Chapter - III.

CHANGING CHARACTER OF STATE ACTIVITIES.

In every stage of human community, there must be a law-creating and law-maintaining organ. Viewed in this sense, the state is an inevitable form of human society. That moment of the organization of every society, in which it presents itself as independent, dominant and capable of asserting its own conditions of life by force, forms always a distinct phase in the process of association; and whenever any particular society assumes this form it appears as the State.

The sovereign power of the state is not a mysterious subject which might be severed from the state itself; it is only a general personification of the sum total of the conception and activity of the state so far as it has become self-consciously and asserts its functions self-consciously. The sovereign power thus is not something absolute and immutable, but is always relative and is connected with the aim of the society which forms its body and continually
Changes with the culture, capacity for organization, social interest, with each of the agencies of human civilization severally. Thus the quality and character of the sovereign power of the state is never regarded as absolute but is conditioned by the aims and ideals that the state is expected to realise, the prevalent ideas of the scope and functions of the state.

In the primitive stage, the state had for its end to keep the peace in the society at all events.¹ Other functions were left to different other agencies. In a society organized on the basis of kinship, in which greater number of social wants were taken care of by the kin-organizations, two sources of friction might be possible viz. the clash of kin-interests of different kindreds and the kinless man who has no kin-organization to stand behind him in asserting his claims. In such a stage of society the primary task of the state is to maintain the general security. The function of the state during this period is that, in which men of different natures obtain each their place and participate in the affairs of the community, in proportion to their several abilities and virtues. Since however these different elements may come in conflict with one another, the authority of the state is required to prevent such
collisions. This authority may find its expression in the personal direction of God or the ideal king, the sage instead of the Deity and plays the same part in the guidance of the state which the pilot does in steering the ship.

During the periods of the Renaissance and of the Reformation, with the termination of the moral and political rule of the papal authority, societies, professing the most divergent principles entered the arena of politics, all equally claiming for supremacy, until at last the national state was formed and established its sway over all.

The function of the state during this period was solely regarded as the protection and perfect security of its members in every sphere. Such a theory, state for protection and perfect security thus, had to give greater prominence to the absoluteness and unlimitedness of the sovereign power and at the same time to its perfect independence.

It will be clear that such a conception of the legal supremacy of the state was possible because of the negative functions of the State. Its purpose was to leave the currents of life free, to remain in the background so that the forces of society might work out social destiny in an ordered way.
The nineteenth century is one of order and security. It is characterised by all the energies of a dynamic individual civilisation rising to a crescendo. It had seen European society sweep forward like a mighty river, broadening and deepening with each decade, turbulent at times but reasonably obedient to its dikes and never catastrophically destructive.

But with the advent of industrialism, we have been passing through a global change of life. Science and technology have ushered man into a new cycle of Industrialism - its effects on society. Indeed industrialism has been truly characterized as the benefactor and the villain of our time: "It has burned up the mortgage, but at the same time sealed us in a subtler slavery. It has created wealth and comfort in undreamed-of abundance, but only for a tiny fraction. But in the wake of its incomparable economic achievement it has left the thin, deadly trail of anxiety. The connecting fluids of industrial society begin to dry up; the seams harden and crack; and society is transformed into a parched desert, 'a heap of broken images, where the sun beats, and the dead tree gives no shelter, the cricket no relief, and the dry stone no sound of water.' "The social
order ceases to be society in faith and brotherhood. It becomes "the a-social society", "a society of onlookers, congested but lonely, technically advanced but utterly insecure, subject to a complicated mechanism of order but individually irresponsible". The social pattern which we are now having seems indeed to have been long switched off; it is still running, it is continuing to run from its earlier momentum. It has rescued the society from the feudal warrior only to hand it over to the accountant.

Thus from the beginning of the twentieth century, changes of staggering magnitude have taken place in the social structures and consequently in the functions of the modern states. Indeed present-day social structure is experiencing the impact of these dynamic and social changes affecting the character of state activities with the emergence of galvanic forces with the emergence of the new functions of the state. The rapid industrialisation has created such complexities in social life that the need for control is now keenly felt because of the sheer physical and technical conditions of life. Thus there has been a notable shift in the legislative policy of all modern states. Inspite of all the polemical controversies on the degree of public control of industries and public utilities, nobody now seriously laments for the decay of the unmitigated economic individualism of the nineteenth century. The state is now increasingly called upon to share the responsibility for creating conditions
of stable and full employment, for minimum standards of living, housing, labour conditions and social insurance, for fighting the "giants of idleness, disease, squalor and want."

As a result of these manifold state activities, the free economic society in which the state is a glorified policeman, but otherwise a disinterested spectator has been slowly but surely transformed into a controlled society in which the state has actively to participate in the economic and social life of the citizen. The notion of a government which is exclusively concerned with military defence, foreign affairs, police and legal justice, has now become a thing of the past.

Modern Government has to concern itself with factory and health legislation and other legal measures of labour protection, with the conservation of vital national assets and resources, with the control of investment and employment to mitigate trade fluctuations. In short the modern State is a social service State.

Hence almost a century ago, Spencer could limit the state solely to the function of protecting the life and property of citizens and repelling invasion. The earlier theorists, under the spell of the Darwinian doctrine were inclined to believe that progress was a
spontaneous and inevitable product of natural process working in an evolutionary manner. Human effort, they thought, could not hasten the process, but might fatally retard or divert the movement.

But the position has recently so much changed that it is now generally accepted that "the theory of continuous automatic inevitable progress is impossible." Thus Lester F. Ward has vigorously criticised such writers as Spencer and Sumner as "Nisarchists" and defended the entry of the state upon an ambitious programme of social legislation.

Prof. Cooley has aptly observed that "we must, of course, take the relative point of view and hold that the sphere of government is not and should not be fixed, but varies with the social condition at large."

We are indeed living in an age of transition, fastly moving from the days when the state was regarded generally as a passive organism intervening only when required to moderate friction that might from time to time occur in the relations between its various elements, into the age of planned society wherein the state is to be accepted as itself the driving force in social betterment. Whatever might have been the functions of a state in the past, it does no longer exist only for protection,
only to hold its position as umpire. It might originally have been founded on the need for protection, but certainly it now exists for more than that. Not only material security, but the perfection of human and social life, is what we aim at in that organised co-operation of many men's lives and works which is called the State. Hence the task of law also is continually changing in order to accommodate itself to the fluidity of life and society it is intended to govern. Indeed "the centre of gravity of all legal development lies not in legislation nor in juristic science nor in judicial decision, but in society itself."

When politically organised society had for its end only to keep the peace or at most to maintain peaceably the social status-quo, the function of law or of legal institutions and legal doctrines did not require much thought. But the advent and continually increasing activity of the welfare or service state of to-day, the manifold services it undertakes lead to putting both to the legal order and to the precept of law, the question of its social and economic function in the whole complex machinery of the political organisation of modern society.

In this newer perspective, the task of law, even if we may not agree with William James to be the satisfaction of
the total of human demands, should be to provide as much as we may of the total of men's reasonable expectations in life in civilised society with the minimum of friction and waste. Thus with the advent of this century, there are signs of a very significant change in the doctrine of sovereignty. Among the considerations which were responsible for a re-interpretation of this doctrine, none was more potent than the recognition of the role played by great non-political associations, associations which the state claimed to regulate but which it could no longer claim to be merely its creations. Writers like Figgis gave a new interpretation to the meaning of the separation of church and state by distinguishing the autonomy of the church in its own sphere from that of the state. But it was the contemplation of the great associations of the economic order which more generally inspired the attack on absolutist sovereignty. The loyalties evoked and the powers exercised by the corporate groups or voluntary associations within the community, associations that, like those of capital and labour, entered into conflicts on which the state seemed unable to impose its will, while at the same time they united their members in unions that extended beyond the confines of any state came into open conflict with unqualified claim of a sovereign state. Above all, economic power refused to be the mere subject of political power and there were salient occasions when it openly or tacitly defied the sovereignty of the state. Indeed "if we look at the facts,"
as Lindsay has pointed out, "it is clear enough that the theory of the sovereign state has broken down."

The political theory of syndicalism, though an extreme one, remains significant of a new attitude towards the state. No doubt conditions have materially altered since the time when the French exponents of this doctrine, Sorel, Louis, Pataud, Pouget and the rest could regard the state as an outworn and rather needless organ, to be supplanted by economic syndicates. It was the farthest reach of the movement of protest against sovereign claims that seemed no longer realistic. It paved the way for the rise of the doctrines of the guild socialists who like Penty and S.G. Hobson would merely limit the state's sphere on the ground that the business of economic production was already controlled by other forces and could be far more satisfactorily administered by functional or occupational organisations, the reconstructed guilds or "parliaments" of producers.

The alleged economic impotence of the state was also made the basis for assaults on its sovereign independence in international spheres. It was effectively expounded by Norman Angell in "Great Illusion" which demonstrated the economic futility of the last resort of sovereign power,
viz. war. It was also brilliantly exposed by H.N.Brailsford who pointed out how the powers of world finance are moving behind the curtain of diplomacy. Socialists, of whom Oppenheimer and Loria are the important exponents, adopted the same argument. The Marxists also made it the ground for a reconstituted state rather than for a limitation of state powers.

Such a change in the attitude towards State and Law cannot but affect the exercise of the sovereign power itself.

When the State was regarded only as a character of sovereign power changing, its traditional functions were confined to defence, foreign affairs, police and administration of justice, and taxation in the limited field to discharge these functions. These were the traditional spheres where the doctrine of State Sovereignty could find its full expression and legitimate application. The immunities and privileges of the Crown in England in regard to litigation, taxing, submission to statutes and other fields are survivals of feudal sovereignty; the special law and jurisdiction for military forces are an exercise of the defence power. The large number of prerogatives of the Executive in the fields of foreign affairs and defence, the so-called Acts of State are but the expressions of the
sovereign power of the State at a time when they were bearable as the functions of the State were limited.

But as the activities of the State extend in the manifold directions of industrial and commercial enterprise and of social services, the entire field of the play of this sovereign power requires a fresh examination and analysis. In fact this dual role of the State which both enters into the field of Government and industrial, commercial management and at the same time, supervises and controls over the allocation of economic resources for the nation has created a delicate problem for the traditional theory of state sovereignty.

Continental theory has sought to face the problem by distinguishing the dual role of the State, as sovereign and as fiscus. The Supreme Court of the United States also sought to make some distinction between governmental and non-governmental powers. Thus "when a State enters the market place seeking customers, it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far at least the taxing power of the federal government is concerned." But the difficulty of such a division is,
as Dr. Friedmann points out that it is by no means an easy task to draw an exact borderline between predominantly administrative and predominantly civil functions and activities of public authority.

A nearer analogy to the problem can be found in the doctrine of State immunity in international law. One of the implications of State Sovereignty is that according to the rule "par in parem non habet imperium" - no State can claim jurisdiction over another. Hence although States can sue in foreign courts, they cannot as a rule be sued, unless they voluntarily submit to the jurisdiction of the court concerned. But the increasing commercial activities of states have made the traditional principle of immunity of ships owned by foreign States under their own jurisdiction obsolete and unjust in its application. The Brussels Convention of 1926 signed by nine nations adopted the test concerning immunities of government vessels. State-owned vessels carrying cargoes and passengers were to be subject to the same rules of jurisdiction and liability as private vessels, but certain specified categories comprising warships, hospital ships and other non-commercial vessels were to be excluded from the operation of this rule. A parallel development can be noticed in the growing subjection of
From a brief analysis of the evolution of the State activities it will be clear how the traditional sovereign rights and privileges of the State are gradually reduced and restricted.

It may not be out of place here to consider the view of Prof Laski that a correct approach to the sovereignty of the state can be made only if we analyse the essential nature of the state. The state, he thinks exists to maintain some given system of class-relations; and in the international, as in the internal sphere, it is bound by its own inherent logic, to promote the interests involved in that given system. The learned Professor thinks that the state in a capitalist society needs to remain sovereign in order to protect the interests of capitalism. In the last resort, these interests have to be protected by war, which is the supreme expression of sovereignty in international relations.

Mr. James Marshall in his "Swords and Symbols: The Technique of Sovereignty" a book which is often called "a new Machiavelli for our troubled times," points out that dynamic sovereignty not only breaks down under analysis into commercial inter-State transactions and private law and municipal jurisdiction.
"physical force," but also adds up under synthesis into "economic power" and "psychological power".

The Soviet authors also seem to be the most ardent champions of sovereignty as the necessary attribute of each state—ancient, medieval and modern. "State Sovereignty", writes V.I. Zuev, "appeared simultaneously with the appearance of the State and law, and represents an attribute of the state power, all through the whole history of the state and law."\footnote{13}

Sovereignty according to Mr. A. Vishinsky "is the substance of the independence of a given state authority of any other authority both within and without the boundaries of that state."

The confusion that the sovereign has unlimited, absolute power has been created by a loose and illegitimate identification of the bearer of the sovereign power with the sovereign power itself. Much of the confusion can be avoided if we do not forget that the ultimate basis of sovereignty is popular consent, that sovereignty resides in the people.

In fact the sovereign power is not something absolute but is conditioned by the functions for which it was created.
It is essentially based upon popular recognition and acceptance for the purpose of certain orderly arrangement of the activities of the state. The sovereign power of the state was created as means to an end, as a device to achieve certain ends, to secure "life, liberty and the pursuit of happiness" of the people. Thus the sovereign power, by the logic of its existence, is limited by the purpose it is intended to serve; it is not an irrevocable power, but is viewed more as a social trust which can be taken back from a government which has failed to fulfil its pledge, and the latter may even be called to account.

The problem of the sovereign power thus presents itself as relative to the scope and activities of the state. No doubt the primary purpose of the state for the exercise of its sovereign power is to maintain order, to protect its members against the encroachments of others. The order of a society on the other hand, depends largely upon the amount of strength with which the state is able to uphold it; if its sources dry up, then order itself becomes unstable and collapses, for the healthful current of life is arrested.
At the same time, with the progress of human society and the consequent expansion of human wants, wishes and interests, the functions of the state continually widen as a regulative and operative agency in the newer spheres of action.

In fact as long as there remains room for human progress, and as long as new aims continually arise and fresh fields of action which necessitate the creation of new institutions, the calling into life of new organisms open out, the activities of the state will be supplied with novel and fresh tasks to meet the requirements of the time.

It is incorrect and dangerous to put the nation-state first in one's thinking. It is the individual human being for whom all social institutions are maintained; the state is simply an agency to serve the human being. If the state is to be an end in itself and allowed to become all powerful, the rights of individuals will be submerged and other nations will be absorbed. The two world wars and a current cold war clearly demonstrate what is happening in the name of "national interest".

In fact the extreme view of Prof. Hans Morgenthau that the interest of the nation is superior to anything else, can
hardly be applied to the realities of the present-day world. Prof. Dickinson ably points out the inadequacy of present-day international law, which allows order to bow out backward, so to speak, in the presence of sovereignty. Sovereignty of the state he points out was perhaps necessary when nations lived in a state of nature and hence it is a consequence of the insecurity of national life in an imperfect community of nations.

In fact, we can hardly afford to indulge in such assumption that the state can alone afford the best protection for the individual human being. Perhaps this might be said in the past, although it is doubtful whether one state could protect its members against other states. To-day however, in the new pressures of interdependence, not even the strongest of states can protect its individuals against economic forces or against the risks of war which modern technical developments have made so destructive that humanity can no longer afford to use it.

In a sense, whatever may be the patterns of the social system, the use of force in the social order cannot be denied. Society cannot be a community of angels; a social system which could function without pressure of any kind and which could base everything upon absolute, spontaneous consensus. Such an approach which denies the need for power altogether and which
imagines it possible to build society on the basis of mutual
aid, co-operation and love alone ignores
the realities and complexities of our
social life. On the other hand, such
reactionary attitude which complacently
accepts the existing forms of social and political power as
eternal ones precludes any philosophy of power. Thus physical
force cannot, as the anarchists claim, be abolished altogether
from the social system. There must always be the necessity of
some socialised force to restrain the anti-social manifestation
of force itself, whether exerted by individuals or by organized
groups. There are fundamental forms of order and of security
which can be maintained under laws all must obey. In fact the
real service of force can be conceived only as a safeguard of
this order.

But if the state is endowed with force within its borders,
it has been necessary for the preservation of order and should
be adjusted to the functions it serves and may defeat its own
purpose unless it is restricted by safeguards and saddled with
responsibilities. Thus to serve social ends, sovereign power
of the state should be exercised with responsibility; it should
also be conditioned by the ends it serves. Since no ends are
absolute or unlimited, no exercise of power should be.

In fact sovereign power of the state does not convey
and positive immutable meaning. On the contrary its meaning and
sovereign power and import have changed with the changing character of the functions and activities of states. It may acquire a new meaning in the future as a result of further changes in the character of human society and developments in international organization.