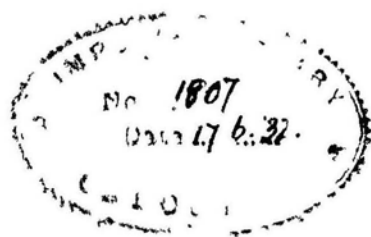


A MONOGRAPH ON

The Separation of Executive and Judicial Powers

IN BRITISH INDIA

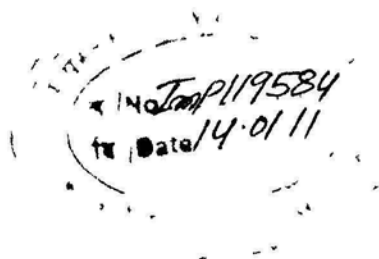
BY
NARESH CHANDRA ROY, M. A.
Lecturer in History, City College, Calcutta.



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PREFACE

No apology need be made for writing this Monograph. The independence of the judiciary is an administrative and political problem still awaiting solution. It has been before the country for about a century. People now-a-days are feeling more keenly than ever the absence of independence in the judges who preside over our criminal tribunals. It was confidently expected that with the inauguration of the Reforms of 1919, criminal justice would be completely separated from executive hands. But all the attempts during the last ten years in this direction have been abortive. Nothing substantial has come out of the Resolutions passed by the Legislative Councils and the Committees appointed by the Provincial Governments during this period. The Government in every province have shelved the question on one pretext or another. They think that the reform is not in the least an urgent one. It has been the object of this Monograph to analyse the problem in all its details and to bring out clearly how dangerous to individual liberty is the combination of the judicial and executive powers in the same hands. The control of the executive is immediate and direct over the Magistracy. The Executive Officer of every district exercises a close control over all the officers wielding Magisterial authority in that area. Higher up the ladder also, the judicial officers are no more independent. The control of the Government over the Sessions Courts is not of course so open and brazen-faced, but it is there all the same. When the officers dispensing justice are thus completely under the influence and control of the Executive Government, what are the chances of the people to maintain and enjoy their privileges against the encroachment of that very Government? The judge is expected to be the task-master of the executive, but when that judge is himself dependent upon the favours of the executive, how can he discharge his functions satisfactorily at all? Naturally as against the Government, the people have now very little opportunity of getting any justice.

Papers and documents on the subject have accumulated into a large mass. They would now make a library. But although the raw materials are thus plenty, only one attempt has so far been made to cook them into a scientific treatise. I am referring to Mr. R. N. Gilchrist's "The Separation of Executive and Judicial Functions", published by the Calcutta University. My approach of the problem is fundamentally different from his. While some common grounds have been covered and many common materials have been inevitably threshed out, I have attacked the subject from a different angle and exploited many new sources of information.

I utilise this opportunity to thank Mr. Sachchidananda Sinha of Patna who very kindly lent me from the Library he has founded in that City a copy of the Report of Sir B. K. Mallik Committee on the Separation of Judicial and Executive Functions in Bihar and Orissa and Mr. C. Y. Chintamani of Allahabad who sent me a very prompt reply to some of the queries I put to him. My thanks are also due to Mr. S. C. Coomer of the Imperial Library for his zealous help in making available to me the different papers and documents on the subject, and to my colleague, Mr. B. B. Bannerjee, M.A., B.L. who read a considerable portion of the Manuscript and made many valuable suggestions.

N. C. ROY.

CITY COLLEGE,
6th January, 1931.

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INTRODUCTION.

The judge occupies a pre-eminent position in the modern state. He is the guardian of the rights and privileges of the people against the encroachment of private persons and the aggression of executive officers. His function consists in interpreting the laws of the country and applying them to individual cases. He has got to settle not only private disputes but to bring under review executive action. The way he discharges his duty is of vital importance to the people. The legislature may lay down good and wholesome laws. But they would not be of any avail if they are not ably, promptly and impartially applied. Without right administration of justice, good government is out of the question. "There is," says Lord Bryce, "no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen."¹

Now if judicial administration has to be run properly and efficiently, some qualities are indispensable in the judges. Legal knowledge and skill are of course their essential attributes. In interpreting and applying the law, they must have a thorough grounding in the legal principles and practices. But this intellectual equipment is not enough for the right discharge of their duties. They must be at the same time adorned with the moral virtue of impartiality which has in fact to be the breath of their judicial life. Without looking to the interest of any one, without consulting personal profit or party gain, without grinding national or communal axe, the judge has got to decide a case on its own merits. He is no respecter of persons. Neither the smile nor the frown of any authority, however high, may influence his verdict. To exercise such impartiality is certainly no easy job. It is indeed a tough business to overcome all internal and external influences and deliver the judgment only with an

¹ *Modern Democracies*, Vol. II., p. 421.

eye to the law of the country and the facts of the case. As regards the internal influences—the personal prejudices and ideals—they must be left to the judge to be repressed by him as best he can. By no rules and regulations, they can be checked. But as regards the external influences and control, the judge should be made independent of them by every necessary precaution. Especially, he should be made immune from all control which the executive is so prone to exercise over him. This independence is the prime virtue that must always pervade a court of law. Without it, all other virtues which a judge may possess come to nothing. Of what use will be his legal learning, his wide experience and all his insight into human nature if he has not the independence to put them into operation? On the contrary if he is under the thumb of the executive, these qualities of his will be requisitioned for curbing popular liberty, and trampling upon individual rights and not for maintaining them against executive onslaughts. Independence of all external control is hence the basic quality of the judicial bench. This fact was brought out into relief in England in the seventeenth century. In the course of the fight between the Stuarts and the Parliament, it was early brought home to the people that the dependence of the judges upon the Crown for their office and emoluments was a great handicap to the popular cause. It was equally a revelation to the King that his control over the judiciary was a potent instrument in his favour. Sedulously, therefore, he attempted to make the judges absolutely subservient to him, and after the dismissal of Sir Edward Coke in 1616, he was quite successful in his venture. After this, all the resources of the English judiciary were marshalled against the rights of the people. The judges became the bulwark of royal prerogative. Nor could they act otherwise. Dependent upon the Crown for their future advancement, they could not be expected to give their verdict impartially in cases in which the Crown was interested. They could not commit economic and official suicide by delivering a judgment adversely affecting the prerogatives of the King. It was urgent and indispensable therefore that the judges should be independent of both the

Crown and the Parliament for their office and emoluments. If they were to apply the law of the land without consulting the interests of the executive, they must cease to hold office during the pleasure of the Crown. Their tenure of office must be during good behaviour. Accordingly it was embodied in the Act of Settlement that the judges must no longer be removed from the bench by the Crown. If they were guilty of any misbehaviour, they might be dismissed by the Crown only on an address of the two Houses of the Parliament. The judges thus passed out of the the control of the executive and the legislature. When the French publicist, Montesquieu, visited England in the middle of the eighteenth century and set about studying the social and political institutions of the country, this independence of the judiciary appealed to him much. He was so much fascinated by it that he easily formed the idea that the combination of different public functions in the same hands was the source of tyranny in his own country while their separation was the cause of popular liberty in England. He was really so much taken up with this aspect of British administration that he built out of it a political theory. The three branches of government, the executive, the legislature, and the judiciary, must be separated and clearly distinguished from one another. They must constitute three departments completely independent of one another. Their combination any way would be fatal to the liberty of the citizen. This doctrine of the Separation of Powers held long the imagination of the people of Europe and America. It seemed to have enshrined all political wisdom. It "came to be regarded as almost a political maxim which should lie at the basis of the political organisation of all civilised states."² In the constitutional practices of the present-day world, however, there has been a wide departure from this principle, enunciated by Montesquieu and once held sacred in every country. So far as the relations between the executive and the legislature are

² F. J. Goodnow—*Comparative Administrative Law* (Students' Edition) Vol. I, p. 20.

concerned, the doctrine has certainly been completely thrown overboard in the leading states of Europe. They have taken to the parliamentary form of government in which the executive and the legislature are not only not separate but the executive is really a committee of the legislature.

But, however modified the principle of the Separation of Powers may have been in actual constitutional operation, the fact remains that the judiciary should be, in all respects, immune from any external control. In this aspect of the problem the assertion of Montesquieu still enshrines the vital truth. Neither the executive nor the legislature should be given any opportunity to interfere with the independence of the judge. The executive is to regulate its action and shape its policy only according to the law of the land. It must not overstep the bounds of law and take to a measure which its lawful authority does not cover. Whether the executive is acting within the law or not is for the judiciary to determine. The court must, therefore, have the right to scrutinise every executive act. The judge is, in other words, the task-master of the executive. After a careful scrutiny, he has either to uphold its action or to nullify it as illegal. Now the judge can give an impartial verdict in cases like these if only he is not any way under the influence and control of the executive. But to make the judiciary "in any sense subordinate to the executive is to make impossible the performance of the most urgent function within its province."³ The combination of judicial and executive powers is clearly inadmissible for in that case the judicial decision may only cloak the executive tyranny. The judicial power may then be used to subserve executive expediency.

Now if we are to take away the judges altogether out of the influence of the executive and the legislature, the logical system would be to vest their election in the sovereign people. Neither the legislature nor the executive should have anything to do with their appointment. But however logical this

³ Laski—A Grammar of Politics, p. 298.

principle of popular election may appear to be, in practical operation it has been proved to be inapt and inappropriate. During the revolutionary days of France, this experiment was made for some time but under the third Republic it has not been repeated. Many of the American States, imbued with extreme democratic tendencies, have accepted no doubt this principle of popular election for the judges. But under this system of recruitment, it cannot be said that proper persons have been raised to the bench. In fact a "growing dissatisfaction with the popular election of judges" is noticeable in many states to-day.⁴ On the other hand the appointment of the judges by the executive to which so much objection was once taken has proved to be on the whole satisfactory. In the United States of America, all the Federal Judges are appointed by the Executive with, of course, the approval of the Senate.⁵ And it is admitted on all hands that the Federal Judges thus recruited are by far the most efficient, impartial and independent in all America. In Great Britain also, the Judges are appointed by the executive. The judges of the Supreme Court are appointed by letters patent under the great seal on the advice of the Lord Chancellor, while the judges of the County Courts are appointed finally by the Lord Chancellor himself.⁶ Although appointed by the executive, the judges of England have never been known in these days to have subordinated their judgment to the will of the executive. They have rather enjoyed an international reputation for independence and impartiality. This is because, once appointed, the judges have had no reason to curry favour with the executive. Their secure and permanent tenure of office has made them independent of all external control.

The question of the tenure of office is then the key to the independence of the judicial bench. Of the three branches

⁴ Holcombe—State Government in U. S., p. 419.

⁵ Art. II, sec. 2 of the Constitution.

⁶ Anson—The Law and Custom of the Constitution, Vol. II, part II, (3rd Ed.) pp. 268, 270.

of government, the judiciary is naturally the weakest. The executive dispenses the honours and holds the sword of the community. The legislature commands the purse and prescribes the rules by which the duties and rights of the citizens are regulated. The judiciary, however, has no influence over either the sword or the purse. It is therefore in constant danger of being influenced and overpowered by the other two branches of Government. Now to counteract this influence and to follow a straight path of its own, it requires permanency in office which contributes the most to its firmness and independence. "That inflexible and uniform adherence to the rights of the constitution and of individuals which we perceive to be indispensable in the courts of justice can certainly not be expected from judges who hold their offices by temporary commission. Periodical appointments, however regulated, or by whomsoever made would, in some way or other, be fatal to their necessary independence."⁷ Hence "on the whole it seems best that judges in all grades should ordinarily hold office during good behaviour."⁸ They must not hold office during the pleasure of the executive or the legislature. That would make the judiciary simply subservient to either of the two branches of Government—an undesirable contingency. Once appointed, they should hold office for life. Nor should they look to the executive for their promotion in office and emoluments. "Promotion by the executive from a lower grade to a higher may be as dangerous to independence as the power of dismissal, since it would be practically much easier for the executive to reward judicial subserviency by promotion than to punish its opposite by dismissal."⁹ Whichever body would determine the future promotion of the judges would control, to a great extent, their will and conscience. It is hence not a bad principle observed generally in many countries to-day that there must be no promotion in the judiciary. If, however,

⁷ The Federalist No. 78.

⁸ Sidgwick—Elements of Politics, p. 464.

⁹ Ibid p. 465.

the principle of promotion has to be maintained, it must be either automatic or regulated by a body which may not have any interest in the work of the judges.

In the U. S. A. all the Federal Judges hold office during good behaviour and are removable only by 'impeachment'.¹⁰ The judges are as a rule appointed to a fixed post on a fixed salary. They labour under no fear of a transfer from one post to another for a decision not to the liking of the executive. Nor do they expect any favour at its hands for any action after its mind. Neither hope of promotion, nor fear of degradation affects their independence. In Britain also the judges enjoy a fixed salary and expect no promotion. The judges of the Superior Courts here, like the Federal Judges of the U. S. A. hold their office during good behaviour, and can be removed only by the King on an address of both Houses of Parliament. The inferior judges, however, can be removed from the bench at the instance of the Lord Chancellor.¹¹ They hold their office only during the pleasure of the Crown. The inferior judges in England do not thus in theory enjoy the protection given to the federal judges of the District and Circuit Courts of America. In practice, of course, the difference is not so much as noticeable. The English county judges are never dismissed except for gross misbehaviour. In France also both by law and usage, security of judicial tenure has been well established. But the system of promotion by the executive which has been put down as dangerous to judicial independence constitutes the very basis of the French judicial organisation. This promotion of the judges from a lower to a higher grade in France, of course, does not depend wholly upon the freaks of the executive. The minister of justice determines it, only with the help of an expert commission. But it cannot be said that extraneous influence and back-stairs pressure have no bearing upon it. In fact, other factors than seniority and merit very often decide the future of a judge. This is certainly not a congenial atmos-

¹⁰ Article III, section 1 of the Constitution.

¹¹ Anson—Op. Cit. Vol. II, part II, p. 268.

phere for the growth of judicial independence and impartiality. The judges in fact, instead of being the fearless task-master of the executive, want to stand well with the people who hold in the hollow of their hands their official destiny.¹² The efficacy of the principle that the promotion of the judges should not be determined any way by the executive is not thus affected by French experience.

¹² Bryce—*Modern Democracies*, Vol. I, pp. 305-6.

CHAPTER II.

EVOLUTION OF THE SYSTEM.

In the 18th century, the administrative system had absolutely broken down in India. "Lack of governance" was the pre-eminent feature of the time. The collapse of the mighty Mughal Empire had let loose all the forces of separatism and sectionalism in the country and heralded the Great Anarchy with all its horrid results. The East India Company that was gradually stepping into the shoes of the Great Mughals could not, for some time, grasp the full significance of its position. In Bengal, it remained for many years in power without responsibility. A British officer in India who has traced the rise of the Company's power in this country, has been constrained to observe that these years of misrule constitute "the only period of Anglo-Indian history which throws grave and unpardonable discredit upon the English name."¹ At last the situation became so grave that not only the Company's Directors themselves had to be prepared to face administrative responsibility but His Majesty's Government also began to interfere in Indian affairs and "regulate" Indian administration. But it was not possible to transplant overnight a cut and dried governmental system to the Indian shores. The Britishers were new to this country and unfamiliar with its social traditions, cultural background and economic system. Without a thorough and systematic exploration of administrative and economic facts it was not possible for the Company to impose a ready-made administrative structure upon India. (All that the East India Company could do during the first half-century of its rule was to make administrative experiments. Most of its governmental measures were naturally tentative in character. No step could be taken all at once on a permanent basis. The crying need of the hour was strong government. The resur-

¹ Sir Alfred Lyall—*British Dominion in India* (1905), p. 143.

rection of law and order was the prime duty of the administration. In this matter the Company's government occupied the same position in India which Henry VII, the first Tudor, occupied in England after the Wars of the Roses. The forces of disorder that were abroad had to be checked and subdued and an administrative structure was to be reared that would guard against the anarchical traditions of the last half century. For the discharge of this duty of the hour, a corps of strong and efficient officers was indispensable and it stands to the credit of Lord Cornwallis that he was able to roll back the tide of corruption among the Company's officers and instil into them a new spirit and a new ideal. He was successful in creating a Civil Service for administering the Company's affairs and putting it on a sound and solid basis. His appointment in 1786 as the Governor-General of the British territories in India is hence a land-mark in the administrative history of the country.

Now in those rough and troublous days, if the Government were to establish its prestige and majesty, its officers must act with promptitude and vigour. Concentration of energy and effort was essential for the rapid discharge of duty. Niceties of modern administration were out of place in that age of turmoil. The doctrine of the separation of powers which was coming into vogue at the time in Europe and America, could not fit in with the Indian situation. Concentration of powers and the unity of authority were the principles advocated and accepted.² Shortly after the advent of Lord Cornwallis we find (1786) that the same officers in the districts had to discharge the duties of a revenue Collector, Judge and Magistrate. He had to assess and collect the revenue, try the civil and revenue causes, and was responsible for maintaining the law and order of the locality under his charge. He had also to try petty criminal cases and punish thereby the offenders he had himself taken into custody. This combination of functions was recommended by the Court of Directors in con-

² Joseph Chailley—Administrative Problems of British India, pp. 442-3.

sideration of its having a "tendency to simplicity, energy, justice, and economy,"³ Now the arrangement that the same officer who was to assess the revenue was also to hear the complaints against this assessment was certainly not an equitable one. It was not expected to make for justice and fair-play. The officer who in his executive capacity had done injustice to any land-holder was not expected to be straight and generous enough in his judicial capacity to rectify the wrong. Naturally this iniquitous combination of functions roused the qualms of conscience of Lord Cornwallis and in 1793 it was laid down by the Governor-General in Council "that if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another."⁴ The Collectors, therefore, should not themselves try the revenue cases any longer. Accordingly, the judge-magistrate of the district was relieved of his duty of collecting the revenue which became a distinct function by itself and was vested in a separate convenanted officer.⁵ While, however, revenue and judicial functions were thus separated, the incongruous combination of police duties and criminal justice in the same hands was continued still. No protest against this unnatural combination was made; rather for a period at least the connection between the executive police and criminal justice was made more intimate and regular. The burden of duties thrown upon the judge-magistrate of the district was too heavy for any single officer to bear. His time was almost eaten up by his judicial duties. Hence executive work suffered; the police became inefficient in consequence and law and order ill maintained. At last in 1829, some changes were introduced in the administrative arrangement. Some new officers were created in the persons of the

³ The Fifth Report (Firminger's Ed. 1917), Vol. I, p. 22.

⁴ The Preamble to Regulation II of 1793.

⁵ Section III of Regulation II of 1793.

Commissioners of circuit and revenue.⁶ Each of them was to be in charge of four or five districts, and in addition to the supervision of revenue work which was vested in them they were to go out in circuit as sessions judges. The supreme control over the police was also made over to these officers, so that in the hands of the Commissioners all the threads of administration were collected together. Excepting civil justice, all the functions of administration were centralised in their offices. Thus the combination of police duties and criminal justice which had been already noticed in the hands of the district officers, was now further developed and extended in the hands of the Commissioners. They became responsible at once for higher criminal justice and supreme police duties. The executive and judicial functions were thus fully combined in their hands. This administrative arrangement, like many other experiments during this period of British rule, was not to last long. It proved to be short-lived. In 1831, civil judicial and magisterial functions were separated. The former was vested in the civil judge of the district while the latter was made over to the Collector.⁷ Henceforward the Collector became the chief executive officer of the district. He was to collect the revenue, control the police, and was in charge of criminal justice. As to the higher criminal justice, that was also to change hands. From 1831, the Government began to transfer it from the Commissioners to the Civil Judge.⁸ This was a reform in the right direction. But while higher criminal justice was thus separated from executive duty, lower criminal justice remained combined with police functions. The District

⁶ Regulation I of 1829.

⁷ Report on the Administration of Bengal (Statistical Summary), 1872-73, p. 49.

⁸ Section II of Regulation VII of 1831 made it competent to the Governor-General in Council to invest the District Judge with full powers to conduct the duties of the Sessions. And Act No. VII of 1835 further empowered the Governors of Bengal and Agra to transfer the whole of the duties of the Commissioners concerned with criminal justice to any Sessions Judge.

Collectors were to control the police, investigate crime, arrest persons on suspicion and at the same time try and punish them.

The combination of so many diverse functions in the hands of the District Officer did not, however, conduce to the efficiency of the administration. Lawlessness was rife and crime could not be properly repressed. For the better administration of the police, a rearrangement of public duties was now called for. Accordingly in 1836, Lord Auckland as the Governor of Bengal appointed a Committee to investigate into the actual state of police administration in the Bengal Presidency and make recommendations for the better organisation of the police force. The Committee after due enquiry reported that the hands of the District Officer were too full. It was not possible for one officer to do justice both to his revenue and police duties. Both the functions were onerous and exacting. Now the District Officers generally paid most of their attention and devoted most of their time to their revenue duties. It was as a result of this alone that the police force could not be properly supervised and police administration accordingly deteriorated. This defect, the Committee opined, could be made good only by separating the revenue functions from the hands of the District Officers and placing them in the hands of separate Officers to be known as the Collectors.⁹ The Government accepted this recommendation of the Committee and ordered the separation of revenue duties from the rest of the functions of the District Magistrate. This separation was, of course, not effected all at once throughout the Province of Bengal. But by the year 1845, the scheme was carried out in every part of the Presidency except in some three districts.¹⁰ The District Magistrate thus remained endowed with both judicial and police duties while the revenue duties were taken out of his charge. This administrative arrangement was given only a short experiment when it came to be attacked by the Government of Bengal. The division

⁹ The Report, p. 4.

¹⁰ Parliamentary Papers Vol. 59 of 1857, p. 295.

of labour which this arrangement involved did not improve the efficiency of the police to any appreciable extent. On the other hand, it was supposed to have weakened the administration of the province. "We have suffered a grievous loss of power," observed Sir Cecil Beadon, Secretary to the Government of Bengal, in a note, dated 3 Dec., 1853, "maintaining a separate class of Collectors, charged with special duties insufficient to occupy their time and yet inhibited from rendering assistance to the other great branch of executive government."¹¹ The Government of Bengal was thus convinced that the reform inaugurated in 1838 was unwise and unnecessary and addressed a letter to the Government of India in 1854 advocating the reunion of magisterial and revenue functions. The letter pointed out that "the separation of the two offices has been injurious to the character of the administration and the interests of the people." "The Governor, therefore," the letter proceeds, "begs leave to recommend to the Government of India that steps should be taken for re-uniting the offices."¹² The recommendation of the Bengal Government could not be all at once accepted by the Supreme Government. It became the subject of a keen controversy among the different members of the Governor-General's Council. After several years' of minute-writing, however, it was decided at last in 1859 to abolish the separate office of the Collector and hand over his functions to the District Magistrate. This reunion of offices brought the Government to the situation of 1838. The District Officer again became overburdened with work and it became impossible for him to cope with the demands of the police upon his time and attention. It was accordingly thought wise to appoint a Police Commission in the following year to devise measures for an efficient organisation and a strict supervision of the police force. On the basis of the recommendations of this Commission, an Act was passed in 1861 by the Government of India which provided for a new

¹¹ Ibid p. 295.

¹² Ibid p. 289.

constitution of the district police. In every district, a Superintendent of Police was set up under this Act. In him was vested all the executive control over the police in this area. In this capacity, he came under the authority of the Inspector-General of Police. The appointment, suspension, reduction, and dismissal of the subordinate police staff were placed at the disposal of the Superintendent working under the final authority of the Inspector-General of Police and his Deputies.¹³ Thus in maintaining order and discipline in the police force, the Superintendent was not to be dependent any way upon any Magistrate. In detecting and preventing crime also he was to work "under the general control and direction" only of the District Magistrate.¹⁴ The other magistrates of the district would have no connection with the police, either in the matter of the discipline of the force or in the subject of preventing and detecting crime. Except for a half-hearted association with the District Magistrate, the police would be a department altogether separate from the magistracy. In the year 1861, when the Act was passed, many officials were of opinion that this measure was the funeral of the combination of judicial and police functions maintained hitherto in the same hands. An official writer in the Calcutta Review actually went out of his way to observe that "the separation of the police and judicial functions is the grand fundamental principle of the present police reform."¹⁵ But although in 1861, the union of judicial with police duties was looked upon as decently buried, it was not really dead. Only a decade passed before it was carefully exhumed and brought back to life. In the early seventies, Sir George Campbell was appointed to the Lieutenant-Governorship of Bengal. He was a bureaucrat of the most reactionary type and had implicit confidence in the divine despotism of the Covenanted Civil Service. It was not relishing to him at all that an important department like the police

¹³ Section VII of Act No. V of 1861.

¹⁴ Section VI of Act No. V of 1861.

¹⁵ The Calcutta Review, June 1861, (Vol. XXXVI, p. 210).

should be immune from the supervision and control of the District Magistrate. It was his ambition to make this officer "the general controlling authority over all departments in each district." The District Magistrate must be, in his opinion, "the real executive chief and administrator of the tract of country committed to him, and supreme over everything except the proceedings of the courts of justice." Accordingly, the object of the Police Act of 1861 was to a great extent nullified and the Lieutenant-Governor had the satisfaction that he had "now made very clear the entire subordination of the police to the Magistrate for all and every purpose."¹⁶ The ball was thus set rolling and during the next thirty years in every province, the intention of the law was overlooked and the District Magistrate became practically the head of the department of police. When the Indian Police Commission, appointed by Lord Curzon in 1902, began its enquiry, it was surprised at the degree of interference by the District Magistrates "which the law did not contemplate and which had often been most prejudicial to the interests of the department."¹⁷ The Act of 1861 had made the police to a considerable extent independent of the District Magistrate. The Superintendent of Police, the head of the district force, was not amenable to his control and supervision except in matters of the detection and prevention of crime. Only in this field, the Superintendent was to act "under his general control and direction." As regards the maintenance of discipline and appointment and dismissal of officers, the Superintendent was to act under the orders of his superiors in the Police department. He was not to be responsible to the District Magistrate in these matters. But the Indian Police Commission of 1902-3 found the situation altogether different. The District Superintendent of Police was no longer the head of his department. He was found characterised in the Police Manuals as an assistant of the District Magistrate for police duties "and as such bound to carry

¹⁶ Report on the Administration of Bengal, 1871-72, pp. 66-67.

¹⁷ Report of the Indian Police Commission (1902-3), Cd. 2478, p. 79.

out his orders." His office was "virtually a branch of the District Magistrate's headquarters office." In matters of recruitment and punishment of police officers also, the District Magistrate had come to exercise a decided voice. These duties were vested in the officers of the department. They were, however, to be exercised under rules to be framed by the Local Government, and the Local Government everywhere framed rules in such a way as to place in the hands of the District Magistrate an enormous power of control. This way the appointment of Constables was made subject to the veto of the District Magistrate and that of any officer above the rank of the Constable could not be made without his previous sanction. The same degree of authority was exercised by the District Magistrate in taking disciplinary action and awarding punishment. Every member of the force had an appeal to the District Magistrate and the Commissioner of the Division. Even a Constable could not be reduced by the Superintendent without an appeal to the District Magistrate. The Indian Police Commission thought all this as going too far, and recommended a relaxation of the control of the District Magistrate. Without affecting his responsibility for the criminal administration of the district and for the preservation of the public peace, the Commission wanted for the police department greater independence and autonomy. It wanted, in fact, to revive the arrangement contemplated by the Police Act of 1861.¹⁸ The Government of India in pursuance of these recommendations, modified to some extent the position of the District Magistrate vis-a-vis the police. He was asked not "to interfere in matters of departmental management and discipline except where the conduct and qualifications of a Police Officer affect the criminal administration of his district."¹⁹ This latter clause made the reform only nominal. The District Magistrate still retained the right of directing an enquiry into any misconduct on the

¹⁸ Ibid, pp. 79-80.

¹⁹ Report of the Royal Commission upon Decentralisation in India (1908), Cd. 4360, p. 191.

part of Police Officers. He was also empowered to call upon the Superintendent to remove incompetent subordinates.²⁰ All these powers notwithstanding, an impression gained ground that the District Magistrate had been shorn of his controlling authority over the police department. Accordingly the Royal Commission upon Decentralisation in India took evidence upon this question and recommended in its Report (1908) a closer and more intimate connection between the District Magistrate and the police department.²¹ It also recommended that "the District Magistrate should be competent in the interests of his district to require the transfer of an inspector or a sub-inspector from any one part of it to another."²² It was further of opinion that the police stations and their records should be regularly inspected by the District and Subdivisional Magistrates in the course of their tours.²³ These recommendations were accepted by the Government and embodied in the police manuals.

We have thus travelled far since 1861 when Act V of that year was passed. The head of the magistracy in the district was by this measure given only so much of directing and controlling authority over the police as was indispensable for discharging his duties for preventing and detecting crime. Of the Magistrates in the district, he alone was allowed to have a link with the police. Even his connection with it was understood to be provisional. It was given out, as we shall see later, that in the near future even the District Magistrate would be shorn of his responsibility for maintaining law and order and as such would cease to have any connection with the police. During the next half century, not only this last link between the magistracy and the police was not snapped, it was tightened to a far greater extent. The connection of the District Magistrate with the Police has been made more intimate and his control over this department more stringent. He is now in his district the head, in the true sense of the term, of the revenue, the magisterial and the police departments. He is the

²⁰ Ibid, p. 191.

²² Ibid, p. 192.

²¹ Ibid, p. 192.

²³ Ibid, p. 192.

head of the department that detects crime and hunts out the alleged criminals. He also heads the department that dispenses justice to these suspected offenders. Again he is not the only Magistrate now in the district who is associated with the police. During the last quarter of the nineteenth century, the sub-divisional system was carved out and the officers in charge of these administrative areas have all along exercised all the police powers of the District Magistrate within their limited jurisdictions. For a period of time, the District Magistrate himself continued to be the officer in charge of the Sudder Sub-division. But on the recommendations of the Decentralisation Commission of 1908, he has been relieved of this charge and some other Magistrates have now to be placed at the head of even the Sudder Sub-divisions. In every district, therefore, besides the District Magistrate there are other officers who are concerned both with judicial and police duties. It is not in the District Magistrate alone that executive and judicial functions now meet. They have now been combined in the hands of some other magistrates also, sometimes two, and sometimes even as many as five or six in a district

CHAPTER III.

HISTORY OF THE MOVEMENT FOR SEPARATION.

The movement for the repeal of the incongruous combination of executive and judicial functions in the same hands first began under official auspices. The anomalous character of this union of powers was apparent to British officers in the early days of the Company's Government in this country. Lord Cornwallis, we have seen, did not allow the revenue Collectors themselves to try the revenue cases. He had no confidence in the system under which a man who was responsible for making an assessment of revenue would be asked to judge if any person was being adversely affected by that assessment. He thought the Zemindars of the country would have no justice under this arrangement. Equally incongruous was certainly the system under which the same man was allowed to catch a thief and try him in the court of law. Lord Cornwallis possibly did not consider the circumstances of the country quite favourable for modifying this arrangement. Those were desperate days and called for desperate remedies. The abnormal condition of the country was the only justification for the arrangement that would leave an individual at the capricious mercy of the executive officers. Nearly half a century later, when Lord Auckland appointed in 1836 the Committee to investigate into the condition of law and order in the Presidency of Bengal, the situation had changed considerably since the days of Cornwallis. The people of the older provinces had now been accustomed to stable government for a considerably long period of time. Anarchical forces had been exorcised and law and order to a great extent established. These changed circumstances demanded a change in the administrative system. The 'patriarchal' form of justice might have suited the Indian conditions during early British rule, when strong government was the only necessity of the

day. It was, however, quite out of tune with the political atmosphere of the older provinces of India in the thirties of the last century. The union of criminal justice with police functions might have been warranted in unsettled times, but its continuance in normal peaceful days was only an unhealthy anomaly. It was time that judicial and executive powers which had been concentrated in single hands should now be completely separated. The people of the country had, however, not yet learnt to voice forth their grievances in public. Public opinion had not yet been organised. It was not till the year 1851 that the first political organisation, the British Indian Association, was started at Calcutta. It might therefore be expected that the grievances from which the people were silently suffering would go unspotted and unrecognised. But fortunately this did not happen to be the case. There were officers of the Company who had still unquenched the fire of their idealism. Their sense of justice had not yet been thoroughly blunted. In the absence of an organised public opinion, they took up the cause of the suffering millions. We have seen that Lord Auckland's Police Committee which reported in 1838 was unanimously of opinion that for the better administration of the police the revenue functions should be taken out of the hands of the District Magistrate and placed in charge of a separate officer. While, however, this was the opinion of the Committee, Mr. Frederick Halliday, one of its members, touched upon a plague spot of Indian administration in a separate minute. "The union of Magistrate with Collector has been stigmatised as incompatible," he observed, "but the junction of thief-catcher with judge is surely more anomalous in theory and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied. For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy; the danger to justice, under such circumstances, is not in a few cases but in every case. In all the magistrate is constable,

prosecutor and judge. If, the appeal be necessary to secure justice in any case, it must be so in all..... I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders, should without delay be separated from the judicial function."¹ This was a very strong and unhesitating opinion, expressed by an officer of the Company of fourteen years' standing. Nor did he stand alone in demanding this reform. Mr. Bird, the President of the Committee and Mr. Lowis, a fellow member associated themselves with him in this unambiguous condemnation of the union of executive and judicial powers in the same hands.

The movement for the separation of the two functions, thus initiated by Frederick Halliday, gained in strength and momentum as years rolled on. In the fifties, it became a subject of keen controversy in the Council of the Governor-General in which some of the most distinguished members of the covenanted service took sides. In 1854, we have seen, Sir Cecil Beadon addressed, as Secretary to the Government of Bengal, a letter to the Government of India. The purpose of this letter was the repeal of the arrangement that had removed the revenue functions from the hands of the District Magistrate. In this letter was enunciated very clearly and deliberately what is known as the oriental theory of government. The letter wanted to bring it home to the Supreme Government that a Separation of Functions was against the genius and traditions of an Eastern people. "It seems to his Lordship", runs the letter, "that the true theory of Indian government is the entire subjection of every Civil Officer in a division to the Commissioner at the head of it and the entire subjection of every executive officer in a district to its executive chief. Even as regards judicial officers, his Lordship is inclined to think that a great advantage is gained by placing them in all matters of an executive nature directly under the

¹ Appendix of the Report, p. xx. -

Commissioner.”² It was hence futile and even dangerous to depart from this principle of unity of authority and separate the functions according to their nature and character. This was a forceful document. It challenged the fundamental principles of public administration which had been accepted as indispensable for good government in the West. As the letter reached the Government of India, it became the subject of a most cogent and powerful attack by Sir John Peter Grant, a member of the Governor-General’s Executive Council. In a minute, dated the 23rd November, 1854, he tried to demolish the very basis of the scheme submitted by the Government of Bengal. He pointed out that not only the existing separation of powers was desirable and useful but it should be carried further to the logical extent. Not only the revenue functions should remain separate from police duties but criminal justice also should be taken out of the hands of the District Officer. He took up the old arguments of Frederick Halliday expressed in 1838, and observed “according to my ideas it ought to be our fixed intention as soon as possible to dis sever wholly the functions of Criminal Judge from those of thief-catcher and public prosecutor now combined in the office of Magistrate. That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence, and any change of system to be made meanwhile should be contrived, I think, with regard to this fundamental reform.”³ He observed further, by way of a rejoinder to Beadon’s oriental theory of government, “I am unable to support that part of the scheme which would place the judge under the revenue and police Commissioner. A great part of the business of a judge is to decide upon the cases civil and criminal in which the Commissioner is a most anxious and of course, often a prejudiced party. If a man is to be a judge at all, he should be independent. But the mere fact of his decisions not being appealable to the Commissioner will not make him independent

² Parliamentary Papers, Vol. 59 of 1857, p. 289.

³ Ibid, p. 306.

if in all respects or in any other respect he is placed under the Commissioner's superintendence and control."⁴ This was exactly the opinion of Frederick Halliday in 1838. But in course of a decade and a half, he had managed to go back upon his former view and by the time (1854) he became the first Lieutenant-Governor of Bengal he was a zealous convert to the oriental theory of government enunciated by Sir Cecil Beadon. As the note of Sir John Peter Grant was referred to him, he decided to resist with his own emphasis the contention that the Separation of Powers should be logically and wholeheartedly carried out. Although in 1838, he was an officer of fourteen years' standing and had ample opportunity of experiencing men and things for this long period, he now thought that his note of that year was only the result of his immature judgment. "In the days of my smaller experience," he observed in his minute of April 1856, "I myself have held and advocated the opinion which I now very heartily condemn. The opinion to which I allude is this,—that the magistrates of every degree should be debarred from all judicial powers, and should have nothing but executive duty of preventing and detecting offences, and that separate judicial functionaries should always receive and try cases of every kind committed to them by the magistrates of various degrees . . . It is a scheme foreign and unintelligible to Asiatic notions and altogether founded on European ideas and habits."⁵ "Nothing," he continued further, "can be more opposed to the oriental plan of administration than the entire separation of judicial from executive duties, which is advocated by the over much occidentalists."⁶ This attitude of Sir Frederick Halliday had the mild support of the Governor-General, Lord Canning who did not think it expedient to denude the executive officers from exercising judicial powers.⁷ Sir John Peter Grant, of course, did not allow these observations of the Lieutenant-Governor of Bengal to go unchallenged. He returned to the

⁴ Ibid, p. 307.

⁵ Ibid, p. 344.

⁶ Ibid, p. 344.

⁷ Ibid, p. 371.

attack in a second Minute, dated 9th April 1857. He did not question the contention that in some parts of the world the combination of various functions in the same officer might be expedient. But what he asked was whether Bengal was "a fit country for patriarchal experiment." "For this system," he pointed out, "two parties were required: the sage and paternal ruler of a district and the dutiful family of subjects. Not to speak of the first requisite, I may safely deny that Bengal affords the last." The people of this Presidency were in fact "past the patriarchal epoch." The one point of decision, he thought, was which way crime was more certainly discovered, proved and punished and innocence more certainly protected. He had no doubts on this question. The principle of the division of labour had all its general and special advantages in this matter. As regards the contention that the theory might be applicable to Europe but was ill-suited to India, he doubted if there was any real difference between the two countries in relation to this question. He went further still and observed that if there was any difference at all, "the difference is all in favour of relieving the judge in India from all connection with the detective-officer and prosecutor. The judicial ermine is in my judgment out of place in the by-ways of the detective police man in any country and those by-ways in India are usually dirty."⁸ In this struggle for the separation of the judiciary from the executive, Sir John Peter Grant had throughout the powerful support of Sir Barnes Peacock, later the first Chief Justice of the High Court of Fort William. In the heat of controversy, of course, the majority of his colleagues was arrayed against him. But in cooler moments, the Government of India as a whole were to a very great extent convinced of the justice of the cause which Sir John Peter Grant had espoused. The question of the police organisation came in at this moment for solution. The matter was too important to be decided by the Hon'ble Members of Government writing contradictory minutes. It had to be referred to an expert Commission which was appointed in 1860.

In issuing instructions to this Indian Police Commission, the Government of India were found to be quite conscious of the anomaly of combining judicial and police powers in the same hands. They pointed out to the Commission that "the functions of a Police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace. These functions are in no respect judicial. This rule requires a complete severance of the Police from the Judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity."⁹ The Police Commission which reported in the same year also noticed the anomaly of such a union of powers and recommended that as a rule the official who was to collect and trace out the links of evidence, and prosecute the offender should on no account sit in judgment on the case. While, however, this was the broad opinion of the members of the Commission, they could not muster sufficient courage to follow it up to its logical conclusion. They could not go the whole hog and recommend the complete separation of judicial from executive duties. While all other magistrates must be shorn of their connection with the Police, the District Magistrate must still remain vested with supervisory and controlling authority over this institution.¹⁰

The Government of India accepted the recommendations of the Commission and promptly proceeded to give effect to them. When the measure based on these recommendations was on the legislative anvil, Sir Barnes Peacock regretted its halting character and observed that "a full and complete separation ought to be made between the two functions"¹¹ Sir Bartle Frere who was in charge of the Bill was himself quite conscious of the evil which the combination of these powers involved. He was confirmed in his belief that the union of police and judicial duties was so incongruous as to make either the police

⁹ The Separation of Judicial from Executive duties in British India (a compilation of documents and papers) Edited by P. C. Ray, (1903) pp. 27-28.

¹⁰ *Ibid*, pp. 31-32.

¹¹ *Ibid*, p. 54.

officers inefficient or the magistrates biased.¹² The two functions should never go together. • He was not, however, ready to complete the separation immediately. He was going as far as he thought possible at the moment and hoped that "at no distant period the principle would be acted upon throughout India."¹³ The holding out of this hope was taken quite seriously in the sixties of the last century. It was taken for granted that the old patriarchal system was doomed for ever. Its passing was only looked upon as a question of years, if not of months. The High Court of Fort William under the leadership of Sir Barnes Peacock urged the Government in its Annual Reports to fulfil the promise and complete the separation. The question of the proper training of the judges was also at this time seriously inviting the attention of the High Court and the Government, and the High Court did not think it feasible to provide for a systematic legal training of the District Judges without completely separating the executive from judicial duties¹⁴ Thus on its own merits, as also on extraneous grounds, the union of the two functions demanded repeal. In 1868, the Secretary of State in a despatch referred this question of giving suitable judicial training to the members of the Indian Civil Service, to the Government of India. The Government of India in their turn called upon the Provincial Governments and the district and divisional officers to put forward their opinions on the subject. Some of the covenanted officers in their memoranda pointed out in unambiguous language that the separation of judicial from executive functions was the indispensable pre-requisite to any administrative reform. F. R. Cockerell of the Bengal Civil Service submitted a scheme for the total separation of the two ill-matched duties. This separation was called for not only "in consideration of the defects resulting from the want of proper legal training." It was also warranted by the theoretical and practical objections to the combination

¹² *Ibid*, p. 34

¹³ *Ibid*, p. 59.

¹⁴ Report upon the Administration of Criminal Justice in the Lower Provinces, 1869, pp. 12-13.

of the two functions in the same hands. "The Collector may as Magistrate try cases, the prosecution of which has been instituted by himself, and there are instances on record in which this power has been indiscreetly availed of. It is obviously a position which is calculated to suggest doubts in the minds of the people, in regard to the strict impartiality and independence of the judgment of the tribunal so constituted, nor is the case much improved in this point of view, when the Collector's prosecution is instituted before his subordinate, the Joint-Magistrate, who has to work in great measure to the approval of his immediate official superior for his own personal advancement."¹⁵

In view of the facts and opinions, delineated above, it could be expected that the desired reform would not be delayed much longer. Sir Bartle Frere had in 1860 promised it in the near future, the High Court of Fort William demanded it as an indispensable preliminary to the efficiency of criminal justice in the country, and on the top of it all some of the most experienced officers of the Crown now advocated it in the most unhesitating manner. The people naturally might now look forward to the early transference of judicial powers from executive hands. Truly, this reform would have been an accomplished fact in the early seventies of the last century but for the reactionary intervention of a member of the Viceroy's Council. This intervention made all the difference. It set back the hands of the clock of progress and sealed the fate of the reform that had been taken to be inevitable. Sir James Fitzjames Stephen was now the Law Member of the Governor-General's Executive Council. He had succeeded the distinguished jurist, Sir Henry Sumner Maine, to that office. When the question of the separation of powers and the allied problem of judicial training of the officers were demanding solution, he sat down to write an emphatic note on the administration of criminal justice in British India. The result was the celebrated Minute of 1871 which was published in the year following as No. 89

¹⁵ The P. S. of the memorandum.

of the Selections from the Records of the Home Department of the Government of India. This Minute constitutes a landmark in the history of the struggle for the separation of judicial and executive functions in this country. Up till this time the subject had been discussed only with reference to its adaptability to Indian conditions. Those who had supported the reform had done it on the score of its being applicable to the situation out here. In the same way the officers who had opposed it, looked upon the separation as unsuited to the conditions of the country and the traditions of the people. Neither party to this controversy had invoked any extraneous ground for supporting or opposing this reform. Sir James Stephen, however, carried the controversy in his Minute to a different plane. He did not stop to consider if the reform would add to the efficiency and impartiality of justice in India. He looked upon all this as irrelevant and beside the point. What only mattered to him was whether the transference of criminal justice from executive hands would affect the permanence of British rule in this country. No step in his opinion should be taken for the improvement of justice which might adversely affect the future of British Dominion in India. "It seems to me," he observes, "that the first principle which must be borne in mind is, that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the Natives would be dearly purchased even by an improvement in the administration of justice."¹⁶ But the authority and prestige of these officers would certainly suffer, he thought, if they were deprived of the exercise of criminal jurisdiction which "is both in theory and fact, the most distinctive and generally recognised mark of sovereign power. All the world over, the man who can punish is the ruler."¹⁷ The position of the District Officer is the foundation of British rule in India. That position would suffer if the separation of powers was undertaken. The anomalous combination of judicial and execu-

¹⁶ Minute, p. 29.

¹⁷ *Ibid*, p. 33.

tive powers must therefore continue whatever might be the fate of justice on that score. These emphatic observations of Sir James Stephen set forever the tone of the Civil Service in this country. Hitherto this governing service had been divided on this question. But the invoking of the name of British Dominion now silenced all opposition to the patriarchal system. Every voice in the Covenanted Civil Service in favour of the separation of functions was now hushed. And if perchance some noble spirit of this brotherhood of rulers would dare to protest against the prostitution of justice which the union of the two powers in the same hands clearly involved, he would be a marked man and would pass only as a dangerous idealist working towards the loss of British Dominion in India. The publication of the Minute of Sir James Stephen thus puts an end to an epoch in the long history of the demand for the separation of judicial from police functions. It closes the period in which the officials had taken the initiative and lead for the repeal of this ill-matched combination of powers. During the next forty years almost every member of the Indian Civil Service would set his face against any reform in the direction of the separation of powers. Even to-day after about sixty years of the writing of the Minute, there are not many Britishers in the Civil Service who have a good word for this reform. So potent has been the reasoning of Sir James Stephen.

But although the British Officers withdrew their sympathy from the movement which had begun under their auspices, it was not allowed to die from want of support. Just by the time Sir James Stephen's argument hushed the voice of official opposition, public opposition to the anomalous combination of powers began its eventful course. Since the early fifties, the Indian public was slowly awaking from the long stupor and somnolence into which it had been hurled by the great anarchy of the eighteenth century. During the seventies, public opinion was already a force. The starting of the Indian Association in 1876 gave fresh momentum and strength to the popular agitation for administrative reforms. The combination of

executive and judicial duties in the hands of the British Indian Magistracy was one of the many ills of government which invited the attention and roused the opposition of the people. The gentleman who on this particular subject took the lead and educated Indian public opinion deserves special mention. He was no other than the late Mr. Manmohan Ghose of the English Bar of Calcutta. He was the first Indian to be called to the Bar by an English Inn. He joined the High Court of Fort William in the later sixties of the last century. Soon he built up for himself an extensive criminal practice which was by no means confined to Calcutta. In fact he got his briefs mostly from the Mufassil. This way he secured his first hand acquaintance with the methods of criminal administration in the Presidency. Associated as defence lawyer with most of the important criminal cases in the different parts of the province, he acquired an unrivalled knowledge of the vagaries of the Muffassil Magistrates. The evils of the union of judicial and executive powers were clearly brought home to him. From day to day he saw the danger to the liberty of the people which this union involved. He found that under this system the District Magistrates could subject any individual who somehow incurred his displeasure to oppression and tyranny. In 1883, when India was under the enlightened rulership of Lord Ripon, he submitted to that Governor-General a memorial on the criminal administration of the country. In this document, he advocated among other reforms, the immediate transference of criminal justice from the control of the District Officer. Nothing, however, came out of this memorial. It remained pigeon-holed in the Imperial Secretariat. Well-meaning as Lord Ripon was, he had not the driving force to repeal this unnatural combination, in the face of the opposition of the entire Civil Service. He had burnt his fingers rather badly in the Ilbert Bill controversy, and now silently dropped the idea of having another iron in the fire.

While, however, the subject, was given only a cold shoulder by even the most enlightened Viceroy of the nineteenth century, the public made arrangements for carrying on the agitation

with all the greater vigour. In the year 1885, the Indian National Congress had its first sitting at Bombay. In its second session at Calcutta, in 1886, the Congress under the presidency of Dadabhoy Naoroji passed a resolution to the effect "that a complete separation of executive and judicial functions has become an urgent necessity and that, in its opinion, it behoves the Government to effect this separation without further delay, even though this should in some provinces, involve some extra expenditure."¹⁸ The agitation thus set on foot was continued by the Congress with unabated vigour for over thirty years. Up to 1916, this great organisation was dominated by the Moderate School of Indian Politics, and during this long period there was not a session of the Congress which did not discuss this question threadbare. In every meeting of this All-India body, the combination of the two functions was condemned and a resolution for its repeal was unanimously passed. On several occasions, even the Presidential addresses found room for reference to and condemnation of, the union of judicial and police functions. The speech of the President of the National Congress possessed and even now possesses an importance all its own. It could not refer to all the subjects which would be reviewed by the Congress. It only touched upon the most outstanding problems to which the attention of the Congress and the public had to be specially invited. During the moderate regime, the Presidential address discussed, in fact, only those grievances from which the country was specially suffering. The late Sir Surendra Nath Bannerjea in his two Presidential addresses, in the Poona Session of 1895 and the Ahmedabad Session of 1902, devoted a good space to this question. Referring to the contention that the separation of powers could not be undertaken for that would diminish the prestige of the District Officer, he very cogently observed that "Prestige which perpetuates injustice and excites discontent and dissatisfaction among the masses is not worth having. It is no aid to the

¹⁸ The Indian National Congress (G. A. Natesan & Co.) Second Ed. Part II, p. 7.

Government. It is a source of weakness and embarrassment."¹⁹ In 1902 he was equally emphatic in his demand for the reform. "If it is true," he said, "justice is the bulwark of Thrones and States, then there can be no more urgent or pressing consideration than a proposal which seeks to improve the administration of justice in India and to relieve it of the scandals which are inseparable from the present system."²⁰ The Bombay Session of the Congress in 1904 was presided over by Sir Henry Cotton who had retired from the Indian Civil Service two years earlier. This gentleman, while in Service, was a marked man for his sympathy with the Indians in their national aspirations. He could not be a member of the Viceroy's Council, or the Lieutenant-Governor of a province simply because he could not fall in with the ideals of Lord Curzon. In his Presidential address, he made out a case for the immediate withdrawal of the old patriarchal form of justice. The remedy for all the ills associated with justice in this country lies, he declared, "in the complete separation of the judicial from the executive service"²¹ In the following year at Benares, Mr. Gokhale also referred, from the Presidential Chair, to this question as one of the reforms which should not be delayed any longer. Year in and year out such demands went forth from the Congress platform, but the Government turned only a deaf ear to them all. It was this indifference of the Government to the Congress resolutions, which helped the transference of this great organisation from moderate to extremist hands in 1917. A change of Congress policy was at once undertaken. The extremists had lost all faith in passing empty resolutions for administrative reforms which they themselves could not carry out and which only elicited silent scorn from the Government. They therefore concentrated all their attention upon the wider question of Indian Home Rule. Once that was won, all the administrative ills could be remedied without further agitation. The question of the separation of judicial from executive functions thus took

¹⁹ *Ibid*, Part I, p. 271.

²⁰ *Ibid*, p. 691.

²¹ *Ibid*, p. 780.

its exit from the Congress platform, after engrossing its attention for over thirty years.

While the Indian National Congress was making a vigorous though ineffective demand for the repeal of the combination, this question was also being fought on other platforms and through other agencies. In 1888, was published in England "A few plain truths about India," by the Right Hon'ble Sir Richard Garth. It was a small brochure and had no pretensions to much literary merit. It was, what its title signified, a very plain, blunt and unvarnished expression of some opinions on the administrative system in India. But emanating from the source they did, these opinions carried great weight. Sir Richard had been, some time earlier, the Chief Justice of Bengal and in this capacity he had much experience of the relations between the executive and the judiciary in this country. His opinion on the position of the judiciary, therefore, could not but confirm and strengthen public feeling against the union of the two incompatible duties. "When the functions of a police man, a magistrate and a judge are all united in the same officer," he affirmed, "it is vain to look for justice to the accused." "To be tried by a man who is at once the judge and prosecutor," he continues, "is too glaring an injustice, and it is only wonderful that a system so indefensible should have been allowed to prevail thus long under an English Government."²² This trenchant condemnation of the system by one who had the right to express an opinion on this matter whetted public indignation all the more in this country, but it failed to make any impression on the unimaginative mind of the Government.

Several years later occurred an incident which compelled the Secretary of State for India to break his silence and express his opinion on this administrative question. In 1892, the famous Mymensingh case focussed public attention. It was aptly illustrative of the evils of uniting criminal justice with

²² A few plain truths about India (W. Thacker & Co., London, 1888), pp. 43, 45.

executive authority. Not that it was an isolated instance of the evil. It was only one of the many thousands of such cases occurring in the country from day to day.²³ But the special feature of the Mymensingh case was that the victim was a highly influential noble man and a great public benefactor. When Raja Surja Kanta Acharya Bahadur could be disgraced, persecuted and made to suffer an immense loss simply for the fact that a District Officer of perverted ideas bore a malice against him and took it into his head to humiliate him in public, nobody in the Presidency could think his honour safe and his individual liberty secure. The whole of Indian society was hence convulsed as the story of the Raja's humiliation got abroad. The incident was widely condemned in the press and on the platform. The Lieutenant-Governor was moved to take proper steps against the District Magistrate. But he only disapproved in a mild resolution of the methods and procedure of the action of the District Officer. Beyond this he refused to do anything.²⁴ The matter was, however, not allowed to rest there. Lord Stanley of Alderley who had interested himself in Indian questions dragged it to the House of Lords. A discussion was introduced on the 8th May 1893, and Lord Stanley pointed out quite convincingly that under the existing arrangement "justice could not be administered satisfactorily." Lord Kimberley, the Liberal Secretary of State, participating in the debate made an important pronouncement. He admitted that it was "contrary to right and good principle that the civil and judicial powers should be united in one person." He assured the House that he was "in no way insensible to the inconveniences which arise from the union of these two func-

²³ "This case is only one of many hundred instances of the injustice of the system which have come under my own knowledge; and one of many thousands of such cases of which the people, and specially the natives, are every day complaining." Sir Richard Garth in a letter on this case to M. Ghose. See the *Amrita Bazar Patrika* for 7th January, 1893.

²⁴ Proceedings of the Bengal Legislative Council, Vol. V, (1893) p. 203.

tions." That the existing system was faulty was "not a matter in dispute." But, he thought, the separation of the two functions would necessitate the doubling of the staff and the state of Indian finances would make it impossible to carry that out. Viscount Cross who had been the Secretary of State for India in the preceding Conservative Cabinet, associated himself with the opinions of Lord Kimberley. The question under review was such an important one that he himself, while in office, was anxious to deal with it. But the financial condition of the Government stood in the way.²⁵ The debate in the House of Lords thus gave the impression to the public that the only objection of the Government to the separation of judicial from police functions was a financial one. And if this objection could be met, the British Government in India would in no time annul the fusion of the two powers. Mr. R. C. Dutt of the Indian Civil Service was at this time on leave in England. He was an officer with an experience of over twenty years of active service to his credit. He had held charge of some of the biggest districts in Bengal. He was convinced that the separation of the two functions would not entail any material addition to the public expenditure. The debate in the House of Lords and the pronouncement of the Secretary of State now encouraged him to work out his scheme and put it before the public. After about three months of labour, he completed his scheme and published it in the August issue of 'India' in 1893. The scheme was introduced by Sir Richard Garth who in his note again bewailed the continuance of executive control over criminal justice and commended the scheme of Mr. Dutt to the Government and the public. By way of justifying the public demand for separation, Mr. Dutt alluded to the evils of the existing arrangement which he himself had experienced. "I have for years past," he observed, "directed and watched police enquiries in important cases, had the prisoners in those cases tried by my subordinates, heard and disposed of the appeals of some of those very prisoners and superintended their

²⁵ Hansard's Indian Debates, (Session 1893), pp. 282-290.

labours in prisons. And during all these years I have held the opinion that a separation of Judicial and Executive functions would make our duties less embarrassing and more consistent with our ideas of judicial fairness, that it would improve both judicial and executive work ; and it would require no material addition to the cost of the administration.”²⁶ The Secretary of State for India had observed in the House of Lords that the separation of the two functions would necessitate the doubling of the official staff and that this was his only objection to the immediate repeal of the existing system. Now an officer of the Crown was pointing out to him with all the experience and responsibility of his position that the financial objection had been unduly exaggerated. And what is more, he was now ready with a cut and dried scheme for the separation of functions which would not put any appreciable strain on the public purse. Was it not up to the Secretary of State, committed as he was in his speech to the principle of separation, to seize this opportunity and order a detailed examination of the scheme of Mr. Dutt? If he was serious about his opinions, expressed on a responsible occasion on a responsible platform, he should have welcomed this scheme and investigated carefully and promptly if as it was or modified here and there it could be applied without much addition to public expenditure. But the Secretary of State far from examining it would not even look at it. The question of expenditure, as later history would show, was only a camouflage for postponing the issue to an indefinite time. His speech in the House of Lords was only the formal expression of a sensible opinion which he had no intention to carry out in practice in India. In the Bengal Legislative Council, Sir (then Mr.) Surendra Nath Bannerjea asked if the Government had seen the scheme of Mr. Dutt and if they wanted to take any action upon it. The Chief Secretary replied that the attention of the Government was drawn to the scheme by the Secretary of the Indian Association but “the

²⁶ Para IV.

Lieutenant-Governor was not in a position at present to make any statement regarding it."

Even in the face of this indifference of the Government, the Indians continued the agitation. In December 1895, was published in 'India' an interview with Mr. Manmohan Ghose. He pointed out in this interview that the danger from the union of the two functions was not only not on the wane, it was actually on the increase. There was a greater tendency now in Bengal, he said, "to force the Judiciary to decide criminal cases according to the pre-conceived ideas of the Executive."²⁸ This interview in which he exposed the different methods of executive interference with criminal justice was expected to acquaint the British public with the actual position of the judiciary in India. Mr. Ghose also conceived at this time of an influentially attested memorial to the Secretary of State for the repeal of the union of police and judicial powers. It was with a view to this that he compiled and published two pamphlets in the middle of the following year. One was a collection of the opinions of highly placed officials and judges in India in favour of the separation of the two functions. In the other were collected twenty cases illustrative of the evil which had sprung from the fusion of the two powers.²⁹ These cases were not meant to be exhaustive. They were only typical instances of official high-handedness nourished by the unholy co-operation between executive and judicial powers. The particular purpose for which the two compilations were made and published was not immediately fulfilled. The projected Memorial did not at once materialise. But the pamphlets did their work. They evoked a rejoinder from the pen of Sir Charles Elliot who had only recently retired from the Lieutenant-Governorship of Bengal. As the Satrap of this Presidency, he was noted for his autocratic ideals. He was the man who moved heaven and earth for the withdrawal of the jury system

²⁸ See P. C. Ray—*Op. Cit.* p. 166.

²⁹ The two pamphlets have been incorporated in P. C. Ray's *Compilation*.

from this province. He believed in the divine right of the Indian Civil Service to govern this country and never allowed his imagination to be warped by any ideal of liberty and freedom. Such a man now entered the list to cross swords with Mr. Manmohan Ghose. He wrote a long article on the subject which was published in the Asiatic Quarterly Review for October 1896. It was a long eulogium of the existing patriarchal system. In his support of the combination of the two powers, he revived the old oriental theory of government formulated by Sir Cecil Beadon and sanctified by Sir James Stephen. "I would point out," he observed, "that the keynote to our success in Indian Administration has been the adoption of the oriental view that all power should be collected into the hands of a single official so that the people of the District should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of Government."³⁰ The District Magistrate was the eye and ear of Government. His hands should on no account be weakened. He must continue to hold in his hands all the threads of the different branches of the Administration. He must also have the officials in all these branches under his general control. All these were the old arguments of Sir James Stephen. After the debate in the House of Lords in 1893, it was supposed that this trend of reasoning had become out of date. But Sir Charles Elliott would still swear by them. He had still confidence in their potency. He even out-distanced his *Guru* in his zeal for the *status quo*. He did not think the supervision and control of the District Officer over the Magistracy of the district as merely expedient, he made himself almost ludicrous by saying that it was useful and beneficial as well. He even went to the length of questioning the fact that the duties of the police and the criminal judge were any way dissimilar. "There is no real distinction in kind," he observed, "between the action taken before and after the trial."³¹

This article, so naked in its praise of the existing despotism,

³⁰ Para II.

³¹ Para V.

would certainly have elicited a crushing reply from Mr. Manmohan Ghose. Unfortunately, however, in the course of the month he died. It was now left to others to fulfil the task which would have devolved upon him had he survived. In "India" for November 1896, were published two replies from eminent authorities to the article of Sir Charles Elliott. Sir John Budd Phear who had been a Puisne Judge of the Calcutta High Court and the Chief Justice of Ceylon gave an effective rejoinder to his theory that the duties of the police and the judiciary were essentially of the same nature and type. "On this principle it seems plainly to follow," observed Sir John, "that the metropolitan magistrates are an expensive and unnecessary luxury and in the interests of economy and justice they ought to be got rid of, and Scotland Yard to be entrusted with the disposal of the work."³² Mr. H. J. Reynolds who had been a member of the Indian Civil Service, had considerable experience of the District administration of Bengal and had risen to be the Chief Secretary to the Government of this province also gave a cogent and suitable reply to Sir Charles Elliott. "That a system which is vicious in principle will naturally bear evil fruit," he remarked, "is a reasonable conclusion. It is for Sir Charles Elliott to show that this is one of those exceptional cases in which it is possible to gather grapes from thorns and figs from thistles."³³

The memorial which Mr. Manmohan Ghose had proposed was delayed by his sudden death in 1896. It was not till July 1899 that the memorial was presented to the Secretary of State, Lord George Hamilton. It went over the signature of Lord Hobhouse who had succeeded Sir James Stephen to Law membership of the Government of India and several other men with long and practical experience of Indian administration. The noble array of signatories included the names of two ex-chief Justices of Bengal, a retired Chief Justice of Ceylon, several retired Puisne Judges of the Calcutta High Court and several retired executive officers of the Government. The memorial

³² Para X.

³³ Para VII.

itself was divided into three sections and had two appendices attached to it. The first section was devoted to a brief history of the problem, the second was taken up by the arguments which the memorialists adumbrated for the separation of the two functions. In the third was embodied the scheme of separation which Mr. R. C. Dutt had published in 1893 and which was now accepted by the Memorialists. In the first appendix were collected fourteen letters and articles bearing on the question and in the second appendix were placed the two pamphlets of the late Mr. Manmohan Ghose. It was an imposing document signed by an imposing array of public men, and it was expected to have the desired weight with the Secretary of State and the Government of India. Of course the Memorial has not been without its traducers. Some people have tried to cry down its importance on grounds quite unconvincing. It has been pointed out that most of the memorialists were men with judicial experience and only two were there who had borne administrative responsibility.³⁴ How can this be a ground of complaint it passes one's understanding. Men who had sat on the bench of the highest tribunal, men who had headed the judiciary in a province were certainly the fittest persons to speak on the position of the law courts in their relation to the executive. They had seen from within how the combination of the two functions stood in the way of the judges discharging their duties with independence and fairness. They had experienced from day to day not simply the open control which the executive exercised over the criminal courts but also the many sinister and overt methods by which the executive Government tried to keep the judiciary under its malign influence. Men who had sat on the High Court bench and as such had a direct experience of the relations between the executive and the judiciary were hence the most qualified to recommend to the Secretary of State the changes necessary in the existing system. The executive officers on the other hand

³⁴ R. N. Gilchrist—The Separation of Executive and Judicial Functions, (1923), p. 119.

were not expected to give quite the impartial opinions on the subject. They were apt to be prejudiced in favour of the arrangement under which they had worked so smoothly and comfortably. Used to greater authority and wider powers, they were not expected to recommend the curtailment of their jurisdiction. Accustomed to maintain law and order with a free hand, they would generally refuse to recommend a system under which all their acts would be open to the scrutiny of the courts entirely independent of them. They had so long controlled the destiny of the subordinate magistracy. They looked upon these Magistrates as their henchmen ever ready to subserve their interests. Would they all at once invite a reform that would make these very Magistrates their task-masters? Very few would like to accept such a self-denying ordinance.

The second ground on which the importance of the Memorial has been belittled is its association with Mr. Manmohan Ghose's pamphlet containing the twenty cases. It has been observed that a system under which only twenty instances of the miscarriage of justice could be brought out was indeed an eminently successful and useful one. This was the comment made by Sir Charles Elliott soon after the publication of the pamphlet in 1896. This point was, however, quite successfully met by Mr. Reynolds one month later in his article in "India." He pointed out that these cases were not and could not be an exhaustive list. They were "only types and specimens of hundreds more in which similar injustice has been done, but there has been no publicity and no redress."³⁵ Besides, these twenty cases were chosen by Mr Ghose as he had personal knowledge of the details as they happened. In every one of these cases he was retained as the defence lawyer and in this capacity he came across at first hand the vagaries of the Magistrates. The Memorialists wanted to draw up a case for the separation of criminal justice from executive authority. They tried to bring it home to the Secretary of State that the existing system was a danger to individual liberty and provided

³⁵ Para XI.

ample scope for executive high-handedness. By way of illustrating this contention, they thought it wise to append some specimen cases to the Memorial. It was from this motive that the pamphlet of Mr. Ghose was incorporated in the Memorial as an appendix. We do not see how it has weakened the case of Lord Hobhouse and his co-signatories. It has on the contrary strengthened it. But ignoring the reply of Mr. Reynolds in 1896, and the obvious character of the pamphlet, some critics³⁶ would still repeat that this collection instead of being a condemnation of the existing system constituted its vindication.

The Memorial pointed out that the duties of the judge and the executive officer differed considerably in nature and character. They were not infrequently contradictory. "While a judicial officer", it observed, "ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his District"³⁷ The union of the two functions was hence quite incompatible, and even if serious miscarriages of justice did not always occur, its administration was sure to be brought "into suspicion while judicial powers remain in the hands of the detective and the public prosecutor."³⁸ So long as the District Officer would try a case of which he had taken cognizance or have it tried by a subordinate within his control "the administration of justice in India," the Memorial repeated, "is not likely to command complete confidence and respect."³⁹

Within three months of the submission of this Memorial, a judgment was delivered by a Sessions Judge in Bengal which authoritatively and emphatically brought to the fore the serious nature of the evil which the combination of the two functions involved. This judgment was delivered on the 7th of October

³⁶ Gilchrist—*Op. Cit.*, pp. 116-7.

³⁷ Para XII.

³⁸ Para XI.

³⁹ Para XIII.

1899 by Mr. Pennel, the District and Sessions Judge of Chupra, then a district in Bengal, in the case *Queen-Empress v. Constable Narsing Singh*. The case itself was not an extraordinary one. It was of the type of cases that happened frequently. But the correct and impartial attitude taken up by the Sessions Judge was certainly an extraordinary one. It was uncommon for a judicial officer belonging to the Indian Civil Service to call spade a spade, and protect an innocent, helpless individual from the high-handedness of the executive and that too with an apposite censure upon the illegal methods of the executive officers concerned. The judgment took the country by storm and shook the Indian Civil Service and for the matter of that the whole of Anglo-India to its base. It showed the timeliness of the Memorial and certainly added weight to its contention for the immediate annulment of the union of the two incompatible powers.

But what was the fate of this Memorial? After about one year of its submission, Mr. H. Lewis put a question on this subject to the Secretary of State in the House of Commons. Lord George Hamilton said in reply that the Memorial had been forwarded to the Government of India in August 1899 and he had not yet received any report from that Government. Asked further as to when he did expect it, the Secretary of State answered that the subject concerned was a large and important one and he could not say when the Government of India would be able to report.⁴⁰ Two years more passed by and in March 1902, Mr. Caine questioned the Secretary of State if he had received any reply from the Government of India. Lord George Hamilton again answered in the negative but assured the House that the Government of India had this question under their consideration and were consulting the Provincial Governments on the subject.⁴¹ In 1903, in the budget debates of the Indian Legislative Council, Rai Sri Ram Bahadur incidentally referred to this question and urged that

⁴⁰ Hansard's Indian Debates (Session 1900), p. 284.

⁴¹ *Ibid.*, (Session 1902), p. 160.

the separation of the police from the magistracy should be undertaken without delay.⁴² But there was no response from the Government bench. The Government of India were of course still considering the question. In 1905, was made the much delayed publication of the Report of the Indian Police Commission which had been appointed in 1902 and presided over by Sir Andrew Fraser, later the Lieutenant-Governor of Bengal. The Majority of the Commissioners who belonged either to the Indian Civil Service or to the Indian Police Service, had still full confidence in the union of executive and judicial powers in the hands of the District Magistrate. They considered that "in the interests of the people the police must remain under the general control and direction of the District Magistrate. He is the officer in every way marked out for the discharge of the duties of supervising both the Magistracy and the Police."⁴³ The District Officer must hence continue to be "the connecting link between the executive and judicial functions of the administration."⁴⁴ While this was the not unexpected opinion of the Commission, the Maharaja of Darbhanga, the only Indian Member of this body, advocated the separation of the two functions in his Note of Dissent. "Having regard to the actual working of the present system," he wrote, "it is hard to see how approval can be accorded to an arrangement under which the District Officer is at one and the same time the head of the police and the head of the magistracy."⁴⁵ Cases had frequently occurred, he affirmed, "which show that this combination of the duties of the police and the Magistrate leads to failure of justice and what is still more regrettable, makes the entire administration less popular than it should be."⁴⁶

While thus the demand for the separation of the two powers was thickening from far and near, the Government of India were sleeping over the Memorial of 1899. They had already

⁴² Proceedings, Vol. XLII (1903), p. 113.

⁴³ Report of the Indian Police Commission of 1902, (Cd. 2478) p. 81.

⁴⁴ *Ibid.*, p. 82.

⁴⁵ *Ibid.*, p. 153.

⁴⁶ *Ibid.*, p. 153.

received the opinions of the Provincial Governments which had been of course most unfavourable to the separation of powers. The Bengal Government, for example, had reported in 1901 that "in the interests of good government *i.e.*, of general administrative expediency, the union of executive and judicial functions in district and sub-divisional officers was at the present day essential."⁴⁷ In the provinces the Indian Civil Service was, in the fullest sense of the term, the Government. The Lieutenant-Governor who was the head of the establishment was himself a senior member of the Service. The Secretaries and the District and Divisional Officers who supplied him with information and advice belonged also to the same corps. In view of these facts, the unfavourable character of the opinion of the Provincial Governments should have been taken for granted even before it was actually submitted. The demand for the separation of the executive and judicial powers was regarded by the members of the Indian Civil Service as a reflection upon their activities. They thought that the Indian public had rather perversely taken it into its head that the Civilians were mis-using their power. It was to check this alleged misuse that this demand for the separation was being put forward. The Civilians, therefore, set their face in a body against this reform for otherwise they would be admitting their human weakness. They could not be convinced that abuses under this system were inevitable. There would be no injustice to any body under this arrangement only when ideal men with extraordinary rectitude were placed at the head of the Indian Districts. But the Indian Civilians, however efficient in their own way, should not have any idle pretension as to that uncommon uprightness. They were after all ordinary mortals with the prejudices and foibles of ordinary men. But the members of the "Heaven-born" Service were not ready to admit it. This explains their universal opposition to any scheme of administrative reform.

⁴⁷ Quoted by Sir Henry Wheeler in his speech in the Bengal Legislative Council on the 5th April 1921. See Bengal Legislative Council Proceedings, Vol. I, No. 6, p. 269.

This attitude of the Indian Civil Service was not unknown to the Government of India and the Secretary of State. Hence if they were serious at all about the separation of the two functions, they should have taken to some other straightforward method for gathering opinions and information. They might have appointed an impartial Committee of Enquiry whose recommendations would have been a better guide to the Secretary of State in this matter. But this was not to be. The Government of India and His Majesty's Government in England thought it still wise to be guided by the Indian Civilian, however prejudiced a party they might be on this question.

At the time of discussing the financial statement in 1907, this topic was again raised by some non-official members in the Indian Legislative Council. Dr. Rashbehary Ghose looked upon the union of judicial and executive functions in the same public servant as "certainly an anachronism at the present day in the advanced provinces." But he observed in a tone of disappointment that there were some fallacies "which, though doomed to death, are yet fated not to die." He had thought that the Government of India would take prompt action upon the Memorial of 1899 sponsored by so many distinguished men. "But nothing has yet been done. The question, we are told, is still under consideration."⁴⁸ The Maharaja of Darbhanga also spoke in the same vein. "Law Courts," he thought, "have a peculiar importance in this country. They are regarded as the one check on the executive." The judiciary should hence be immediately emancipated from the control of the executive. He was not sure if any scheme of separation was likely to prove expensive. "But even if it was, the reform is of a character which would justify any expenditure that might be bestowed on it."⁴⁹ Sir Harvey Adamson, the Home Member of the Government of India, also participated in the debate. He tried to belittle the anomaly and danger of the existing

⁴⁸ Proceedings of the Legislative Council of India, Vol. XLV., pp 71-72

⁴⁹ Ibid, p. 120

system. But he could not go the whole hog in support of the existing arrangement. He had to admit that it was not "in all respects a satisfactory one." He held out the hope that in course of the year "the question will be brought to a solution." But he hinted at the same time that "it will be necesasry to address Local Governments again,"⁵⁰ on this subject. Seven months later on the first of November 1907, Mr. Gokhale asked the Home Member as to how far the question of separating executive and judicial functions had advanced. Sir Harvey Adamson said in reply that "a definite scheme for the experimental separation of Judicial and Executive functions in a few selected districts of certain provinces is now under the consideration of the Government of India and it is probable that the Local Governments concerned will be consulted on the subject shortly."⁵¹ In March 1908, Sir Harvey Adamson speaking on the Financial Statement acquainted the members of the Indian Legislative Council with his provisional scheme. He admitted that "criminal trials, affecting the general peace of the district, are not always conducted in the atmosphere of cool impartiality which should pervade a Court of justice." Unless the administration of justice was above suspicion in India "it can never be the bed-rock of our rule." Steps should hence be taken which would remove public suspicion in the impartiality of criminal tribunals in this country. The Government of India, announced the Home Member, had accordingly "decided to advance cautiously and tentatively towards the separation of Judicial and Executive functions in those parts of India where the local conditions render that change possible and appropriate." He further pointed out that a commencement of the separation should be made in Bengal including Eastern Bengal. It was from Bengal that the cry for separation had gone forth and it was appropriate that the experiment should be first made in that province.⁵² This statement of Sir Harvey Adamson raised much hope in the Indian nationalist circle that the much fought for reform was at last attaining

⁵⁰ Ibid, p. 187.

⁵¹ Ibid, Vol. XLVI, p. 35.

⁵² Ibid, pp. 248-249.

fruition. But this was only a delusion. In the budget debate of the previous year, the Home Member had hinted that the subject would require further reference to the Provincial Governments. In replying to the question of Mr. Gokhale in November 1907, he had repeated that the Local Governments concerned would be consulted on the subject shortly. Accordingly the scheme which he had expounded in the Indian Legislature was referred in 1908 to the two Governments of Bengal. And this reference amounted to the practical burial of the scheme. It was a foregone conclusion that the Indian Civil Service headed by Sir Andrew Fraser and Sir Lancelot Hare would see nothing in the scheme that would be useful to public administration in Bengal. Sir Andrew Fraser, as the President of the Indian Police Commission of 1902-3, had recommended that the union of criminal justice with police power should stand as usual. Five years later as the Lieutenant-Governor of Bengal he was not expected to change his opinion. Nor would his comrades advise him differently. He frankly recommended to the Government of India that the whole scheme should be dropped.⁵³ Sir Lancelot Hare, the Lieutenant-Governor of Eastern Bengal also set his face against the proposal of separation. What would the Government of India now do? They now simply marked time. In 1909, Sir Andrew retired from the *Gadi* of Bengal and was succeeded to that office by Sir Edward Baker. This gentleman, while associated with the Government of India, had a considerable hand in the formulation of the scheme of Sir Harvey Adamson. He was convinced of the utility of separating criminal justice from executive control. It was, therefore, expected by the Indian public that in his regime the scheme would be given a trial in Bengal. But he could not overcome the opposition of the rest of the Indian Civil Service to the scheme of separation. He had, therefore, to postpone the issue. He reported to the Government of India that the time was unpropitious for the reform in question.⁵⁴

⁵³ The Bengal Legislative Council Proceedings, Vol. I, No. 6, p. 269.

⁵⁴ *Ibid.*, p. 270.

On the 29th March 1910, Mr. Dadabhoy raised this issue again in the Legislative Council of India, while discussing the Financial Statement. He could not understand "why there should be so much delay over the settlement of the details of a small measure."⁵⁵ He did not know that not merely the details but also the principle of the reform had been attacked by the Civil Service in the two Bengals. He had no idea that once the underlying principles of a measure had been accepted by the Government, they might be questioned by the Civil Service and the whole thing might be gone into afresh. Soon he was disillusioned. Mr. Madge, an official member of the Indian Legislative Council, voiced the opinion of the Civil Service when he condemned the very principle of separating the two functions. He pointed out that it would diminish the prestige of the District Officer which was so very essential for the peace and safety of the District.⁵⁶ This was the orthodox argument of the Civilians against the proposal of separation. In 1908, Sir Harvey Adamson had ridiculed this prestige theory.⁵⁷ Now, however, he succumbed to the opposition of the officers like Mr. Madge. In reply to Mr. Dadabhoy he pointed out that the scheme was being held over for the time being and that for three reasons. In the first place the two Bengal Governments had reported that the scheme would cost much more than the original estimate of the Government of India. The Government, however, were not at that time in a position to find the money that would be required by the new experiment. Secondly influential sections of opinion in two Bengals thought that the scheme would weaken the power of the District Officer. Neither the Government of India nor the head of the Bengal Government, Sir Edward Baker, shared this opinion. But still he thought it would be unwise for the Government to launch upon a reform in the face of the opposition of those "whose views are entitled to consideration." Thirdly political

⁵⁵ Proceedings of the Council of the Governor-General of India, Vol. XLVIII, p. 628.

⁵⁶ Ibid, p. 734

⁵⁷ Ibid, Vol. XLVI, p. 249.

crime was at this time rife in Bengal and "in these conditions it is undesirable to make delicate experiments with the judicial system."⁵⁸ The scheme was thus postponed, rather given a smooth and unostentatious burial. It was the opposition of the Indian Civil Service which killed it. No doubt, after 1910, there was some parley over this issue between the different governmental authorities. But all this came to nothing. All beat retreat before the solid phalanx of opposition which the Indian Civil Service presented. On the 10th September 1912, the late Mr. Bhupendra Nath Basu asked the Home Member if any decision had been arrived at as to the question of the separation of the two functions. Sir Reginal Craddock replied in the time-honoured fashion that the Government of India were not in a position to make any statement on the subject.⁵⁹ The Indian nationalists still, however, did not give up the fight. Nor had they lost all hope yet. On the 17th March 1913, during the discussion on the financial statement, Sir Surendra Nath Bannerjee moved a resolution in the Indian Legislative Council, to the effect that some money should be set apart in the budget for the experiment of the scheme of Separation in certain selected Districts. But even this moderate proposal could not have the support of the Government. Sir Reginal Craddock pointed out that the Government of India could not accept the proposal at the time. He made a rather surprising observation that the discussion on the Adamson scheme between the different Governments "is still going on. It is not yet finished." Mr. Vijiaraghavachariar could not resist the temptation of asking as to what was still under consideration. He questioned whether it was the principle of the reform or the principle having been accepted it was the details that were being discussed. Sir Reginald Craddock, however, would not say anything definitely. Even when urged by the President to answer either way, he would not commit himself. He only said that the principle and the details could not be differentiated. All the non-official votes were cast in favour

⁵⁸ Ibid, Vol. XLVIII, p. 757.

⁵⁹ Ibid, Vol. LI, p. 6.

of the resolution but the standing official majority was opposed against it. The resolution was lost.⁶⁰ A year later the Great War broke out and the issue was postponed *sine die*. Submitted in 1899, the Memorial was accorded a tortuous discussion for about a decade. But nothing substantial came out of it except the empty scheme of Sir Harvey Adamson which in its turn was discussed for a full quinquennium and then abandoned without regret. Strange are the ways of the bureaucracy.

Meanwhile the Royal Commission on the Public Services in India was appointed in 1912. It was presided over by Lord Islington and among its members were Lord Ronaldshay (now Lord Zetland), Mr. Ramsay MacDonald, Mr. Gokhale and Sir Abdur Rahim. This Commission took some valuable evidence on the question of the Separation of the Judicial from Executive powers. Indian gentlemen both non-official and official who appeared before this body as witnesses were practically unanimous in their demand for the withdrawal of executive control from over criminal justice. Dewan Bahadur P. Rajagopala Chariar, a statutory Civilian on the Executive side, at that time the Dewan of Travancore, deposed before the Commission that the first need in his opinion was "the complete separation of the Revenue (Executive) and Judicial Departments."⁶¹ Sir C. Sankaran Nayar, then a Puisne Judge of the Madras High Court condemned the arrangement under which the officer interested in the administration of the police, was also responsible for trying cases or having them tried by his subordinates. This system, he pointed out, had fully alienated the confidence of the public in the impartiality of the criminal tribunals.⁶² Mr. S. Kasturi Ranga Aiyangar, the reputed publicist of the southern Presidency, voiced the demand of the people when he observed that he was "in favour of a complete separation of judicial and executive functions in the holder of

⁶⁰ Ibid, pp. 383-394.

⁶¹ Report of the Royal Commission on the Public Services in India, Vol. II (Cd. 7293), p. 262.

⁶² Ibid, p. 463.

an office. Purity of the administration of justice and the confidence of the people in the same demand the adoption of this measure."⁶³ In Bengal both Mr. K. C. De and Mr. J. N. Gupta, two Indian members of the Civil Service and distinguished District Officers, did not see any objection to the separation of the two functions.⁶⁴ The non-official witnesses raised a chorus of opposition to the existing arrangement. Mr. Bhupendra Nath Basu in his evidence demanded that not only the District Officer should himself be divested of all judicial duties but he should not be given any control over the officers dispensing criminal justice.⁶⁵ From other provinces also came the same cry. Pandit Madan Mohan Malaviya tried to bring it home to the Commission that the separation of the two powers was the unanimous demand of all classes of the Indian people. It was time that the reform should be conceded.⁶⁶ When the Commissioners collected all this evidence, it was expected that they would record an opinion either way on the subject. But at the last moment, the Commission was convinced that the question was outside its terms of reference and accordingly it refrained from making any recommendation.⁶⁷ Sir Abdur Rahim did not agree to this contention. He did not think that the subject was without the purview of the Commission. He accordingly devoted a portion of his excellent minute of dissent⁶⁸ to this topic and concluded that "there should be a complete separation of the judicial and executive functions." "This already exists in the Presidency towns," he added, "and the arrangements which obtain there could easily be adjusted to the district conditions."⁶⁹

In 1919 the Reforms were introduced and soon the provincial and central legislatures were reconstituted under the new Government of India Act. Elective element now got the

⁶³ Ibid, p. 255.

⁶⁴ Ibid, Vol. III, (Cd. 7578), p. 464.

⁶⁵ Ibid, p. 481.

⁶⁶ Ibid, Vol. IX, (Cd. 7581), p. 79.

⁶⁷ Ibid, Vol. I, (Cd. 8382), p. 196.

⁶⁸ Mr. Gokhale died before the completion of the Report.

⁶⁹ The Report, Vol I, (Cd. 8382), p. 452.

upper hand both in the provincial councils and in the two Houses of the Central Legislature. The question of judicial and executive separation was hence assured a favourable reception in all these bodies. But this did not bring the question any nearer the solution. The Executive not responsible to these Legislatures, but dominated as hitherto by the Indian Civil Service, took good care not to carry out the reform. The question was evaded every time it was raised. Early in 1921 the Hon. Mr. Bhurgri moved a resolution in the Council of State requesting the Government of India to take immediate steps for the severance of the two functions. Sir William Vincent, the Home Member, tried to whittle down the necessity and urgency of the reform. But, he pointed out, it was not for the Government of India now to discuss the question. Justice was a provincial subject under the new regime and it should be tackled by the Provincial Governments as best they could. If any of these Governments thought it wise to separate the two functions and take criminal justice out of executive control the Government of India would not stand in the way. On this assurance being given, the resolution was withdrawn by leave of the House.⁷⁰

It was now the turn of the Provincial Legislative Councils to move for the reform. On the 4th of April 1921, a resolution recommending "the total separation of the judicial from the executive functions in the administration of this Presidency," was introduced in the Bengal Council by Mr. K. M. Choudhury. He hoped that under the new regime the angle of vision of the officials had changed and that no time would be lost "in giving effect to this much-needed reform."⁷¹ Participating in the debate on this resolution, Sir Henry Wheeler, the Member in charge of the Political Department, made a "halting, hesitating, and ambiguous speech."⁷² He

⁷⁰ The Council of State Debates, Vol. I of 1921, pp. 435-449.

⁷¹ Bengal Legislative Council Proceedings, Vol. I, No. 6, pp. 255-259.

⁷² This was how this speech was characterised by Kumar Shib Shekhareswar Ray in the Bengal Legislative Council in March, 1923. Proceedings, Vol XI, No. 5, p. 27.

traced the history of this question since the year 1836 and then in a most non-committal way summarised the arguments on either side of the controversy. The theory that Magisterial authority should not be subject to executive interference and control was admitted no doubt by the Government. But Sir Henry remained silent as to whether the Government would practically undertake to separate the two functions at an early date. He proposed that the whole subject should be examined afresh by a competent Committee. He wanted an authoritative pronouncement by some experienced experts as to how the separation could be carried out. The non-official Indian members looked upon this proposal of the Home Member as a method of shelving the issue. They would not of course object to such a proposal and would amend the resolution accordingly if the Government definitely accepted the principle that criminal justice should be immediately and completely separated from executive functions. They would have no objection to such a Committee if it were only to work out the details of a scheme of separation which had been already accepted in principle. On no assurance being given by the Government on these points, the resolution of Mr. Choudhury was put to the vote and carried without a division.⁷³

The Government of Bengal, in spite of this resolution, still adhered to the view that as a preliminary step a Committee should be formed to elaborate a practical working scheme for the separation of executive and judicial functions in the administration of this province and to report on the cost thereof. Accordingly on the 19th August 1921, the Governor in Council appointed a Committee on the lines foreshadowed by Sir Henry Wheeler in the Council debate of the previous April. It was to be presided over by Sir Ewart Greaves, a justice of the High Court of Fort William. Of the other five members, Mr. F. C. French was a senior member of the executive branch of the Indian Civil Service, Sir Ashutosh Chowdhury was a retired justice of the High Court and a member of the Legislative

⁷³ Bengal Legislative Council Proceedings, Vol. I, No. 6, pp. 268-290.

Council, Dr. A. Suhrawardy, an educationist and a prominent representative of the Mahomedan Community in the Legislative Council, Raja Manmotha Nath Rai Chowdhury of Santosh was also a member of the Legislative Council with over twenty years of valuable experience in Indian public life, and lastly Mr. G. Morgan was representative of the European interest in the Bengal Legislative Council. It was thus a Committee of experienced men which Sir Henry Wheeler had wanted to set up and the conclusions of this body might be regarded as "an authoritative pronouncement" which he had so much looked forward to. The Committee examined twenty-one witnesses of whom fourteen were executive officers, one being the Commissioner of a Division, and nine District Magistrates. The other witnesses were lawyers, some of them practising in the Mufassil. The Committee also sent a questionnaire to all District Magistrates who were not orally examined and their replies were available to the Committee. Similarly another questionnaire was sent round to the District Judges and their replies were of much help to the Committee. The views of the different public bodies on the subject were invited and received and they helped the Committee materially in coming to its conclusions.⁷⁴ The Committee was thus acquainted with every shade of opinion upon the subject. All the pros and cons were before the members of this body and they now after digesting all these evidences came to the conclusion that there was "no practical difficulty in effecting a separation of judicial and executive functions."⁷⁵ They actually drew up a scheme which would provide for a complete separation of the two powers, which would at the same time disturb the existing conditions as little as possible and which would also minimise any increase of administrative cost.⁷⁶

The Committee finished its work and submitted its Report in January 1922. But it was not published immediately. The Government sat tight upon it for about a year. It was not

⁷⁴ Report of the Greaves Committee, p. 5.

⁷⁵ *Ibid*, p. 6.

⁷⁶ *Ibid*, p. 6.

till the close of November that the Report was placed before the public. Even then the Government revealed no intention of giving effect to the recommendations of the Committee. The personnel of this body was chosen by the Government and in all the individual members of this Committee the Government had the fullest confidence. After exploiting all the most authoritative sources of information, the Committee came to certain conclusions as to the methods of separating the two functions and as to the extra cost that they would involve. If a Committee asked the Government to depart from an established line of public policy or to initiate any new principle of public administration, it could be open to the Government to reject the recommendations. But if a new principle of public administration is once accepted by the Government and if an expert Committee is set up to work out the details for carrying out that principle, it is certainly not open to the Government to reject the work of this Committee very lightly. Time may prove that the Committee is not far-seeing in every detail and not accurate in every estimate. No human work can be all-perfect. Every scheme must have a flaw. But still these recommendations of the expert committee, come to after much deliberation and weighing of all evidences, must be the best upon which the Government may act. They must undoubtedly be far weightier and more authoritative than any opinion of an individual officer of the Government. But the Government of Bengal and for the matter of that all the bureaucratic authorities in India, cherish peculiar opinions in these matters. On the 15th of March 1923, Kumar Shib Shekhareswar Ray brought a resolution in the Bengal Legislative Council asking the Government to give immediate effect to the recommendations of the Greaves Committee. He was disappointed that the Government had not taken any notice of the Report although it had been before them for over a year. The question of separating the two functions was kept hanging so long that the Government should burke it no longer. It was time that they should prove their sincerity in the matter by acting up to the recommendations of the Committee which

they themselves had appointed. Sir Hugh Stephenson, successor of Sir Henry Wheeler in the Political Department, spoke on the resolution in reply to the Kumar and his supporters. His speech was a most disappointing performance. Its temporizing character was apparent. The object of Sir Hugh was only to postpone the issue. He, of course, announced that the Government had accepted the principle of separation. But he could not see yet how it could be carried out. He found fault with the Report of the Greaves Committee in this particular and that. He would like to reject this recommendation and was not sure as to the utility of the other. He also thought that the Committee had underestimated the expenditure necessary for the reform. Now how could he think that way? Why, his officers in the Mufassil had told him so.⁷⁷ So he had more confidence in the judgment of himself and some of his officers than in that of the expert Committee. The Indian members of the Council were not surprised that the Report of the Greaves Committee had thus practically been consigned to the Waste Paper Basket. They knew quite well that this was the only fate which the recommendations of the Committee would attain. The setting up of the Committee was a mere eye-wash. It was a cover for doing nothing. The attitude of the Government was quite apparent. But still the resolution of the Kumar was put to the vote and agreed to without a division.⁷⁸ Several months later on the 17th August 1923, Maulavi Hafizar Rahaman Choudhury asked Sir Hugh Stephenson as to what action the Government were taking upon the Greaves Report. Sir Hugh replied that the matter was under the consideration of the Government and he was not in a position yet to make any statement on the subject.⁷⁹ A few more months passed by and the Government remained still silent over the matter. Then on the 14th March 1924, Mr. Debi Prasad Khaitan moved a resolution recommending the early separation of judicial and executive functions in Bengal. Sir Hugh Stephenson in speak-

⁷⁷ Bengal Legislative Council Proceedings, Vol. XI, No. 5, pp. 27-58.

⁷⁸ *Ibid*, p. 58.

⁷⁹ *Ibid*, Vol. XIII, p. 233.

ing on this resolution announced that he had considered the scheme of the Greaves Committee as unsatisfactory in many important particulars and hence worked out a scheme of his own which provided for a complete separation of the two functions. But this scheme involved some radical alteration of the functions and prospects of the services in Bengal. Without the consent of the Secretary of State, it could not on that account be given effect to. Accordingly in November 1923, the scheme had been sent to the Government of India so that through them it might be despatched to the Secretary of State for his views. In the mean time, Sir Hugh confided, an officer had been placed on special duty "to work out in detail the cost of the scheme," and his task was now practically finished.⁸⁰ So the Member in charge of the Political Department could himself draw up the scheme and a special officer could make a correct estimate of the expenditure that would be necessary for the reform. Sir Hugh thus gave out the impression that the expert Committee of 1921 was an unnecessary luxury. All that it had tried to do so unsuccessfully and so inefficiently could be accomplished satisfactorily and accurately in the course of three months by a Member of the Government in collaboration with an officer on special duty. But in point of fact, if the labours of the Greaves Committee had proved to be unproductive, those of Sir Hugh Stephenson were no less so. His scheme was sent to the Secretary of State for his seal of approval, and there in the labyrinths of the India Office it lost its way. More than three years after its despatch to the Secretary of State, a question was put in March 1927, to the Government as to the fate of this pet scheme of Sir Hugh Stephenson. Mr. A. N. Moberley, the successor of Sir Hugh, replied to Mr. Akhil Chandra Dutt that the Secretary of State had not yet favoured the Government of Bengal with his opinions and views on the scheme.⁸¹ The India Council was either sleeping over the document or had ordered it to be consigned to some pigeon-hole

⁸⁰ *Ibid.*, Vol. XIV, No. 4, pp. 130-135.

⁸¹ *Ibid.*, Vol. XXV, No. 3, pp. 236-237.

to remain forgotten there for ever. Nothing more has been heard of it. Thus the ten years of the Reforms have rolled by without relaxing the least the control of the executive over the judiciary. The combination of the two functions was a part and parcel of the old despotic system which it was the intention of the Reforms to modify, if not to replace. The separation of the two powers would have been the most fitting reform under the new regime. The right of the people to vote at the elections and send their representatives to legislatures becomes a chimera if it is not accompanied by their immunity from the vagaries of the executive officers. Political liberty and civil liberty must go hand in hand. But the forces which had fought the initiation of the Reforms as long as they could now combined to whittle down their implications as far as possible. The Civil Service with its allies stood, as a solid phalanx, against any measure that would further curtail its authority and powers. Throughout the period of the Reforms, it set its face against the separation of criminal justice from executive functions.

Such was the painful experience not of Bengal alone during the last ten years. The other provinces also found all the forces of the Civil Service similarly arrayed against them in their efforts to free criminal justice from executive shackles. In Behar, in U. P. and in the Punjab, expert Committees like that in Bengal were set up to frame suitable schemes for the separation of the two functions. In Assam and the Central Provinces also the Government promised to meet the public demand in this matter at the earliest convenience. But nothing came out of these schemes and promises. The old despotic system of District administration continues everywhere as before. The history of popular agitation for this reform during the last decade is thus, in every province, a story of ingenious evasion on the part of the Government and baffled attempts on the part of the people's representatives.

CHAPTER IV.

THE EVILS OF THE COMBINATION IN THE MAGISTRACY.

The union of executive and judicial functions has very naturally brought in its train certain very dangerous evils which only their complete separation can eradicate. It has invested the District and Sub-divisional Officers with powers which, human as they are, they must abuse, in a greater or a smaller degree. It is not in the nature of things that an Officer will discharge his executive duties vigorously and efficiently and perform at the same time his criminal judicial duties correctly and impartially. It is humanly impossible for him to divide his duties into two compartments, completely separate and not the least influencing each other. It is on the contrary quite natural that such an Officer would use his judicial powers to subserve executive expediency. His executive duties become primary and his judicial duties only secondary and auxiliary. The District Officer and his Deputy in the Sub-division are the local satraps in India. They are the representatives of the Raj in their areas. They are responsible for maintaining law and order in the localities under their charge. It is they who have to supervise and control the police in the detection of crime, the investigation of cases and the apprehension of criminals. They are responsible to the Government not only for maintaining peace but also for looking to every other interest of the Government. They are thus executive officers *par excellence*. Their bias is pre-eminently executive. They are the sword of the State. Now if, under these circumstances, they are also invested with the mace of justice, they would only place it under the sword. Their judicial powers would only be a hand-maid to their executive authority. The fusion of police powers with criminal justice thus places the liberty and freedom of the people at the disposal of the executive officers. A man, for one reason or another obnoxious in their eyes, may fall a victim to their high-handedness. The criminal courts,

if independent, would bring him out of the police clutches and restore him to freedom. In India, however, these criminal courts are under the thumb of the executive. They would consequently only confirm the action of the police and clap the man into prison. People thus have to live under the sword of Damocles constantly hanging over their head. The gravity of the danger that threatens the liberty and freedom of the individual is brought out into relief, when the judicial powers of these executive officers are fully enumerated.

The District Officer is by virtue of his position a Magistrate of the first class and can as such pass sentences of imprisonment upto two years with hard labour and of fine up to one thousand rupees.¹ He is also an appellate judge, all appeals from a conviction by a second or third class Magistrate lying with him.² In his capacity as the District Magistrate, he has also wide powers of control over all other Magistrates of the District. He can transfer a case from the file of one to that of another Magistrate. He has also to call for and look over the records of all the Magistrates in the District. "He makes a daily inspection of the register of cognisable cases and also inspects the trial registers of the different courts. He also from time to time examines a number of records disposed of by each Magistrate,...and keeps himself informed of the progress of all serious cases reported."³ The Sub-divisional Officers also are mostly Magistrates with first class powers. They distribute cases among the different Magistrates and exercise some control over them as to their discipline and conduct. In certain provinces, they also hear appeals against the decision of the second and third class Magistrates.⁴

The District Officer is, of course, a very busy man and his time to try original criminal cases is consequently very limited. In fact during the last fifty years, in the Regulation Provinces,

¹ The Code of Criminal Procedure, Section 32 (1) (a).

² *Ibid*, Sec. 407 (1).

³ Report of the B and O Committee on Separation (1922), Vol. I, p. 21.

⁴ *Ibid*, p. 21.

he could take on to his own file only a few original cases. The appellate work, however, he had to perform in full till the close of the first decade of the twentieth century. Now-a-days, he does very little judicial work, in some districts nothing at all. In some places, an Additional District Magistrate has been set up and he discharges all the judicial duties entrusted to the District Magistrate. In some other districts again, where there is no Additional District Magistrate, these duties are generally delegated to a senior Deputy Magistrate. But it is clearly immaterial whether the District Magistrate himself tries any criminal case or not. That does not affect in the least the position of the people *vis-a-vis* the executive. The thing that really matters is the supervision and control which he exercises over the Magistracy of the District. He may not try a single case but he may, if he likes, influence the decision in every case. All the other Magistrates of the District have to look upon him as their chief. Their promotion and prospects in the service depend very largely upon his notion of their conduct. The Deputy Magistrates especially have to look to him for their advancement in the Service. The District Officer thus presides over their official destiny. They have therefore to keep him in good humour and cultivate his sympathy and support. They cannot for any reason go against his will. The man who controls anybody's future prospects, ordinarily controls also his conscience. This is a self-evident truth. The Deputy Magistrates again belong to the Provincial Executive Service and are not in a judicial cadre with judicial duties alone to perform. Temporarily they may be deputed to criminal judicial work but soon they may be given some executive duty. Uniformly they are not engaged only in judicial work. They interrupt it or combine it with some executive functions. Consequently, they develop some executive bias and come to look upon themselves as the executive agents of the Government. It becomes difficult, if not impossible for them, to bring to bear an open mind on a case in which any interest of the Government may be involved. So they start with an original prejudice which is further aggravated by the control

exercised over them by the District Officer and his official superiors. The Deputy Magistrates hold their office during the pleasure of the Provincial Government. Their promotion and transfer are all determined by that Government. They have to get over three efficiency bars before reaching the top places in the Service. They cannot get over these bars without the favourable recommendations of the District Officers under whom they happen to serve. They are hence completely under the thumb of the District Magistrate. In no case, in which the local representative of the Government is interested, have they any independence. They only pronounce the verdict as dictated or desired by the District Officer. They are only the conduit-pipe through which is conveyed the decree of the executive. The voice may be the voice of Jacob but the hand is the hand of Esau.

Now there are various methods by which the independent judicial discretion of the trying Magistrates is interfered with by the executive. A case has been sent up by the Police and the accused are having their trial before a Magistrate, when a demi-official letter is addressed by the District Officer to the trying Magistrate instructing him as to what he should do. This practice of issuing demi-official "chits" to the Magistrates during the progress of a case has always been very common in the older provinces. It is not always possible to discover that such 'chits' have actually been addressed by the District Officer. Now and again, however, they luckily for the accused and the public fall into the vigilant hands of the defence counsel. The late Mr. Manmohan Ghose, in his famous interview with the representative of 'India', brought this aspect of executive interference with judicial fairness into public notice. One instance will suffice to show clearly the nature of interference with the ordinary course of justice which the issuing of such "chits" involves. In 1905 when the Swadeshi movement in connection with the partition of Bengal was in full swing in this province, the District Officers were bent upon crushing the boycott movement somehow and clapping the emissaries of this movement anyhow into prison. In November 1905, it was alleged that

Rajendra Lal Saha, a young boy only fourteen years of age, had had a scuffle with a dealer of Manchester cloth in a bazar in the interior of the Sub-division of Tangail, in the district of Mymensingh. The boy was taken into custody and placed before the Sub-divisional Magistrate of Tangail. The District Officer of Mymensingh now lost his sleep over this case. The prosecution case was supposed to be very feeble and the witnesses seemed to be got up. They might break down under efficient cross-examination and the case might collapse on that account. Now to avoid any such contingency and ensure the punishment of the boy, Mr. C., the District Magistrate of Mymensingh wrote a demi-official letter to the trying Magistrate on the 28th November. "In the case under section 147 I. P. C. against Rajendra Lal Saha and Purna Saha (The Balla disturbance case)," he wrote, "please take care that the case is disposed of promptly and the prosecution witnesses are not unnecessarily troubled. Let me have a copy of the orders you pass on the order sheet each day the case comes up for trial." After this, there could be no doubt as to the result of the trial. The young boy was promptly sentenced to rigorous imprisonment for fourteen days and a fine of sixty rupees.⁵

Cases crop up again which may have been instituted at the instance of the District Officer himself or in which he may be otherwise directly interested. He certainly invites conviction in such cases and the fact that he is keen about it is quickly noised about. The subordinate Magistrate who has to try a case like this does not wait for a 'chit' or any verbal instruction from the District Officer. It has already reached his ears that a conviction is wanted and he proceeds to record one irrespective of the merits of the case. He does not think himself quite in a position to exercise free judgment in such cases. The public also for obvious reasons does not cherish the least confidence in his impartiality and very frequently applies to the High Court for the transfer of the case to a Magistrate in

⁵ The letter somehow came to be published in the *Amrita Bazar Patrika*. See *A. B. Patrika* for 23rd March, 1906.

another district. One or two instances would testify to the miscarriage of justice that takes place so often in such cases. Mr. Nittyadhane Mookerjee of Howrah was a Swadeshist and a public-spirited member of the local Municipality of which the District Magistrate himself was the Chairman. As an elected Municipal Commissioner, he thought it his duty to guard the interests of the rate-payers from executive perversity and recklessness. He did not hesitate to show up the vagaries of the Magistrate-Chairman. All this independence and public spirit, however, rendered him obnoxious to the Municipal and District Executive and in April 1907, the Magistrate-Chairman proceeded to take his revenge upon his opponent in the Municipal Council. A petition was brought rather in a mysterious way to the District Magistrate that Mr. Nittyadhane Mookerjee had, in his capacity of a Municipal Commissioner, induced one Enayet Khan to deliver to him an amount of ten rupees by promising to obtain for him a licence to open a shop for refreshments. The District Magistrate took action upon this mysterious petition and directed the police to send up the case in the usual form under section 420 I. P. C. The Joint Magistrate of Howrah who was also a Commissioner of the Municipality was asked to try the case. The accused suspecting that he might get no justice from a Magistrate subordinate to the District Magistrate who was the prosecutor, applied to the High Court for the transfer of the case and meanwhile requested the trying Magistrate to postpone the trial. The Joint Magistrate, however, refused to give him any time to move the High Court and insisted on examining the witnesses immediately. The criminal bench of the High Court thought that this attitude of the Joint Magistrate proved his prejudice in the case and precluded him from trying it. But the bench could not assume without conclusive reasons that "all the subordinate Magistrates of Howrah are so subservient to the District Magistrate that they will fail to do justice simply because the District Magistrate is supposed to have some bias against the accused. There is always and very properly a presumption that every judicial officer has a free conscience." Accordingly the District Magistrate sent the

case to the file of the Deputy Magistrate, Mr. M. Now what was this poor gentleman to do? He knew that the District Magistrate was specially interested in this case and certainly wanted a conviction. If he now proved by his conduct that he had a free conscience of which the High Court had spoken and discharged the accused, his Chief might stand in the way of his promotion or have him transferred from the enviable station of Howrah to some distant unhealthy place. So he sacrificed his conscience and acted up to the promptings of self-interest. He humoured the Officer upon whose good grace hung his future and sentenced Mr. Nittyadhane Mookerjee to rigorous imprisonment for three months. An appeal was filed in the Court of the District and Sessions Judge of Hooghly and Howrah who quashed the sentence and acquitted the accused. He thought the story of the prosecution was "grossly improbable" "with grave causes for suspicion all along the line."⁶

Not infrequently also it occurs that the District Magistrate calls for his subordinate and asks him not to proceed with a case without consulting him. In 1892, a warrant was issued against Pravat Chandra Nag a zemindar, by the Joint Magistrate, Mr. G. of Comilla. As it could not be served, a proclamation was issued on the 4th November to the effect that Nag must attend the Court within thirty days. But it came to his notice on the seventh of the following month when thirty days had already long expired. Later on the case came up before a against Pravat Chandra Nag a zemindar, by the Joint-Magistrate, Mr. G. The case, however, was compromised and the accused let go. But this was not to the liking of the District Officer whose enmity Nag had somehow incurred. Hence a fresh case for wilful disobedience of the proclamation was instituted against him under section 174, and the case came up for trial before the Deputy Magistrate Mr. R. Now the charge against Nag could not certainly stand. The proclamation was to the effect that he must attend the Court by the 3rd of December.

⁶ See the A. B. Patrika. The issues of 23rd, 25th, 26th September, 1907 and 2nd October, 1907.

But he noticed this order only on the seventh of that month when he appeared in the Court. Hence how could he be said to have wilfully violated the proclamation by not attending during the period specified? The Deputy Magistrate, however, could not exercise his independent judicial discretion and acquit the accused. He had been asked by the District Magistrate to do nothing without consulting him. The conversation between the Court and the defence pleader is interesting.

The Defence Pleader :—I submit, I am ready to enter into my defence if the Court so desires ; but I think that is unnecessary as no case has been made out against my client, and I am entitled to an acquittal.

The Court :—Wait, gentlemen, I shall go and see the District Magistrate first.

The Deputy Magistrate then left the Court, saw his Chief and returning in a few minutes observed, "this is a very serious case. The accused cannot be leniently dealt with. The District Magistrate does not consider fine to be an adequate punishment in a case like this." So Pravat Nag was sentenced to imprisonment for two weeks and a fine of Rupees two hundred.⁷ One more illustration will be enough to understand the position of the subordinate Magistrates.

In what is known as the Barisal Delegates' case, some delegates to the Bengal Provincial Conference of 1906 which was being held in this town, were assaulted by the police at the instance of the Superintendent of Police himself. After the incident, they went to the neighbouring Police Station to enter their case in the Police diary. On the officer in charge of this Station refusing to record the information, their counsel appeared before the Senior Deputy Magistrate to make an application for

⁷ See the A. B. Patrika for 22nd September, 1893. Editorially the Patrika in the same issue wrote : "We hope some M.P. will place this dialogue before Lord Kimberley and try to convince him that the scandal of this executive interference with the judicial work of the subordinate Magistrates has reached its climax in this country and ought to be removed as speedily as possible."

process against the accused. The conversation that followed this application between the Court and the counsel brings out into relief the pitiable position of the Deputy Magistrate.

Court :—The standing order on me is to record the complaints and send them up to the (District) Magistrate.

Counsel :—Such standing orders are not known to law.

Court ;—My power of receiving complaints come from the (District) Magistrate.

Counsel :—As Magistrate, you are to follow the legal procedure, I cannot take notice of any standing order not in accordance with law.

Court :—Two accused are Europeans, I cannot try them.

Counsel :—You may not try them but you can issue process against them.

Court :—The order delegating power to me by the (District) Magistrate is that I am to record the complaints and then refer them to the (District) Magistrate. I understand he wishes to withdraw the case from my file. My duty is of a clerical nature. That is what I have been ordered to do in this matter. My hands are not quite free."

Again,

Court :—The order of the (District) Magistrate is to submit the papers to him.

Counsel :—Before doing so, you are bound to issue process as there is a *prima facie* case before you. You must record an order either under section 202 or section 204 before sending the records to the (District) Magistrate.

Court :—I shall only submit the record to him for orders without any remarks of my own.

Counsel :—I object to this as contrary to law.

In spite of these protests, the records were sent to the District Magistrate through the Bench Clerk who shortly returned with the following order, noted on the petition—"complaints dismissed and struck off." On this, the High Court was moved and their Lordships held that the action of the District Magis-

trate "was in contravention of the law" and the direction to the Deputy Magistrate to submit all complaints to the District Magistrate for passing orders "was clearly illegal."⁸

Some Deputy Magistrates in the absence of any instructions from their Chief, try to be independent and convict and acquit at their discretion. This, however, has its dangers. Mr. Manmohan Ghose in his interview, already referred to, remarked how a Deputy Magistrate showed him with fear and trepidation an autograph letter written to him by the Divisional Commissioner. In this letter, the Commissioner had expressed his disapprobation of a particular judgment which the Deputy Magistrate had delivered some time earlier. In consequence of this disapproved judgment, his promotion had also been stopped by the Lieutenant-Governor for a term of years. The Government treated him so vindictively although his verdict was affirmed, on revision, by the High Court.⁹ Naturally when such treatment was expected at the hands of the Government, the subordinate Magistrates who had any experience of the administration of criminal justice would always like to be on the safe side. They would do everything to consult the wishes of their Chief before coming to any final verdict in a case in which he might be the least interested. The attitude of Maulvi Zakir Hussain, the trying Magistrate in the Chupra case which has been made famous by the historic judgment of the District Judge, Mr. Pennel, is hence quite intelligible, though not supportable. In 1899, Narsingh Singh, a Police Constable on leave and in indifferent health, was asked by Mr. C. the Assistant Police Superintendent of Chupra, to do some earth work in connection with a *Bundh*. On his refusing to do so, Mr. C beat him and kicked his bottom. Mr. S, the District Engineer, who had accompanied Mr. C also gave him some cuts with his rattan. The incident soon got abroad and it could be expected that the matter would be taken to the Court of Law. In order

⁸ The case is incorporated in full in Sir P. C. Mitter's *The Question of Judicial and Executive Separation* (1913), pp. 21-23.

⁹ P. C. Ray—*Op. Cit.*, p. 169.

to forestall this, the District Magistrate, Mr. T, took Narsingh into custody and sent him up for trial on a charge of assaulting Messrs. C and S. The case came up for hearing in the Court of the Senior Deputy Magistrate, Maulvi Zakir Hussain. Now this Magistrate knew quite well that his Chief, the District Officer, was interested in the case. Accordingly in the course of its hearing he went over to the District Magistrate and took instructions from him as to the way he should dispose of the case. In his own words, "I have been a Deputy Magistrate for twenty-seven years. I have before this served under very young District Magistrates. I have discussed pending cases with them similarly. It is not the fact that I discussed the cases with them because I wanted to know what they wished me to do—it was to avoid after troubles. What I mean is that sometimes when cases are disposed of and District Magistrates do not like it, they find fault and so I settled it beforehand." And this time he settled it to the victimisation of an innocent and already injured man. Narsingh was sentenced to a rigorous imprisonment for two months. Fortunately Maulvi Zakir Hussain was a Magistrate of the first Class and the appeal from him lay with the District and Sessions Judge, who not only set the poor accused free but exposed mercilessly the character of the case and the subserviency of the trying Magistrate. "It certainly does seem to me," Mr. Pennel observed, "that Maulvi Zakir Hussain's predilection for satisfying his superior at all costs might find more legitimate indulgence on the revenue side, and it would be a grave scandal if he be retained as a Magistrate in this neighbourhood."¹⁰

The Magistrates in an Indian District have not only to adapt their decisions to the wishes and opinions of their superior, the District Officer, but they have also to ingratiate themselves with the Superintendent of Police. They have so to acquit themselves as not to allow their names to be entered in his bad books. The Indian Raj is a police raj and the interests of the police are paramount in this country. The Magistrates, and as

¹⁰ Ibid, Appendix B, pp. 331-348.

we shall see later even the Sessions Judges, have to curry favour with the police. If a subordinate Magistrate goes against the demands of the police in what they regard as a clear case, they will not wait for the verdict of the higher court and allow the Magistrate to pass his judgment unhampered. They will immediately approach the District Officer who as the common head of the two departments will now intervene and ask the Magistrate to act according to the dictates of the police if his judgment has not been delivered already, and warn him for the future if his verdict has been issued. These things generally happen behind the *purda*, but now and again the curtain is a bit tucked up and the people have a glance at these ugly pictures. In 1895, the police of Purulia sent up some men in A form. The case came up for trial before the Deputy Magistrate, Mr. U. C. Mookerjee. He did not think it necessary to refuse bail to the accused. He at his own judicial discretion allowed them to go out of the lock-up on furnishing suitable securities. This concession, however, could not meet with the approval of the Superintendent of Police who wanted the accused to rot in the *Hazat* till the conclusion of the trial one way or the other. He ran to the District Officer, Mr. Morshead, and complained to him against the conduct of the trying Magistrate. The District Officer immediately asked Mr. Mookerjee to withdraw the order for bail and put back the accused into the lock-up. The poor Deputy Magistrate had now to repudiate his previous order and put back the accused into the *Hazat*. Now this action of Mr. Morshead was clearly illegal. The Criminal Procedure Code does not give him any such revising powers. A question was put in the Bengal Legislative Council by Mr. Surendra Nath Bannerjee as to this conduct of the District Officer and the steps which the Government would take against him. The Chief Secretary, Mr. Herbert Risley, replied that the action of the District Officer was technically wrong but it was a *bona fide* mistake and the Government did not want to take any disciplinary action against him.¹¹ Nowadays when

¹¹ Proceedings Vol. XXVIII, pp. 315-19.

the Superintendent of Police would complain to the District Officer against the judgments of the subordinate Magistrates, he would certainly reprimand and warn them but would do nothing illegal like Mr. Morshead which might create opportunities for a row anywhere. The police recently in a district town in Bengal, sent up some men for trial on charges of creating disturbance and breach of public peace. The police thought that it was connected with the illegal preparation of salt, but did not mention anything about it in their reports. The trying Magistrate took a lenient view of the case and sentenced the accused to a fine only for their offence of disturbing the public peace. The police were dissatisfied with the sentence. They expected something more severe and drastic. In their wrath, they approached the District Magistrate and placed the matter before him. The District Magistrate at once called the trying magistrate to his Chamber and demanded an explanation. The latter explained his conduct and the District Officer seemed to be satisfied. Now the District Officer had no business to demand an explanation of the trying Magistrate. If the police thought the punishment that had been awarded ~~was~~ insufficient, it was open to the Government under the Criminal Procedure Code to appeal to the higher Court for an enhancement of the punishment. The executive should have taken its chance before the court of appeal. But the District Officer took advantage of his position as the superior officer upon whose recommendations the trying Magistrate's future depended, and informally asked him to explain his conduct. Now every subordinate Magistrate would like to avoid this informal reprimand. He will always like to keep the police in good humour. He will allow them no opportunity to go over to the District Officer and persuade him to give him a rebuke which any time may result in his transfer to a less congenial place or even the stopping of his promotion. So the Magistrates are under the thumb of the police. A lawyer member of the Punjab Legislative Council had enough experience of the position of the Magistrates to observe that "a mere Head Constable of police can twist the magistrate round his little finger and the latter dare not bail

out the accused without the concurrence of the Deputy Commissioner and the police officials." "In my own district," he pointed out further, "at least one meeting is held every month attended by the Deputy Commissioner, Superintendent of Police and the Magistrates of the district, and in that meeting the policy to be followed is chalked out and all the Magistrates... carry it out to the letter. Only recently I requested a Magistrate to take up my case as I had to go to the Council, but he refused to do so because he had to consult the Superintendent of Police in another case."¹² The police are thus all-powerful. The Magistrates simply are the agents that register the decisions of the police. Even the District and Sub-divisional Officers who are the head of the police in their jurisdictions, are not without their fear of the police. Their position is absolutely anomalous. They are the head of the Magistracy, as also of the police. Generally they look upon their executive functions as primary and their judicial functions as secondary and even as auxiliary. But here and there are officers who stray from the common herd and make an attempt to be faithful to their Magisterial duties. They refuse to accept police evidences always as gospel truth and convict uniformly at the instance of the Court Inspector. If, however, they discharge the accused in an important case, or if unimportant police cases break down frequently in their court, they are sure to invite the odium of the police upon their head. The Superintendent of Police will now send one report after another to his departmental superior, the Inspector-General of Police who in his turn will put the matter before the Chief Secretary. The Chief Secretary will then take disciplinary action, if the explanations of the defaulting Officers prove to him unsatisfactory, and they will in time get notice of their transfer or meet with some punishment more severe still. To pull on well with the police is the first duty of the Magistrate of every grade.

We have so far spoken only of the Magistrates being influenced and hampered in their judicial duties by the Execu-

¹² Punjab Legislative Council Debates, Vol. XI—No. 10, pp. 470-471.

tive over them. Nothing has been said yet of the Executive Officer himself sitting in judgment upon cases in which he is directly interested. The District Officer does not try many cases in the older provinces. But even in the few cases he tries incalculable damage is done to the interests of the accused. In April 1930, the Civil Disobedience movement was started against the Government in this country. The Working Committee of the Indian National Congress was giving the lead to this movement. After the arrest and conviction of its President, Pandit Mati Lal Nehru was nominated to the office and he became now the head of the executive committee that guided the Civil Disobedience movement. Naturally he became the *bete noire* to the Government. He was looked upon as a man working for the subversion of the established order of the country. The Government now must put him out of the way. Accordingly, Pandit Nehru was arrested at 5 A.M. on the 30th June, 1930. The arrest was decided upon by the Provincial Government in consultation with the Central Government. The District Officer of Allahabad where Panditji had fixed up the Congress head-quarters, must also have been consulted. He at least was in the know all about it. He was one of the Officers who had effected the arrest. He was hence one of the prosecutors. As an actual prosecutor, and as a limb of the great executive body which had ordered the arrest, he was certainly interested in the conviction of Pandit Nehru. It was hence imperative that he must not sit in judgment on the accused. But the trial was actually held by him and Panditji was sentenced to six months' imprisonment. The charges that he framed and the judgment that he delivered leave nothing to be proved that he was out somehow to clap the accused into prison. Two charges were framed against the accused, one under section 117 for abetting certain offences and another under section 17 (1) of the Criminal Law Amendment Act for being a member of an unlawful body. In the warrant that was issued against him, there was mentioned only the section 117 which makes the abetment of certain offences punishable. It did not allude to his being a member of an unlawful assembly.