr. Dicey points out in his *Law and Opinion in England*, it is the factory movement that laid first the growing seeds of social legislation in England and became the first "battle-field of collectivism against individualism." It went on receiving impetus from the rise in the growth of industry and commerce necessitating combinations of individuals into large organisations with their own rules and regulations, the substitution of mechanical for manual labour, the discoveries of science, especially medical, proving that the evils of poverty and disease can be eradicated by preventive and curative measures adopted by society on a large scale instead of being left to individual care and effort. But while all this process was going on in favour of social legislation, the *laissez faire* theory of individualism supported by the scientific discovery of Darwin and the evolution theory of society of Herbert Spencer were still holding.

Prof. Huxley's Romanes lecture on Oxford in 1893 marks an epoch not only in the progress of scientific but also of political thought. That lecture was all the more remarkable and created a profound impression on the public mind, because Huxley had till then supported strongly Darwin's theory of Natural Selection and the law of the survival of the fittest flowing from it. Darwin's theory had affected the political and social thought of the time by countenancing *competition* as the law of the *cosmic process* governing and limiting social progress. Huxley in his Romanes lecture declared that it was not true that "because on the whole animals and plants have advanced in perfection of organisation by means of the struggle for existence and the consequent survival of the fittest, that, therefore, men in society, men as ethical beings, must look to the same process to help them towards perfection". He declared that "social progress means a checking of the cosmic process at every step and a substitution for it of another which may be called the ethical process". That ethical process marks human evolution as distinguished from the evolution of organic life, because man is an *ethical* being, has the power of self consciousness and can master his being and his environment. He is rational, whereas the organic world is a mere machine of Nature. That constitutes the value of man as the unit of his society ; he can make his society because he can combine with his fellows, and instead

Huxley's Rational
Selection Theory.

of competing, can co-operate with them and thereby advance the cause of social progress. The cosmic process meant competition, the destruction of the weak by the strong, and a perpetual war for life ; but the ethical process meant that man finds his life by losing it in union with his society—"in place of, ruthless self-assertion, it demands self-restraint ; in place of thrusting aside or treading all competitors, it requires that the individual shall not merely respect but help his fellows ; his influence is directed not so much to the survival of the fittest as to the fitting of as many as possible to survive. It repudiates the gladiatorial theory of existence" This lecture of Huxley's deserves attention as marking an important stage in modern political thought, because it furnishes the key to the principles which govern the legislation and political atmosphere of our time in all civilised countries. The lecture may be said to have established the following points with reference to social progress :—

(1) Man as an individual being is a rational creature, and is governed by the law of *Rational*, not Natural, Selection ; (2) while his social environment creates him, he can re-create that environment by regenerating it ; (3) he and his society are needed for one another, for social and individual progress—individualism alone leads to egoism, socialism alone to bureaucratic officialism—both must be complements of each other ; (4) co-operation with society, not competition, with his fellows, can

alone enable him to fulfil the end of his being and advance social ends; (5) *competition* is the law of his natural life only so far as it is necessary to save him from the temptation to be idle and useless; and (6) it is the duty, therefore, of the State as the social organism to see that every individual composing it is fitted by education, sanitation &c. to be a *productive* member of his society constituting that State.

These were the political principles directly deducible from *the ethical process* theory propounded by Huxley.

How Political Ideals
Arise.

But that was not its only influence on the political thought of the day. It had an indirect influence which has been making itself felt in our days even more perceptibly than in any previous period of history. When a people become discontented with the existing order of Government, the dissatisfaction may arise because of the sufferings and injustice which that order inflicts upon them. But where the existing order is such as to lead to no sufferings or injustice but contributes to peace and their material, mental and moral strength and yet there is discontent, so that a cry for change in the constitution of Government and in the laws is heard, it is usual to say that the cry is the result of mere sentiment. But observe how in our own days British statesmen speak of Ireland's cry for *Home Rule*. It was not long ago that Mr. Lloyd George, speaking in the House of Commons on the question of Ireland's demand for Home Rule, said that, materially speaking, Ireland was even better off than the British Isles, that the demand for

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Home Rule was a mere sentiment and 'that the sentiment of a people must be respected and duly given weight to. Why? There is a historic ground for it. History shows that *ideals* are created in the minds of men not merely by the material pressure of actual grievances and wrongs but also and even more by a comparison of their country with other countries. In the Middle Ages ecclesiastical unity under the Pope led people to think of political unity under an Empire and of the unity of learning under Universities. A people's sentiment is, therefore, a fact of human nature which wise statesmen have taken into account in all periods of history but never more than in our own days, because the lesson of history on that head is brought out with added emphasis and turned into a political creed and principle of legislation by the verdict of science as it has been delivered by such scientists as Huxley through their theory of the ethical and rational process of social progress as distinguished from the cosmic or natural process. Man and the society of which he forms a unit are *idealists*, live in imagination as much as in sense and can create in their own minds new situations for realisation in their society by a comparison of their existing condition with others.

From what I have so far said as to the successive steps of the development of the legislative policy of a people who are progressive, it follows that that development runs along three main stages of social

Stages of Legislation in Hindu Polity.

life, (1) the stage of socialism dominated by the patriarchal system of social life which is called "the period of blood unity and custom" (2) the individualistic stage and (3) a return to socialism but with individualism combined, each attempting to soften the rigours of the other and both co-operating as mutual complements. These three stages are represented in our Hindu social economy by, first, the age of the Vedas, when the individual was nothing, tribal life and custom was everything and the patriarch of each family ruled with immense, almost despotic powers. Next came the second stage, the stage of individualism represented by the age of the Upanishads with their emphasis on the *Individual Soul*, its power of contemplation, self-consciousness and idealising. That was followed in its turn by the age of the Mahabharata and the *Gita* where society and the individual are made to co-operate for mutual good. Some critics of the *Gita* have made it a charge against its doctrines that they are self-contradictory because in some parts the *Gita* preaches *individualism* by upholding the life of solitariness and contemplation (विविक्तदेशसेवित्वमरतिर्जन-संसदि) and in others it preaches the necessity of social activity. But the Mahabharata, of which the *Gita* forms a part, is for a union of the individual with his society. When in the *Mahabharata* Parasara says to Janaka; "Let no man, however unhappy his lot, despise himself; man as such, though a *Chandala*, is a noble creature in every way", he puts in a nutshell the creed of individualism represented by Bentham's formula that "each head counts for one and no

more." The *Gita* takes up that creed, and, for the purpose of enabling Arjuna to find the worth of his own individual being, advises him to turn the light of his own soul on himself by self-introspection, by becoming a man of knowledge and reason with the aid of silent and solitary contemplation; and for what? Not for leading the life of a recluse and dreamer but to be a man of action, with duty as his watchword, for the welfare and conservation of society. लोकसंग्रहमेवापि संपश्यन्कतुंमहसि "Action, the performance of duty must be your rule of life for the conservation of social well-being". That is the doctrine of politics and legislation of modern States—individualism and socialism united and helping each other.

In what I have said about the social and individualistic character combined of the doctrines of the *Gita* as marking the third stage of Hindu polity, I must guard myself against being understood to say that the ideal preached by the doctrines represented the real state of that polity as it existed in the times of the *Gita*. It is always a moot question whether, when you find an ideal form of government described in an ancient book, the description represents the actual conditions as they existed when the book was written or is merely an idealistic picture. To that question the historical method of political study rightly carried gives a safe answer. Just as laws in the shape of customs existed before the State as a lawgiver came into existence; just as men were united

Was the *Gita* ideal
a fact?

in society before philosophers preached social cohesion; just as men were moral before saints said they should be moral; so the ideal of a good government must have existed to some extent as a fact side by side with the evils and corruptions of bad government to have led the philosopher to bring out the ideal, emphasise it, and point out to his people the blessings of it so as to create in them a greater longing for it. The description could not be altogether a fanciful picture. Shakespeare in his dramas gives a number of high ideals of life and morality but we know that his age was far from them in point of reality and practice. The Tudors were masterful, the country was imperfectly united, Shakespeare does not mention the *Magna Charta* at all and delineated the masses with the irony of veiled satire. But the Tudor sovereigns, hard as they were, united the people as against the threats and fears of foreign conquest and altogether a spirit of adventure and fearlessness prevailed as the atmosphere of the times. That was the real which had in it the ideal of a strong liberty-loving people. And Shakespeare dramatised the fact of the ideal as it existed. Under the Renaissance, when the idea of nationality came to be preached by Dante and others, they idealised what men had already begun to feel and live as a fact—small states with their sovereigns as against the imperial unity of the Middle Ages. So also, when the *Gita* preached the doctrine of individualism as necessary for social ends, the ideal must have existed to some extent as a fact in the period of the *Gita*, struggling with hostile forces, and

the *Gita* idealised the fact all the more to impress it upon the people of the time.

It is held by some writers that the form and spirit of social legislation, which has of late marked laws in England, came in 1897 from Germany, where, it is said, it began in the eighties of last century with the workmen's insurance measures announced to the Reichstag by the Emperor on November 17, 1881, and resulted in 1883 in the law providing relief by way of pensions for sickness, in 1884 for accident, and in 1889 pensions for invalids and old persons. In England, the law providing compensation for accidents to employees in industrial concerns was passed in 1897; old age pensions became law in 1908; and in 1912 was passed the law providing insurance against sickness and unemployment. Before we accept this view that the present social system of English legislation has been borrowed by England from Germany, we must test it by applying to it the historical method of political study. At the outset it should be remembered that the modern German State is framed on the State theory of Hegel, the German philosopher, according to whom the State only, not the individual forming its unit, is free as the sole spiritual entity. German politics and legislation have ever since proceeded on that theory and we now witness its effects.

In England, however, the legislative spirit from the beginning of the Common Law a thousand years ago has been marked by the social tendencies of individualism. Before William the Conqueror and under

the Anglo-Saxon rulers, the Common Law was purely individualistic. The phrase, "an Englishman's home is his castle" formed its central principle, meaning that every man must be left to play his own game of life as he likes, so long as he does not interfere with other men's liberties. William the Conqueror brought the *feudal* law into England which introduced into English Common Law the germ of social legislation. *Feudalism* meant that the lord and his vassal were bound to each other by certain duties and liabilities arising out of their mutual relation independently of the will or contract of either. The vassal was bound to render services to the lord; the lord on his part was bound to feed, keep in comfort, protect and maintain in health and strength his vassal. This feudal principle had far-reaching influence on the political, and consequently on the legal, development of England. When the Barons won the *Magna Charta* from King John, they based the right of the Englishman to his ancient liberties on the ground that, just as they owed under the feudal law certain duties to their vassals, so equally under the same law the king owed certain duties and liabilities to his subjects. The great Charter thus emphasised the social view of the feudal law, which was moulding the individualistic spirit of the old Common Law. When Hampden refused to pay the tax called shipmoney, he took his stand not upon the illegality of the tax as an abstract question of law or right, not even upon the ground of his individual liberty, but upon the plea that, if he paid the tax, he would be violating the feudal principle sanctioned by the

Magna Charta as defining the rights of, and in consequence imposing certain duties upon, the King as the feudal lord of his subjects. That laid down the principle that, while every man is free to do as he likes so long as he does not interfere with another man's freedom, the moment he is brought into relation with another man, the same law that gives him individual liberty imposes upon him, as upon the other man, in virtue of their mutual relation, certain duties and liabilities, independently of the will and intentions of either, for the purpose of preventing both from violating each other's individual liberty. For instance, mark the difference between English law and the civil law of the Romans which has become the continental law of Europe, in the matter of such contractual relations as master and servant, husband and wife, employer and employee, principal and agent, insurer and insured, landlord and tenant. Under the civil law, the rights and liabilities are determined with reference to the terms of the contract; but the English law has all along attached certain rights and liabilities to the relation, without any reference to the intention of the parties or the terms of their contract. That is the feudal principle.

It is not only instructive, but I should say fascinating, to follow the phases and facts of English history showing how the very spirit of individual liberty, which forms the mainstay of the political development of England, has bred the spirit of social legislation. For instance—to take but one or two of the simplest facts of that phase as enabling us to vividly realise the point I am attempting to

make out—the great judge and lawyer Coke was a most stubborn advocate of the individualistic spirit of Common Law. It was that rugged spirit of his, which led him to warn King James that the divinity of law was above the divinity of kings—thereby suggesting that the king representing the State owed certain duties to his subjects, non-fulfilment of which rendered him liable to punishment for breach of law. Lord Eldon was a most bigoted Conservative, who opposed tooth and nail every attempt to change the Common Law; and yet as Lord Chancellor he introduced by his decisions as an Equity Judge changes which were of a radical character and sowed the seeds of social legislation in England. Lord Shaftesbury hated the very name of socialism. Yet he was the father of factory laws in England, and those laws mark the beginning of the social spirit of English legislation. Mr. Lloyd George, the present Prime Minister, began his political career as an individualist, and to this day he remains so, he will say, if asked. But we all know how much of the present-day social legislation in England owes to him. It is the innate sense of the feudal principle in Common Law which has slowly and steadily grown in the British mind on the basis of its individualistic doctrines since the time of the *Magna Charta*. And it now forms the basis of the legislative policy of the British Empire. Other states are tending in the same direction.

We are in a position now to see in clear perspective what and how much of truth

Maine's formula stands as to Contract.

there is in Maine's political formula that "the movement of all progres-

sive societies has hitherto been a movement from *status* to contract." Put in that form, the statement may be taken to mean—and that is what Maine probably intended it to mean—that, in the primitive stage, each individual of the society is not his own master, as far as his power to deal with others and enter into contracts is concerned, but that, as society advances, the individual becomes emancipated, and his power to act as he likes and enter into contracts gets more and more enlarged. Does this enlarging freedom of the individual mean that, not only does the number of individual units who become free go on increasing, but that the sphere of contract also, in the case of the individual, increases *pari passu*? Maine's formula is true, if the former is its meaning. It is not true, if the latter is intended to be conveyed by it. In the stage of *status*, the number of persons having the *liberty* of entering into contracts is enjoyed only by the heads of families. When that stage is gone, each adult, whether he is the head of a family or not, gets the right of *contract* on his own individual account. So the sphere of contract is enlarged only so far as the number of persons having the right to contract goes. In other words, that number increases and goes on enlarging as society advances. But the formula is not true, if it is intended to mean that, not only does the number of such persons increase as society progresses, but the right of contract also increases in point of its subject-matter and its extensions. It will take me long to develop fully this thought but one instance will make my meaning clear.

Take our own Hindu polity. In its primitive conditions of life, when the father of a family ruled and all other members were under his subjection, eleven kinds of sons were recognised by the law. That is to say, the head of the family, if he had no son born, could make one artificially by his wide power of contract extending over *eleven* modes of sonship. But as society advanced and the power of the head declined and every male member of the family became free to contract as and for himself, those twelve kinds of contract with reference to sonship became reduced to but one, and that was sonship by what we call adoption. That is to say, while every man became free to contract, the contract itself became more limited in extent than it was in the primitive stage of society.

That is the phenomenon which marks every advancing step of a progressive society. Individual freedom means an increasing number of free persons but the freedom itself is bound down by limitations. As civilisation advances, social cohesion grows, the state imposes restrictions on individual liberty by means of liquor laws, health laws, moral laws, and in a variety of ways. So when it is said that society moves from status to contract, the true meaning is this: as the sphere of free persons capable of entering into contracts becomes enlarged, the sphere of contract itself within the enlarged sphere of persons capable of entering into it becomes narrowed. That is the principle of social legislation underlying the laws

Social Theory of
Politics & Legislation.

as to compulsory education, compulsory vaccination, compulsory sanitation and so on. Hence it is that the laws of a democracy seem to hamper individual liberty while professing to foster it.

The basis of modern legislative policy, then, is the socialisation of law and government by reconstructing them on the lines of individualism and collectivism combined. It recognises that every individual, besides his individuality, has his social consciousness and that he must find his life in his society and State.

So far, it may be admitted, individual liberty gains by its curtailment. But the question arises: Does it not distinctly lose by the fact that the Legislature delegates the function of legislation to boards, commissions, and other *executive* bodies or officers; and, ousts the jurisdiction of Courts of law in certain matters by conferring the *judicial* function upon executive officers.

Let me take each of these two tendencies of modern democratic legislation and deal with it so as to point out the principle underlying it and the spirit moving it.

First, as to the increasing tendency among modern democratic Legislatures to delegate their legislative powers to boards, commissions, and executive departments of Government.

The real reason of this marked tendency is that as industry and commerce increase, and the economic

conditions of the social life become more and more complex, the business relations of the society become more and more industrial and urban, with the result that the rules regulating those relations increase in their character of *technique*. Hence every social problem becomes a problem for the expert. The Legislature is a body which cannot be expected to consist of experts in any and every department of knowledge and social economy. Therefore, it is necessary that the Legislature should merely pass a general law on any social problem and delegate to those, who are experts in that problem, the power to make further laws and regulations providing for, and making distinct, the *technical* requirements of the problem, to secure definiteness of law for the guidance of the public. There is no abandonment of its legislative function by the Legislature in that, but rather an extension of that function in favour of those best fitted to legislate for the complex conditions of a society which is day by day being industrialised and socialised by the growing intricacies of trade and commerce and the discoveries of science. This is the principle on which jurists support the growing tendency of modern democratic Legislatures to invest executive departments and officers with legislative powers. And you have a trace of it among us in India in the fact that, while, till about 15 or 20 years ago, all the legislative measures of the Government of India used to be drafted by the Law Member of that Government, latterly each department of the Government drafts its own Bills, the Law Member

drafting only those which relate to the general civil and criminal law.

This is the underlying principle ; and so far as it goes, it is not only wholesome but necessary for the modern economic conditions of social life. But it has its dangers. It sets up the *experts* as *legislators*, and experience shows that *experts*, while excelling in the sphere of their own business, are apt to be and in fact have almost invariably proved to be narrow-minded. To them their special knowledge and business form the whole world. And their legislation becomes narrow too and deals with human beings as mere machines. What is the remedy for that drawback of this legislative policy?

The remedy is in the hands of the democracy itself.

Liberty and Democracy. It chooses its legislators and its rulers and those rulers choose their experts. If the experts go wrong in legislation, the democracy, as the sovereign power, is at hand to correct and to change the experts. Therefore, the democracy has no reason to complain. That is the theory of the modern legislative policy ; how far in practice it can be or is realised is a different question. Like all ideal theories, it is hard of realisation. Hence the necessity of philosophic jurists and statesmen, who can warn the democracy against the perpetual danger it lies in, of preaching liberty on the one hand and undermining it on the other. "Eternal vigilance is the price of liberty ;" but such vigilance can come, not so much from the people, or even their representatives who are

apt to lose themselves in conformity to the popular cries of the day and be subject to the cult of incompetence, which is the bane of a democracy; nor so much from the officials who are unable to see beyond the daily round of official duties; as from thinkers who, by the threefold method of political study recommended above, can read wisely and dispassionately the signs of the times and discern the dangers ahead.

Next, as to the tendency of legislation in modern democratic States to substitute the social idea of justice for the individualistic idea, by ousting the jurisdiction of the ordinary Courts of law and conferring that jurisdiction on the *executive* departments of Government, the principle underlying is this.

**Courts of Justice
and the Executive.**

First, Courts of law deal with disputes on the general principles of *law* known to the legal as a close profession with its own legal traditions. This was all right and for the good, so long as social life was simple, human intercourse and transactions were comparatively limited in point of quantity and quality; and law arose out of and was dictated by almost purely political considerations. But under the growing industrial conditions, social life has become more complex, the range of transactions has increased, every business has come to have its own laws with its *technique*. Formerly, law touched but a few points of a people's life: now it meets him at every step—formerly it met him as one individual dealing with another or as a member of his church or subject of his State. Now it

meets him in a variety of other ways, as a member of his trade, his club and so forth. Judges presiding in Courts of law are not acquainted with the *technique* of these; therefore, it is necessary that disputes in such matters should be determined by experts.

Secondly: The law of Courts of Justice and judicial discretion have become proverbial for their uncertainty but modern conditions of life call for definiteness of law. And experts alone can make it definite.

Thirdly: The law of Judges is individualistic. A Court of law deals with a dispute, as between A and B; whereas, under modern conditions of life, economic disputes involve wide social interests.

Fourthly: Litigation in a Court of law has proved to be costly and delaying, whereas modern conditions call for despatch. Besides, Courts of law, accustomed to treat law as made of precedents, have proved conservative and not amenable to social sentiment and public opinion.

Therefore, the political theory and practice of modern legislation are tending more and more in the direction of special courts for particular classes and kinds of adjudications; such as the children's court, industrial arbitration courts &c.

This is the principle; but in its operation no doubt it involves a danger to individual liberty and arms executive officers with wide and irresponsible discretion. But, there again, the officers are the officers

of a democratic Government. It is the people who have chosen them through their rulers, who are of their choice. If the officers go wrong and abuse their judicial power exercised in virtue of their executive capacity, the democracy is at hand to insist upon their dismissal.

Such legislation is, therefore, a necessity of a democratic State with its life developing in all directions, religious, social and industrial, from year to year.

I have so far dealt in this address with the stages through which political theories in their legislative aspect have passed, in England in particular, during these thousand years, until in our times the theory that dominates the politics of the country through its legislation consists in the individualistic and the social spirit of liberty combined. What I have endeavoured to point out will be of little practical value to us in this country in these days, if I do not equally endeavour to show the bearing of it all on the political theory of the legislative policy of British India. Has that theory with its practice proceeded on lines similar to those in English history? And is it true to say of legislative policy, as it obtains at the present day in British India, that its spirit is both individualistic and social, as it is in England? And if it is, what does it or must it lead to?

Before dealing with that aspect of the question, it may not be irrelevant to ask, whether before the advent of the British Government in India, this country

had passed through the stages of political theory and legislation through which all progressive societies pass.

Those stages, as I have endeavoured to show, are successively (1) the stage of custom; (2) the stage of competition; and (3) the stage of co-operation.

These three successive stages of the progress of a people are compendiously described by Cardinal Newman in phrases, which bring out respectively their marked features, in other words, the good and the evil that besets each stage. A people, he says, are either an *exterior people*, or an *interior people*, or a people who are both *exterior* and *interior*. By an *exterior* people, he means those who, being in the primitive conditions of society, have not developed the spirit of self-consciousness and self-introspection; who are led by the passing phases of surrounding life, and things external. Custom is their law; and the custom is what their senses, which are influenced by things *exterior*, make it. Their consciousness is *institutional*. Such people, when they cling to their *exterior* life, die of stagnation and inanition. They are the destroyers of their own civilisation, such as it is. They do not die but continue, if they develop the spirit of individualism; that is to say, if they become self-introspective and contemplative, and realise that man is a living soul—a small world in himself. That is why Cardinal Newman calls them an *interior* people, people who, instead of turning to and relying upon external Nature and its forces, turn to the Nature within their hearts and

minds. This self-contemplative, self-introspective spirit breeds the soul of individualism in each man, who thereby becomes, so to say, emancipated from the thralldom of custom. Then begins the age of liberty. This was what happened to the Greeks in the 6th century before Christ when the Stoics and Socrates rose with their philosophy. But the individualistic spirit there led to individual independence of thought and action, which in its turn led to sects, parties, factions and threw the State into the confusion of disunion, until, weakened internally, it fell a prey to subjection by the foreign power of Imperial Rome. Plato sought to prevent the cataclysm, which threatened the Greek Society and State, by propounding his *social* theory of politics and law in his *Republic*; but it was too late. The individualistic spirit had gone too far and done its mischief by its life of *competition*—each man for himself and no God, no society or state for all. Greece was conquered by Rome. Rome, starting from an *exterior*, became an *interior* people, and in her turn shared the same fate, was overrun by barbarians because of the individualistic spirit bred by Greek philosophy. Hence Cardinal Newman points out that a people, who are exclusively *interior*, die out by foreign conquest, and that the enduring progress of a people is secured only when they proceed on the lines of the *exterior* and the *interior* life combined—when and so long as, that is to say, they are institutional and also mystical. How does this apply to India? Are we an *exterior* or an *interior* people, or are we both combined?

We have been for centuries subject to foreign conquest. Therefore, one must infer, according to the historic canons above laid down, that we have been an *interior* people, a people given to self-contemplation and too much wedded to the individual soul, neglecting the social consciousness. In his history of Sanskrit Literature Max-Muller tells us that in the songs of the Rig Veda we find little philosophy born of self-contemplation by the individual—but that we do occasionally find wars of kings &c., the active life without,—the mark of an *exterior* people; that only after the Aryan tribes had moved southward and taken possession of the rich plains and beautiful groves of Central India, they seem to have turned their thoughts from the world without to the spirit within; and that then began the *interior* life with speculations as to the immortality of the soul, life and death, and death as the birth of a new life. This life with the spirit of asceticism, neglect of the world, has formed the dominant feature of the Hindu mind ever since and the multitude of our philosophic thought has affected our political and social nature. *Hence* the fact of our life as an *interior* people has resulted in the foreign conquests.

But, on the other hand, foreign conquests in our case have not swept us and our civilisation, such as it has been, off the face of the earth, as it did in the case of ancient Greece and ancient Rome. We are still a live people with our religions, ancient customs, and traditions, though the life has not been as vital as it

might be. Foreign conquests, as in the case of other *interior* people, have not destroyed us and our civilisation. How can we account for that ?

One way to account for it is, in my humble opinion, this. We have been developing all along both the *institutional* and the *mystical* consciousness of life ; the individualistic and the social spirit have been struggling to come together ; they have not come together and formed themselves into mutual allies to make our civilisation as vigorous and progressive as it should be, because (1) of the ante-social and anti-individualistic character of our institution of caste in the form and condition in which it has existed in India, and (2) because of the consequent arrested growth of the idea of freedom as a force which is neither exclusively religious, nor social, nor political, but is all these, and which, when it operates in the *whole* life of a people, makes for their progress as a nation. It will take me long to develop this line of thought. But let me invite your attention to a few salient considerations.

We begin with the age of the Vedas, which are regarded as the source of all our politics and law intertwined with religion and morality. The Vedas grew out of our customs and the customs were made by the people among us as among other people. What Julian in Dig. I. 3. 32. says of the origin of law and politics among all people in general is true of us that "those rules which the people without any writing has approved bind all persons, for what difference does it make whether the people declare their will by their votes or by things and acts.?" The people were

the law-makers in the times of the Vedas; and throughout in India they have more or less remained so for the most part up to the advent of the British Government. That both Max Muller and Sir Henry Sumner Maine say is historically true—our kings before that advent seldom legislated; the king had to obey the laws made by the people and the people were left to manage their own affairs, the king preserving the peace and levying the taxes for its purposes. That was so even during the Mahomadan period, when such law-givers of Hindus as Jimutavahana in Bengal, Nilakantha in Gujerat, Mitra Misra in Northern India, flourished and codified the laws. Our law-givers were first our *Smriti-kars*, the authors of the *Smritis*, and their commentators called the *Nibandhakars*. They were law-givers in a limited sense. They for the most part recorded in writing and codified the unwritten laws which had grown out of customs made by the people and gave them a legal and moral turn of social stability and cohesion as they understood it. They were called *Shistas*, or sages. In the times of the Vedas the laws were more or less exclusively of the *social consciousness*; the individualistic spirit was absent. The Upanishads with their doctrine of the indwelling soul represented the stage of individualism which reached its climax under Buddha. But neither the Upanishad nor Buddha was anti-social. Buddha never condemned the Vedas, which were religiously regarded as the fountain of all political, social, and legal polity and were social in their spirit. He only

denounced the ceremonial and aggressive domination of Brahmins. The result was that the Brahminical lawyers, who codified the laws and shaped the legislative tendency of their times, learnt to distinguish between the *secular law* and *religion*, and to codify in a manner so as to emancipate the individual without making him break from the social spirit. You see that best reflected in the teachings of the *Gita*. Our civilisation has been so far on the right line; but unfortunately the line has stood deflected, because the *social* spirit has been the spirit of castes fostering the individual in such a way as to restrict his social vision to his caste, not to his country as a whole. The idea of the State as a spiritual entity standing for the people as a whole to develop the personality of all, whether high or low, has remained clouded.

That brings me to the political theory and practice of legislation under British rule, the spirit of which, rightly understood and carefully followed, is to develop that personality. Thus it would seem British rule has come in as a necessary sequence in the line of our political evolution with its mission to remove the cloud that has darkened our march forwards in the direction of self-government. I will define the broad aspects of that theory and practice briefly.

**British Indian
Legislation.**

The principle of religious toleration and neutrality, which secures to every person the liberty to follow his own faith, the principle embodied in the Parliamentary statute of 1833 that in the eye of law all men shall be equal, that there shall be no

distinction of race or religion or caste in regard to appointments, high or low, under Government, the laws legalising widow marriage, prohibiting *Sati* and infanticide, and removing the disabilities as to the right of inheritance in the case of persons who have abjured their ancestral faith and been, therefore, out-casted, the right of suit against Government—all these represent the individualistic policy of administration. It dates and is derived from the influence of the English Evangelical, otherwise called humanitarian, movement of the 18th century, assisted by the Benthamite movement of the earlier part of the 19th century. These laws have their root in the principle of individual liberty. In fact, Lord William Bentinck in whose time as Governor General of India *Sati* and infanticide were abolished by law, distinctly affirmed that the British policy was to instil into the Indian the self-respecting idea of individual worth and liberty so as to enable the people of India to stand on their own legs. The social side of British legislation, which in England has been most marked with the rise of the democracy, has also been active in India. Take the *ryotwari* tenure of landed property. The question has often been debated whether the State is the proprietor of all land, entitled to rent from its holder, or only the sovereign power entitled to a share of the produce as a tax for police purposes. The former theory has been supported on the ground that the State has from the times of Hindu kings been the proprietor of land in India and that its holders have been the State's tenants, paying it its share of the produce not by way of a tax

but rent. But whatever the ground of the *ryotwari* tenure, the land-laws of the British Legislature take their cue mostly from the socialistic spirit, which is familiar to legislation in Europe as the nationalisation of land, *i.e.* that the State, being the owner of all landed property on behalf of the people, parts with it in favour of individual holders only so far as such alienation conduces to *personality*, meaning that the land-lord shall enjoy his land for the purpose of fulfilling his obligations to his social environment represented by his Government as a Government by and of the people and for the people. It is upon that ground that the State founds its right to what is called the unearned increment. In England the State's right to the unearned increment in private property was advocated a few years ago by Mr. Lloyd George and there it is still in the developing stage. Here in India it has been in full force since 1872, if not earlier; and has been made the basis of the right of Government to enhance the assessments on land periodically wherever the *ryotwari* system of landed tenure is in force. The income tax is another form of social legislation—the State takes a part of the individual's income and administers it for *social* purposes. The Abkari law is another. When the late Dr. Norman Macleod, who was in the sixties of last century Queen Victoria's Chaplain, travelled through India in 1868 and saw the palm trees bear numbers marked in white, he was told that they were marked for the purpose of checking the illicit distillation of liquor and securing the *abkari* revenue. That struck him as a novel

form of taxation. When he returned to England and published his impressions of India in the monthly called *Good Words*, he described that taxation with this exclamation: "Oh India ! Even thy hairs are numbered ! " That was the period when the individualistic or *laissez faire* theory was holding the ground more than the social in England, and Dr. Macleod, was surprised because he had been brought up in the theory and practice of Government as a power governing least and letting people alone as far as possible, instead of interfering with their liberty beyond the strict purposes of order and peace. But from 1872 the social theory of politics and legislation began to prevail in England over the individualistic with the growth of the democracy. The spirit of that social legislation has since more and more affected the legislative policy in India in a way. That spirit in its essence is three-fold :—

(1). According to the old English idea of legislation, which drew its inspiration from the individualistic principles of Common Law, the word *law* meant something different from the word *right* and carried no ethical content necessarily as in the Roman civil law with its definition of *Jus* as consisting in living honorably, not harming your neighbour, and giving every one his due. This life of the moral man was left by the Common Law of England to the will of each man with his inbred sense of liberty. In our Hindu jurisprudence, the word law originally meant *dharma*, duty, and included religious and secular obligations. But subsequently *law* became more secular than religious and was known as *Vyavahara*. Now, in England

the idea of right and righteousness as a *social* force has entered into the idea of law and legislation since 1872 and legislation places value upon individual rights more for the purpose of the social duties and responsibilities of the individual than for securing individual liberty.

(2) As a corollary to that, the ideas of *public good*, of *legislative expediency*, and of *justice*, have shifted from the idea of class legislation to legislation for the benefit of the masses. And it is since 1872 that in British India the social theory of politics and legislation has been prominent more than before in the shape of municipal and sanitary laws, salt laws, land revenue laws, relief to the indebted *ryots* against money lenders and other laws evidencing very markedly the two tendencies of the democratic legislation of England without the power of the democracy, however, behind it, as in England, as its condition precedent.

Those two tendencies are : (1) investing executive departments of Government and individual officers of Government with legislative powers and (2) investing them with discretionary powers in certain matters by ousting in respect of those matters the jurisdiction of the Civil Courts.

The question arises, whether this *social* spirit of Government by law in India has not been like putting the cart before the horse in respect of the said two tendencies.

In England before 1872 the situation was this: down to 1850 the tendency of the people as such was to be what is called "agin the Government," in respect of

its laws. From 1850 to 1872 the tendency was to say to Government: "let us alone"—a spirit of indifference to legislation. From 1872 onwards it has been more distinctly on the side of Government for its social legislation. And the fact noticeable as to that change is that in 1867 a portion of the working classes obtained a voice in the Government by having the franchise extended to them; in 1870 the compulsory system of education was introduced; and in the eighties the franchise to the working classes was extended.

The inference, which may be said to arise from these facts, is that the people in England have not only become reconciled to, but have become the champions of, the social theory of politics and legislation combined with the individualistic theory, because it has for its object the elevation and relief of the masses, and that object they began to appreciate after the boon of compulsory education had been extended to them, and after they had a voice given in the Government of the country.

Is that a legitimate inference? And ought not the same conditions which the inference pre-supposes—the condition of compulsory education and the condition of representative Government—to apply to India, if the social theory of legislation, which I have pointed out as markedly influencing since 1872 our legislative and administrative policy, is to be popular and effective? And how far is India prepared for those conditions? These are the questions which, I think, are suggested by the mode of treatment I have adopted today, in dealing with the legislative policy of modern civilized States in general, of England and India in particular. Those questions require separate treatment.
