This in fact could not be mentioned in the warrant. The Working Committee of the National Congress was declared unlawful by the U. P. Government with effect from 4 A.M. of June 1930, while Panditji was arrested only one hour later. The Officers effecting the arrest had no knowledge till several hours later that the Working Committee had been so declared. Panditji, of course, was quite in the dark about it. He had hence no opportunity of giving up his membership of the unlawful body, if he so liked. In the course of the trial, the Magistrate thought it wise to charge Panditji with the fresh offence of being a member of the body declared unlawful. Possibly he did it with the purpose of strengthening the prosecution case. The weakness of this charge was however brought home to him. "It is indeed admitted," he writes in his judgment, "on behalf of the prosecution that the law is hard in that it was not possible for the accused at the time of their arrest,. to have known that the Association was unlawful." But this did not deter him from finding Pandit Nehru guilty on both counts, and he was sentenced on each charge to imprisonment for six months. That the Magistrate was overzealous and the trial on some points irregular was apparent to all. Two members of the Allahabad bar drew the attention of the High Court to the irregularities of the trial. The High Court then in exercise of its powers of revision called for the records of the proceedings of the trial They were placed before the Chief Justice and Mr Justice Sen on the 18th July 1930. The Government Advocate conceded on behalf of the U. P. Government that the conviction and sentence under Section 17 (1) for being a member of an unlawful Association might be invalid. But he held that the sentence on the other count was quite in order. The Court also agreed with him and set aside the first conviction but maintained the other. It must be mentioned in this connection that the accused went undefended throughout. This is how an Executive Officer in charge of the administration of a district would try a man who had put himself in opposition to the Government.[13]

[13] See the *Statesman* for 2-7-30 and *Advance* of 19-7-30.

In the so-called non-Regulation Provinces, the District Officer has still to make time to try a number of cases. But in trying them he does, not unnaturally, forget that he is acting in his judicial capacity and not discharging any executive business. One instance is enough to bring home to the public the nature of the evil involved in such criminal trials. About 1918, in the Punjab, a Tahsildar was killed by the residents of a certain village while he was busy recruiting soldiers for the army. The Tahsildar was accompanied in this campaign for recruitment by one Taz Mahmud, a Zaildar of another village. He also received many injuries at the time and escaped death by concealing himself in a mosque. Some of the assaulting party were brought to book immediately but the others absconded. In 1925, some men were brought under arrest on suspicion that they were the absconding offenders. Taz Mahmud who was one of the eye witnesses of the murder and assault, was now called upon to identify them. Not unnaturally he expressed his inability to do so after so many years This attitude of Taz Mahmud, however correct, gave offence to the District Magistrate of Shahpur. He was arrested and sent up for trial under Section 193 I. P. C., and the District Magistrate himself tried the case. He started with a bias against the accused and committed many judicial irregularities. No facilities were given to the accused to defend himself properly. The trial was not held at the head-quarters. It was held by the District Magistrate in a distant, inaccessible village. The climax was reached when at one o'clock in the morning judgment was delivered and the accused clapped into prison. It must be mentioned that the District Magistrate, during the progress of the case, used to hold consultations in his private room with the Public Prosecutor and the Court Inspector. On certain occasions, he even held consultations with the prosecution witnesses before their examination in the Court. He even boasted that he did so. "I am the head of the prosecuting agency. It is my business," he said, "to see that the case is properly put before me by the prosecuting agency, in order that my time may not be wasted in

recording unnecessary depositions. I used to hold consulation with the prosecuting agency and with witnesses in order to see that the evidence was properly placed before me." No wonder after this that the High Court, when it came to deal with this case, unreservedly condemned the action of the Magistrate. "The proceedings taken by him," the High Court observed, "betray his ignorance of the elementary principle of justice that a person cannot simultaneously perform the functions of a prosecutor and a judge in a criminal case. The Magistrate does not realise that he ceases to be an executive officer when he is sitting in Court to try a criminal case."[14]

One or two instances will similarly prove the danger to personal liberty from the combination of the two functions in the Sub-divisional Officers. Both in the Regulation and the so-called non-Regulation Provinces they are the executive officers of the Sub-division with all their supervising and controlling authority over the local Police. They at the same time regularly discharge their criminal judicial duties. They thus enjoy an extensive power which when misused threatens the liberty of the individual. In 1901, the Sub-divisional Officer of Magura in the District of Jessore was somehow offended with a village Panchayet, named Kedar Nath Ghose. He now vowed to teach him a lesson. He waited for a pretext on which the poor man might be taken into custody. A plea was soon found and Kedar Nath was prosecuted on a charge of misappropriating Re. 1/- collected by him in his capacity of the village Panchayet The Sub-divisional Officer himself held the trial, convicted and sentenced him to three months' rigorous imprisonment and a fine of Rs. 400/-. The case was on appeal carried to the District and Sessions Judge who characterised the alleged misappropriation as nothing but an error of book-keeping and acquitted the accused. The ire of the Sub-divisional Officer was now roused still further, and a few days after his release, Kedar Nath all on a sudden

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[14] Punjab Legislative Council Debates, Vol. XI—No 10, pp. 457, 458, 459, 472.

found himself summoned to answer a charge under section 217 I. P. C. No proceedings were drawn up against him but all the same he was hauled up and released on a bail of Rs. 500/-. He was to appear before the Court when called upon to do so. A few days later, a robbery took place in a neighbouring village and Kedar Nath was at once arrested on suspicion and sent to the lock-up. He was refused bail and remained in the *hazat* for about twenty days, and all this inspite of the fact that the Police were still investigating the case and did not yet send up the A form. The Sessions Court was now moved and his release on bail was at once sanctioned. The Sub-divisional Officer got this order on a Sunday and on the morrow he called upon the accused to name two sureties ; in the course of an hour they were named but meanwhile the Sub-divisional Officer had left the station and would not come back from the Mufassil the next three days. The District Judge's order was thus practically violated and the Sub-divisional Officer was satisfied that he had been able to keep Kedar Nath sufficiently long in the lock-up. A private grudge was thus fed fat.[15]

Criminal justice has thus been throughout dependent upon the exigencies of executive administration and the freaks of executive officers. It has known no independence and for that reason no fairness and impartiality in cases in which the executive has been the least interested. The Government also instead of condemning such interference, have encouraged it in every possible way. Sir Henry Cotton has recorded in his Memoirs that the Civilians in his days "were encouraged to exercise considerable executive interference with the ordinary course of justice."[16] The Provincial Governments and the Commissioners of Divisions criticised in their Administrative Reports the actions of the criminal judiciary and suggested how trials should be held and what punishment awarded. All the Magistrates have all along been appointed by the Govern-

[15] See the *A. B. Patrika* 10r 24-8-01.

[16] Sir Henry Cotton—Indian and Home Memories (1911), p. 94.

ment. They have been also promoted, transferred, degraded and dismissed by the same authority. They have been thus the servants of the Provincial Executive working under its direct control, and as such expected to carry out its will in every department of public administration with which they remain associated for the time being. It has never occurred to the Government that once the laws are passed and the procedure of the courts determined, it is not for the executive to see as to how the trials are held and the accused dealt with. They are the functions of the highest tribunal in the province, the High Court. When Sir Charles Elliott became the Lieutenant-Governor of Bengal in the early nineties of the last century, he took it into his head that while crime was rife in the province, criminal administration was lax. The remedy he devised for rectifying this state of things was more dangerous than the disease itself. He did not attach much importance to the better and more efficient organisation of the forces of law and order. He did not think it of much moment that the police should be more skilful in detecting the real offenders, in collecting the proper evidences and in every way strengthening the cases they sent up for trial. This aspect of the question he rather neglected and put all the emphasis on the conduct of the criminal judges. In 1891, he issued a circular to all Commissioners of Divisions and District Officers drawing their attention to the number of adjournments indulged in and the number of witnesses allowed and examined in a case. He thought they were too many and should be cut down to a fixed maximum. He also asked the District Officers to keep a sharp eye on the trying Magistrates and bring home to them the necessity of rapid decision and good conviction.[17] In the following year, the Government Resolution on the administration of criminal justice in the Rajshahi Division referred again to the charge of too many witnesses being allowed and too many adjournments made.[18] In 1895, Mr. Forbes, the Commissioner of the Patna Division issued

[17] See *A. B. Patrika* for 30-11-93. [18] *Ibid*, for 28-2-93.

a circular directing the Magistrates in the Division to take regularly to whipping by way of punishing certain classes of offenders. When the alternative of whipping was at hand, young men of twenty-one or less should not be imprisoned by the Magistrates without a special reference to the District Officer.[19] In 1896, the Commissioner of the Presidency Division, Mr. P. A. Westmacott, wrote a letter to the District Magistrate of Nadia drawing his attention to "a disproportionate number of acquittals in the cases tried by the Magistrates and the Benches noted in the margin."[20] Certain District Officers also took their cue from the Lieutenant-Governor and the Commissioners of Divisions and issued general circulars to the Magistrates under them. Thus the District Magistrate of Khulna passed an order to the effect that in no stamp case should a Magistrate fine less than five rupees.[21] The District Officer of Saran similarly issued a circular asking the Deputy Magistrates not to be lenient but to inflict heavy punishment in excise cases.[22] When the Government of Bengal were depriving the Magistrates of their independent discretion and turning them into mere post-offices and conduit-pipes, the Government of the North-Western Province could not be expected to lag behind. Sir Charles Crosthwaite, the Lieutenant-Governor of this province, issued a circular in September, 1893, on the administration of criminal justice to all Commissioners of Divisions and District Magistrates. In this circular, he urged that the District Magistrates should more frequently supervise the Magisterial work of his subordinates and instruct them as to how they should proceed in particular cases. Whipping should be more freely resorted to and Magistrates with second and third class powers should, instead of sentencing themselves, commit the accused to the

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19 Proceedings of the Council of the Lieutenant-Governor of Bengal, Vol. XXVIII, pp. 11-12. Mr. Cotton informed Mr. A. M. Bose that the circular had been withdrawn by order of the L.-G.

20 *A. B. Patrika* for 6-8-96.

21 Proceedings of the Bengal Council, Vol. XXVIII, pp. 41-42.

22 *Ibid*, 243-244.

higher court so that a more severe punishment might be meted out to them. In the riot cases, the Lieutenant-Governor emphasised, the Magistrates should never sentence the accused to simple imprisonment, it must be always one with hard labour. So the Magistrates must not have any independence and discretion. They were practically reduced to the position of assistants to the Lieutenant-Governor for hearing the cases and writing out the judgments according, of course, to his preconceived ideas.[23]

In the nineties, this interference of the executive with the judiciary which had always been present before and since, became so open and brazen-faced that the High Courts could not long maintain silence. The High Court of Bengal, under the leadership of Sir Comer Petheram, the Chief-Justice, protested to the Lieutenant-Governor that this policy of the Government would lay axe at the root of the right and proper administration of justice in the Province of Bengal. But Sir Charles Elliott turned only a deaf ear to these protests. The High Court now had no alternative but to move the higher authorities and on the 17th August 1892, sent a letter on the relations between the executive and the judiciary to the Secretary of State through the Government of India. The Government of India, then headed by Lord Lansdowne, in forwarding this letter practically took the side of the Lieutenant-Governor of Bengal and supported, though mildly, the right of the executive to criticise and interfere with judicial decisions. The Secretary of State, thus tutored by the Government of India, replied a few months later in a vapid non-commital way. "While I am not prepared to admit," observed the Secretary of State, " that cases may not occasionally arise in which it is the duty of a Government in India to criticise judicial errors, I think it necessary in the interests of the Community that the administrative officer, of whatever rank, should abstain from publishing officially reflections upon the decisions and judicial acts of Magistrates and courts of law."[24]

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[23] *A. B. Patrika* for 11-10-93 and 12-10-93. [24] *A. B. Patrika* for 26-8-93.

After this reply of the Secretary of State to the High Court of Fort William, the Government of India directed the Provincial Governments not to criticise publicly the decisions of the Courts of law. The Bengal Government accordingly sent out a circular on the 25th August 1893, to the Divisional Commissioners asking them not to make any reflection on judicial decrees in departmental reports or similar documents.[25] Henceforward, these reflections became scarce in Administration Reports but otherwise criticism of and interference with, judicial decisions continued as before. In private letters, in demi-official 'chits,' in confidential circulars, the Lieutenant-Governor and his Divisional and District Officers went on merrily interfering with the decrees of the Magistrates and insisting on decisions to their liking.

The Government of Bengal under Sir Charles Elliott were not content simply with enunciating general lines and principles on the basis of which the Magistrates should carry on their work. They devised a method by which the Magistrates of every description might be compelled to convict men as they were sent up by the police. They initiated a new principle in judicial administration—no conviction, no promotion. Practically a percentage system was introduced. Unless a Magistrate could show to his credit about seventy-five per cent. of convictions, he was sure to be looked upon by the Government as worthless and his promotion would be automatically stopped in consequence.[26] No wonder therefore that the Deputy Magistrates trembled in their shoes when they had to try men against whom there was no convincing evidence. If they acquitted such men, they would run the risk of losing the good opinion of their masters. They had hence to harden their heart and send them to prison though possibly they were innocent. The poor Magistrates must make their conscience very elastic, if they wanted advancement in their

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25 *Ibid*, 3-10-93.

26 "The percentage of convictions of a Deputy Magistrate is lower than seventy-five and forthwith the Government writes to him to explain why his work is so unsatisfactory." *A. B. Patrika* for 16-2-93.

service. They must sacrifice their respect for justice, if they did not want to give up their love for promotion. They must dispose of cases without adjournments otherwise they would be regarded as worthless. They must allow only as few witnesses as possible, otherwise they would be dubbed as lenient. They must show a considerably higher percentage of convictions than acquittals otherwise they would be taken to be weak and incompetent. They must also make a good use of whipping for if their whipping list was blank they would be taken to task.[27] Once in service, every man desires promotion to a higher grade and increase in emoluments. It is not unnatural on this account that most of the subordinate Magistrates would fall in with the ideal of the Government and convict as promptly as possible. Here and there of course, there were exceptions and their fate became miserable. They were transferred to uncongenial places and their promotion was stopped. There were many such cases of injustice and the High Court of Bengal thought it wise and imperative to protest in one case which was brought to its notice. Mr. Atool Chandra Chatterjee was the Sub-divisional Officer of Patuakhali in the district of Barisal. He was an independent and conscientious Magistrate and refused to convict in cases in which there was no convincing evidence. His acquittals, however, brought upon him the displeasure of the Superin-

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[27] The *A. B. Patrika* in its issue of 2-3-93 introduced a humorous imaginary dialogue.

Magistrate :—I cannot allow you so many witnesses.

Accused :—But Hoozur, they are essential to prove my innocence.

Magistrate :—You must select two out of the ten you have cited.

Accused :—The two can testify to only one point of my case.

Magistrate :—Well, I cannot allow you more than three witnesses, and now you must manage with that number.

Again, Government :—How much do you draw as salary per day?

Magistrate :—Twenty rupees.

Government :—How many men have you sent to jail to-day?

Magistrate :—None, your Honour.

Government :—You have then no right to draw the day's pay."

tendent of Police, who drew the attention of the District Magistrate to this matter. This was before the steam-roller of Sir Charles Elliott's policy of no conviction, no promotion was actually put in motion. Hence nothing was done against the Deputy Magistrate without further enquiry. In 1891 when Sir Charles went to visit Barisal, the District Magistrate brought the frequent acquittals by Mr. Chatterjee to his notice. Sir Charles thereupon asked the Divisional Commissioner to visit Patuakhali and report upon the conduct of the Sub-divisional Officer. One year later when Sir Elliott's new policy was in full swing, he would not have taken recourse to this second enquiry by the Divisional Commissioner. On the report of the Superintendent of Police and the District Magistrate, he would have taken action and stopped the promotion of the Deputy Magistrate. But now the Commissioner went over to Patuakhali to investigate into the judicial conduct of Mr. Chatterji. He was dissatisfied, on enquiry, with the Sub-divisional Officer's judicial independence and sent a strong note against him. The Lieutenant-Governor immediately transferred him to Burdwan, a hot-bed of malaria. Mr. Chatterjee also got scent of the fact that he would be debarred from promotion. His case was, however, now taken up by the sympathetic District Judge of Barisal, Mr. Stanley. He sent a note to the High Court explaining why Mr. Chatterjee was transferred from Patuakhali and how the stopping of his promotion was under contemplation. Sir Comer Petheram, the Chief Justice, appreciated the gravity of the situation and entered into a correspondence with Sir Charles Elliott. He complained that the Government had interfered with Mr. Chatterjee's judicial discretion and now threatened the stopping of his promotion so that his example might be an eye-opener to other Magistrates. The Lieutenant-Governor, however, did not take the protest of the Chief Justice seriously and persisted in his course. The High Court then moved the Government of India and the Secretary of State. After all this noise, Sir Charles could not debar Mr. Chatterjee from

promotion.[28] He had to eat, this time, the humble pie. But discomfited here, he applied his principle of no conviction, no promotion ruthlessly to other cases, promoting and advancing those who would convict blind-fold and passing over those unfortunate officers who still responded to the little voice within and could not on that score keep pace with his fast policy. The administration of justice in the years following thus became a farce and a mockery. The Amrita Bazar Patrika, the only daily nationalist Paper in Bengal of those days and edited by that redoubtable champion of the popular cause, Mr. Sisir Kumar Ghose, now took up its cudgels against the policy of Sir Charles Elliott. Mr. Ghose was a witty and pungent writer. He now devoted his skill in a series of articles against the demoralising atmosphere which the Lieutenant-Governor had created in the judicial field. He brought home to the public and also to the Government all the implications of the policy that was being pursued. The serious nature of the danger that threatened the interests of the people was explained almost from day to day in a clear, lucid, catchy way. This exposure of the shameful policy in the columns of a most popular newspaper created soon a public opinion against the Government.[29] It had also its effect to some extent. The percentage system was relaxed to an appreciable degree. The principle of no conviction, no promotion was not of course killed, it was only scotched, and every now and then it was found to raise its head. We have seen already how Mr. Westmacott, the Commissioner of the Presidency Division, drew the attention of the District Officer of Nadia, in 1896 to the too many acquittals indulged in by some Magistrates. Mr. Garrett, the District Magistrate of Nadia, on receipt of this letter from the Commissioner, sent for Mr. Jogendra Nath Bannerjee, a Deputy Magistrate and

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[28] *A. B. Patrika* for 19-5-93.

[29] In the issues of 15-2-93, 16-2-93, 28-2-93, 2-3-93, 17-5-93, the leading article was titled "No conviction, no promotion." See also the issue of 30-10-93.

took him to task for his acquittals. He threatened him with his serious displeasure in case he did not show better results in the future. But Mr. Bannerjee's conscience was not so oily and he could not send to prison men against whom there was no convincing evidence. The District Magistrate hence reported against him to the Lieutenant-Governor and Mr. Bannerjee was at once transferred elsewhere by way of a punishment.[30]

The subordinate Magistrates are thus completely under the thumb of the District Officer and the Government. If they show any independence and act up only to the merits of the case and the dictates of their own reason and conscience, their future is sealed. They are sure to be passed over and even degraded to a lower position. If on the contrary they allow themselves to be pliable instruments in the hands of the executive, their gradual promotion is assured. Naturally under these circumstances, there can be no justice in the political cases in which the Government are vitally interested. As soon a case has a political colour about it, the Magistrate is on his guard. He requires no 'chit' from the District Magistrate or any general injunction from the Government as to what conclusion he should come to in such cases. He knows quite all right what the Government expect of him. Evidences may be good, bad or indifferent but the conviction of the accused is certain. If the charges are serious, then of course the Magistrate would be relieved to some extent. He would commit the accused to the Sessions. Even if the evidences are meagre and insufficient, he would not still take the responsibility of releasing the accused on his own shoulders. He would commit them to the Sessions where they would now take their chance. During the days of the Partition agitation in Bengal, the Magistrates seldom dared to acquit any person accused of a political offence. "It is a remarkable fact," wrote the Amrita Bazar Patrika, "that Indians accused of complicity in Swadeshi cases have not escaped conviction, imprisonment or fine, except in one or two insignificant

30 *Ibid* for 4-9-96 and 4-10-96.

cases."[31] Those were the days of the boycott of British goods and the promotion of indigenous articles. This movement roused the violent antipathy of the Government and the fiat went forth that the boycott must be crushed at any cost. The Magistrates naturally were on the alert; any case which smacked of swadeshi must be disposed of with a conviction, evidence or no evidence. In 1907, a Chowkidar of the Village Amna in the district of Barisal, informed one day the police that some youngmen of the locality had had a scuffle a week earlier with a few shop-keepers dealing in British goods. It was alleged that these shop-keepers got some injuries as a result of the tussle. The youngmen were put under arrest and sent up for trial which came off before a Deputy Magistrate. It is important to remember that the shop-keepers themselves did not lodge any complaint against the accused. It was the Chowkidar who seven days after the occurrence of the alleged offence informed the police Besides, when the merchants in question were called in as prosecution witnesses, they deposed in favour of the accused and denied that they were molested any way by them. There was thus not an iota of evidence against the accused But it was a swadeshi case and how could the Magistrate acquit them? He sentenced them all to rigorous imprisonment for four months The case on appeal came up before the Sessions Judge of Barisal who in his conversation with the defence lawyer in the court gave vent to his deep-seated prejudice against the Swadeshi workers. But all the same he too could not swallow the sentence of the lower court and released the accused.[32] In political cases, the Magistrates are thus mere gramophones giving expression to their Masters' voice. During the last ten years, there has been a political upheaval in the country and indiscriminate arrests have been made. But the Magistrates have seldom shown courage enough to go against the police and acquit the accused. They have kept on the safe side. They have either committed the accused to the Sessions or sentenced them to certain terms

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31 *A. B. Patrika* for 27-1-06 32 *Ibid*, 24-6-07

of imprisonment themselves. They cannot be expected to do otherwise. All the political prosecutions are initiated at the instance of the District Officer or the Provincial Government. The Government being thus directly interested in these cases, the Magistrates have to try them to their entire satisfaction. Like the police, the Magistrates are also an arm of the Government. Like the baton of the Police and the sword of the army, the mace of justice is also an instrument in the hands of the Government. The Magisterial Courts are not to distribute even-handed justice to all but to maintain the fiat and the prestige of the Government. They have accordingly lost all confidence of the people. When a man is hauled up on a political charge before any Magistrate, he never expects any justice. It is hence becoming rare every day that an accused should enter any defence. Whatever the evidence, he knows that his punishment is premeditated. It has been determined when the Police have taken him into custody. The Court of the Magistrate is only the office for registering the decision of the Police. To appoint a counsel and defend oneself against the prosecution does hence amount only to a loss of money and time for nothing. It is an unnecessary luxury which people are discarding now-a-days. That people do not cherish the least confidence in a Magisterial tribunal in political cases, is brought out in a most lucid statement with which Mr. A. V. Thakkar of the Servants of India Society withdrew his defence in the court of a Magistrate at Kaira. That he belonged to the Servants of India Society was itself a guarantee that he was a moderate in political views and opposed to the policy of the Congress. His straightforwardness and honesty of purpose would be testified to by all who knew him. As a social worker, he went over to a place called Mahomedabad to study the situation there. Picketing at this time was going on before the liquor shops of the locality. Once Mr. Thakkar was found there, he too was arrested on a charge of picketing. At first he entered a defence when he was hauled up before the court of the Magistrate at Kaira. He was not a Congress man nor a satyagrahi. He was a Moderate who had not yet been dis-

illusioned as to the justice meted out by the Magisterial Courts. But soon the atmosphere of the Court opened his eyes to the utter unreality of the whole thing. He accordingly withdrew his defence. He had now no hope of getting justice from a Magistrate who belonged to the executive service and as such was under the direct control of, and in perfect sympathy with, the Government who might be interested in his conviction.[33]

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[33] See the *A. B. Patrika* for 7-10-30.

CHAPTER V.

Higher Courts.

The movement for the separation of the two functions has been up till this time concentrated mainly, if not exclusively, upon the Magistracy. That the District and Sub-divisional Officers combine in their hands both judicial and executive functions and that the other Magistrates also are influenced and controlled by the executive have been hitherto the complaint of the people. But the fact that the Sessions Courts are also amenable to executive control has to a great extent eluded their notice. If the Magistracy is completely under the thumb of the executive Government, it must be remembered that the Sessions Courts are only one degree less influenced by that authority. The control is there but in the case of the Sessions Judges it is only not so brazen-faced. The Sessions Judges hold their office during the pleasure of the Government. Their transfer, leave, and promotion are determined by the Provincial Governments. Of course, in these matters, the opinions of the High Courts are consulted and this fact gives the Sessions Judges one degree more freedom than the Magistrates. But all the same the fact remains that the Judges depend upon the Provincial Governments for their leave, transfer, and promotion. They have hence to keep the Government in humour. They cannot freely use their own discretion in cases in which the Government have any stake. They are after all the officers of the Government, and not of the High Court.[1] Sir

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[1] The following conversation was held between Sir John Woodburn, L.-G. of Bengal and Mr. Pennel, the District Judge of Noakhali.

L.-G. :—"The Judicial Officers are my Officers just as much as the executive Officers and I want them to do well.

Mr. Pennel :—What you have been saying to me sounds very much like a threat. Have I your permission to represent the matter to the High Court?

Charles Elliott, during his Lieutenant-Governorship of Bengal, attempted to introduce the principle of no conviction, no promotion even in the case of the Sessions Judges. Unless these Judges also convicted as freely as the Magistrates, the accused sentenced in the lower court, would get off on appeal to the higher tribunal. Sir Charles Elliott reprimanded the Sessions Judges if they did not keep pace with the Magistrates in the lower Courts. Referring to the work of the Sessions Courts in the Patna Division during the year 1892, he remarked that "the percentage of cases in which convictions were obtained was 66 6—a very fair result" But he added "the proportion was worst in Gaya."[2] These observations clearly prove that he wanted a certain percentage of convictions from the Sessions Courts and woe betide the Judge who would show greater respect for the merits of the case than for the percentage system of the Lieutenant-Governor. The Sessions Judge is also not without his fears of the District Officer and the Police. In case he indulges in acquittals offensive to the District Executive, a report goes against him to the Provincial Government. That means a black mark against his name The Inspector-General of Police may also similarly report against him for his alleged leniency. "As a result, whenever a Sessions Judge has to try a Crown Case he shows, as a rule, a decided predilection for the prosecution" This was the remark of the Amrita Bazar Patrika in 1909,[3] but it was as true of that year in Bengal as it is to-day. As recently as March 1929, Mr. B. K. Bose, a leading member of the Alipur Bar, observed from his seat in the Bengal Legislative Council that the Judges in the Mufassil always "take care to see how the police received their judgments." He further referred to a Sessions Judge belonging to the Indian Civil Service, who lamented in his presence

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L.-G. :—No, I am not going to enter into a discussion with the High Court It is my business to say where my Officers can be most usefully employed The Judicial Officers are my Officers and not of the High Court." *See* Correspondence relating to the Removal of Mr. A. P. Pennel from the Indian Civil Service, 1902, (Cd. 1031), p. 253.

2 *A. B. Patrika* for 17-5-93. 3 For 25-6-09.

the publication of one of his judgments for Sir Charles Tegart might think ill of it.[4] In political cases specially it is very difficult for the Sessions Judges to use their independent discretion. Once a political accused is committed to the Sessions, the Government watch the case with care and anxiety. The presiding Judge feels every moment that the eyes of the Government are fixed upon him, and if he comes to a decision not to the liking of the executive his future prospects may be blighted. He naturally gives up all pretence for impartiality and issues verdicts that may place him in the good graces of the executive Government over him. His primary duty, he thinks, is not to protect the liberty of the individual from the onslaughts of every aggressor, private or public, but to uphold and sanctify the fiat of the executive.

During the days of the Swadeshi movement, the Government of Eastern Bengal and Assam prohibited the singing of the *Bandemataram* song by an executive decree. A band of Gurkha soldiers under the leadership of Captain Lyall was posted in the district town of Barisal to carry out this fiat of Sir Bamfylde Fuller. One day in January in 1906, Lyall heard a sound of *Bandemataram* but could not exactly locate the place from which the sound came. He, however, with some of his Gurkhas entered without any hesitation the office room of a local legal practitioner, named Bidhubhusan, and assaulted him despite his protest that none in his house had cried Bandemataram. He now filed a case against Lyall for trespass and assault. The Joint-Magistrate who heard the case had no hesitation in dismissing it. A criminal motion was now made against the decision of the lower court to the District and Sessions Judge of Barisal. Here also the case fared no better. The following conversation between the Defence Pleader and the Judge throws a flood of light on the latter's attitude.

"Pleader:—We are not aware of any order which entitled Mr. Lyall to trespass into the house of the complainant and

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[4] Bengal Legislative Council Proceedings, Vol. XXXI, No. 3, p. 372.

assault him in the manner alleged. At least there is no such order on record.

Judge :—We all know that the Gurkhas have been brought here to stop the shouting of *Bandemataram* as prohibited by the Government Circular.

Pleader :—The Circular referred to is itself legally open to question.

Judge :—Be that as it may I am bound to hold it legal until and unless it were declared illegal."[5]

So the Sessions Judge would accept any executive order as legal and valid even though it was clearly illegal and unconstitutional. Anything that the executive might do must hence be valid in his eyes. He would not question, far less censure, an executive measure, however high-handed and disruptive of lawful freedom of the individual it might be. When that measure had the authority of the executive behind it, he would take it as binding upon himself. A liberal conception indeed of the function of a Court of Law! The Midnapur conspiracy case of 1908-9 further illustrates how the District and Sessions Judges can give no protection to the people from the tyrannical and high-handed steps which the Executive in India take so often out of a panic. The District Magistrate of Midnapur, Mr. Weston, took seriously the story of a Maulvi that a conspiracy was being hatched in the district to kill him (Mr. Weston) by bomb. Before accepting the story as true and genuine, Mr. Weston should have carefully cross-examined the Maulvi as to the sources of his information. It was proved later on that the Maulvi got the story from a drunkard butcher in the town whose evidence would be regarded as worthless by every sane man. Mr. Weston, however, was so overpowered and his mental balance was so upset at the possibility of his murder that he readily swallowed the story and moved heaven and earth to unravel the conspiracy. The Lieutenant-Governor, the Chief Secretary, the Commissioner of the Burdwan Division and the head of the Intelligence Branch of

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5 *A. B. Patrika* for 24-1-06.

the Police vowed their support to Mr. Weston in unearthing the plot against his life. The police investigation guided, supervised, and controlled by the District Magistrate himself, went on throughout the district. A panic was created and many persons were put under arrest. Of these as many as twenty-eight including the Raja of Narajole and Mr. Upendra Nath Maity, the two premier citizens of Midnapur, were committed to the Sessions. They applied for bail but the District and Sessions Judge, knowing full well the interest which all the executive Officers, from the Lieutenant-Governor downwards, were taking in the case, dared not face the responsibility of granting it. So the accused, against many of whom there was not an iota of evidence continued to rot in the lock-up. They carried the matter to the High Court and the petition for bail was heard by the Vacation Bench consisting of Mr. Justice Saradacharan Mitter and Mr. Justice Coxe. Mr. Mitter was surprised that the petitioners had been allowed by the Sessions Judge to rot so long in the lock-up. The two Judges of course differed in their opinion but Mr. Mitter being senior, the release of the accused on bail was ordered. The Government now deputed the Advocate-General, Mr. S. P. (later Lord) Sinha, to conduct the prosecution before the Sessions Court. He found on his arrival at Midnapur that there was really no evidence of any valid character against twenty-four of the accused though the Sessions Judge looked upon their case as so serious that he refused to grant them bail. On the advice of the Advocate-General, the case against these twenty-four was now withdrawn and the same Sessions Judge let them go. Against the remaining three, the case continued. It could not be said that the evidences against them also were any way conclusive. The Advocate-General possibly did not advise their release simply for fear of reducing the prosecuting executive into a laughing stock. As, however, the case against these three was not withdrawn, the Sessions Judge thought it wise to satisfy the Government by awarding condign punishment to them. He disagreed with the assessors and sentenced two of the three accused to rigorous imprisonment for ten

years and one for seven years. An appeal was filed against these sentences with the criminal Bench of the High Court. It was heard by the Chief Justice, Sir Lawrence Jenkins, and Mr. Justice Mookerjee. They accepted the appeal and set aside the decision of the Sessions Judge. The evidences on the strength of which the accused had been sentenced to such long terms of imprisonment were worthless in the eyes of the Justices constituting the Bench. They accordingly set the accused at liberty. The great conspiracy case in which the executive officers had shown so much vigour and zeal, and in which the Sessions Judge had played a second fiddle to the District Officer and his superiors, thus ended in a fiasco.[6] The Sessions Judge of Midnapur had, of course, his defence for refusing bail to so many innocent and respectable men and sending three of them to prison for so many years. The case of Judge Pennel was certainly green in his memory. In 1899, when the Chupra case was taken up in appeal by Mr. Pennel, the District and Sessions Judge, all the executive officers including Mr. Bourdillon, the Commissioner of the Patna Division, were found to be interested in it. Mr. Bourdillon actually requested him to take up the executive view of the case and hush it up.[7] He, however, refused to sacrifice his judicial independence and lend his ears to the exigencies of executive administration. He issued a slashing judgment by which the Constable Narsingh Singh was delivered out of the clutches of the police. The failure of the case was taken as a blow to the prestige of the administration and an insult to the executive officers who had taken an interest in the case. Would the head of the executive upon whose pleasure depended the future prospects of Mr. Pennel now forgive him? Of course, he would not. Sir John Woodburn, the Lieutenant-Governor of Bengal did not allow grass to grow under his feet. Immediately after the delivery of the judgment, Mr. Pennel got the

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6 *A. B. Patrika* for 13-5-09, 2-6-09, 3-6-09.

7 Correspondence relating to the removal of A. P. Pennel (Cd. 1031), p. 250.

order of his transfer, practically to a penal station. Chupra was one of the healthiest of the districts in the old province of Bengal, while Noakhali whither Mr. Pennel had now to hasten was notorious for its unhealthiness.[8] This does not end the story of Mr. Pennel's punishment for his assertion of independence. Two years later, as the District Judge of Noakhali, he delivered a judgmet in which he made some indiscreet and unfortunate remarks. For committing such indiscretion, any other member of the Indian Civil Service would have at most been debarred from promotion for some time or temporarily degraded to a lower post. But in the case of Pennel who had made himself obnoxious for his independence, the Governments of Bengal and of India recommended his dismissal without even any compassionate pension. The Secretary of State acted up to this vindictive recommendation and Mr. Pennel was dismissed the Service. Such was the nemesis for the sins of independence and how could the Sessions Judge of Midnapur forget it? The case before him was almost a parallel one, only it was of greater importance and seriousness. As in the Chupra case, here also the whole hierarchy of executive officers from the Lieutenant-Governor to the District Officer was vitally interested in the progress of the case. Naturally he would not do anything which might prove that he was not taking the executive view of the case.

Besides the control which the Government exercise over the conditions of the service of the Judges, there are other factors also which enter into the executive bias of the judiciary. It must be remembered that most of the Sessions Judges are recruited from the Indian Civil Service, which has been the governing service in India since the days of Lord Cornwallis. It has not really been a service at all. The Indian Civil Service has been in fact a corporation entrusted with the government of this country. The members of this great trust have constituted the *Corps de'lite* of the Indian bureaucracy. They have helped the formulation of the general policy of the

[8] *Ibid*, p. 250.

Government and have been responsible for supervising the execution of that policy. They have headed the different departments of public administration in the country. They have led the police, they have guided the public utility concerns, they have sat also on the judicial bench. The *espirit de corps* among them has been remarkable. In their dealings with the people outside their circle, they have been noted for their haughty exclusiveness, but among themselves they have developed a peculiar camaraderie of spirit. Perhaps their exclusiveness as to the outer world has drawn them all the more closely to themselves and turned their association into a brotherhood. Wherever they may be and however different may be the nature of their duties, they are still tied together by the bonds of this brotherhood. They are all of them members of the great trust and are only fulfilling in their different capacities the supreme object of this governing corporation—the maintenance of British rule in India. The I. C. S. Sessions Judge is hence automatically drawn to the District Executive Officers belonging to the same service. Their functions may be different, even antagonistic but they are alike members of the "Heaven-born Service." They look upon themselves as illustrating the principle of God fulfilling Himself in many ways. They may be working in different departments, they may be moving in different spheres, but they are working all the same for the fulfilment of the fundamental objective of the great corporation. In cases, therefore, which affect any way the interests of the Government, the Civilian Judge and the Civilian District Magistrate have no differences. They as a rule see eye to eye. As members of the same brotherhood, they look at such cases from the same angle of vision. The District and Sessions Judge thus constitutes, in important and vital questions, no check upon the vagaries of the District Officer. They are birds of the same feather and seldom fail to flock together.

The very fact that the Judges belong to the Indian Civil Service has itself no doubt inculcated in them an executive bias and perspective. But some conditions of their service have

further aggravated this evil. Up to the year 1873, judicial duties were not looked upon as requiring any specialised skill. They were not regarded as any way different from the other duties of public administration. Hence officers who could discharge police duties to-day or revenue functions to-morrow, might easily occupy the judicial bench the day after. Nor once selected for the bench, would they remain there permanently. Some time later they might be invested with a superior executive office. Thus during the period, 1838 to 1859, a civilian after working for some years as an Assistant and Joint Magistrate would be promoted to be a District Officer. In this capacity, he would be in charge of the district police and magistracy. His next turn of promotion would make him the chief revenue officer of a District. After some years when his next promotion would be due, he would be asked to quit the revenue department and take to judicial duties as District and Sessions Judge. From this office, he would next move, if his ability was recognised, to be the Commissioner of a Division. If he were really an effcient man, and the Government thought him worthy of further promotion, he would revert after some years to judicial duties as a Judge of the Sudder Court.[9] In 1859, the offices of the Collector and the District Magistrate were amalgamated. To this extent, there was a break in the line of promotion sketched above. Otherwise it remained in tact up to 1873.

Now a Sessions Judge who had just discharged the duties of an executive District Officer with enthusiasm and vigour and who looked forward to his promotion to a superior executive post in the near future, could not certainly have developed all on a sudden a judicial temper, balance and fairness. It would not be possible for him to live down his executive bias, and look at things except from an executive angle of vision. As a District Officer, he had been accustomed to take orders from the Government and serve their interests to the best of

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

his ability. Promoted to the District Bench, he would not be able to shake off easily the habit thus incurred. Nor would he at all try to do so even if he could when there was soon a chance of his getting the Commissionership of a Division. In his judicial capacity, he would continue to grind the Government axe and exalt the Government prestige.

In 1873, Sir George Campbell, the Lieutenant-Governor of Bengal, divided the Indian Civil Service into two branches and instituted what is known as the parallel promotion system.[10] Henceforward the Civilians after twelve years of their service were to elect a career. They might choose the executive branch and hold henceforth only executive posts, or they might take to the judicial branch and expect their promotion only in the judicial line. The choice was not to be absolutely voluntary. Both the desires of the officers and the exigencies of the administration would be taken into consideration before asking them to join one or the other branch. The system thus inaugurated in 1873 has continued till this day. Under this arrangement officers have not to move like a shuttle-cock between judicial and executive appointments. They take to one line permanently and discharge one kind of duties throughout. This choice of a permanent career has given the judicial officers an opportunity, limited of course by the general environments of the Indian Civil Service, to live and move in a judicial atmosphere and develop to some extent a judicial temper.

Of course during the first twelve years of their service, the officers have, as usual, to move rapidly between executive and judicial appointments. Nor are their positions any the less responsible during this period. After putting in about five to six years' work as an Assistant Magistrate and as a Subdivisional Officer, a Civilian now-a-days may be promoted to be an officiating District Officer. After working for two or three years in this capacity, he may be transferred to act as an Additional District and Sessions Judge. As a District

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10 Report on the Administration of Bengal, 1872-73, p. 4.

Officer for some time and as Sub-divisional Officer before this, this gentleman has already acquired certain prejudices and has learnt to regard certain classes of men as his opponents. He has acquired also a good experience as to the general attitude of the Government towards men and things. Presiding over a Sessions Court, it is impossible for him now to live down these prejudices and try the Crown cases with an open mind and sure impartiality. He knows already what the Government expect of him. Accustomed for the last several years to obey the Government he cannot all at once muster sufficient courage and independence to try these cases only on their own merits. Nor is it in his interest to show such independence. It is common knowledge that most of the Civilians desire an executive career. The judicial branch is certainly unpopular among them. Work here is monotonous while on the executive side it is varied and interesting. Besides, the executive line affords more prizes and more openings for distinction than the judicial branch. An officiating Sessions Judge who has acted for some time as a District Magistrate not unnaturally therefore wants to go back to his former job It is not enough, to this end, that he should have his inclination to the exectuive branch known to the Government He must also keep the Govermet in humour and prove to their satisfaction that he can pull on well with the police. In other words, he must give up, as Sessions Judge, any pretension to independence in cases which affect the interests of the administration. Some I. C. S. Officers again are promoted straight from a Sub-divisional Officership to the post of a Sessions Judge. They also are as a rule no less cringing to the Government than their Colleagues who have acted for some time as a District Officer. Like most men in their Service, they too prefer an executive career, and while acting as Judges they do their best to move to the executive branch. They have hence to walk a wary path and act with caution and trepidation in Crown cases. No doubt they have not the disadvantages of having acted once as a District Officer. But they have already acquired some executive prejudices and bias in

the capacity of a Sub-divisional Officer. Besides accustomed, as an Assistant Magistrate and a Sub-divisional Officer, to obey implicitly the mandate of the District and Divisional Officers, they cannot, when promoted to the office of a Sessions Judge, develop within a short time an independent attitude towards them. A young officer may be asked to officiate as a Sessions Judge in a district under the Executive Officer of which he might have served as a Sub-divisional Officer not a long time ago. He cannot in such a situation, assert the independence befitting his position. He remains still to a considerable degree under the influence of the District Executive. Now-a-days a Sub-divisional Officer is not as a rule promoted to be a Sessions Judge in the same district. He is generally posted in this capacity in another district, neighbouring or distant. In former days, however, a man who had acted as a Joint Magistrate in one district might and very often did, become the officiating Sessions Judge of that district. This would make the evil uglier still. The case of Mr. Provat Chandra Nag in Comilla has already been referred to in another connection. We have seen that his case came up at first for trial before the Joint Magistrate Mr. G. But by the time the Deputy Magistrate Mr. R. sentenced him to two weeks' imprisonment with hard labour, and a fine of Rs. 200/- under instructions from the District Officer, Mr. G. had become the officiating District and Sessions Judge of Comilla. He had, as Joint Magistrate, been under the control and influence of the District Officer whose enmity Nag had somehow incurred. Now as Sessions Judge he could not shake off his spirit of deference towards him. When Provat Chandra Nag appealed to him against the sentence of the lower court and applied for bail, he took up an attitude which convinced the accused that he could expect no justice at his hands. The Sessions Judge passed the order that Nag might be released only on a bail of Rs. 10,000/-. It was an extraordinary demand in view of the most ordinary character of the case. The High Court was then moved and the appeal was transferred to the court of the Sessions Judge of Dacca who had no hesitation in quashing

the sentence of the lower court at once.[11] Many of the Sessions Judges who are junior members of the Indian Civil Service thus still suffer from the evils and drawbacks which necessitated the bifurcation of the Service in two distinct branches in 1873. They do not enjoy the advantages of the division. They still belong to the combined corps and uncertain as to their future cannot evince properly any judicial independence and fairness.

Even after twelve or thirteen years of service when some officers are transferred permanently to the judicial branch, they still entertain certain extra-judicial ambition and discharge now and again some extra-judicial work which may interfere with their judicial impartiality. In the Bengal Civil List, we come across the name of an officer recruited in 1904 and confirmed in the grade of District and Sessions Judges in 1917. Later on, however, he was allowed to become the Chairman of the Calcutta Improvement Trust and subsequently to become the Secretary to the Government of India, Commerce Department.[12] For a permanent District and Sessions Judge to become the Chairman of the Improvement Trust and Secretary to the Commerce Department is an administrative anomaly hardly to be desired It may be an exception made in the case of only one gentleman. But still it is something to be condemned. There are other Secretaryships and Deputy Secretaryships both in the Government of India and in the Provincial Governments which go as a rule to the permanent District and Sessions Judges. The Secretary and the Deputy Secretary to the Government of India, Legislative Department, are recruited from the I. C. S. Officers belonging to the Judicial branch. Similarly in the Provincial Governments the posts of the Legal Remembrancer and Secretary to the Judicial Department are filled by senior members of the judicial branch of the Indian Civil Service. However technical and legal may be the work in these departments, the District and Sessions

11 *A. B. Patrika* of 22-9-93

12 The Quarterly Civil List for Bengal, Jan. 1930.

Judges deputed to discharge it are initiated into the inner mysteries of the Government. Once in the Secretariat, they imbibe to a considerable degree an executive spirit and lose to a great extent their judicial balance. Besides, when such posts which are covetable to all Mufassil Judges, are dangled before them they are, as a matter of course, tempted to please the Government by their decisions so that they might get a chance to occupy one such portfolio. For a District and Sessions Judge to covet and fill the post of a Secretary to a Government Department is an unhealthy anomaly to be discouraged by all means.

The Sessions Judges in Indian Districts are thus no less under the thumb of the executive than the Magistracy. Depending upon the Government for their leave, transfer and promotion and also for the continuance of their service, they cannot be expected to assert the independence of the bench. Their judicial discretion they have to throw to the winds, in order to placate the authority on whose favours their future hangs. The Provincial Executive controls their future and controls as such their conscience as well. The fact again that most of the Sessions Judges are recruited from the Indian Civil Service makes it further impossible for the judiciary to become a check upon the action of the executive. As members of the great governing corporation, the executive and judicial officers have very often the same outlook and cherish the same opinions with regard to the cases before them. The Judiciary under these circumstances becomes only a hand-maid to the executive power and the Sessions Judges in Indian Districts, though they do not themselves exercise any police function, are not infrequently responsible for upholding and sanctifying the tyranny of the police.

CHAPTER VI.

HIGHER COURTS (CONTINUED).

The judicial hierarchy is topped in an Indian Province by the High Court. In certain civil cases, of course, an appeal is allowed against the decision of this court to the Judicial Committee of His Majesty's Privy Council. In criminal cases, however, the High Court is the final authority. Generally no appeal against its decision is entertained by the Judicial Committee. A Criminal Bench consisting of two Justices is formed by the Chief Justice of the High Court. It hears all the appeals and motions from the lower Courts in the Districts. It confirms the death sentence which a District and Sessions Judge may have awarded to an accused. It also gives its verdict in cases in which the Sessions Judge may have disagreed with the jury. The High Court as the head of the Criminal judiciary exercises also wide powers of supervision and revision over the lower courts. It may transfer a case from one tribunal to another, it may also on its own initiative call for the records of a case and direct the trying Magistrate to show cause why his decision should not be set aside.

The conditions of service of the High Court Judges are far better than those under which the District Judges have to work. They are appointed by the Crown and hold their office during His Majesty's pleasure [1] This of course does not apparently give them the same independence as enjoyed by the Judges of the Superior Courts in England or the Federal Tribunals in the U. S. A. The Judges of these English Courts cannot be removed without an address of the two Houses of the Parliament to that effect. Similarly, the Federal Judges of America cannot be deprived of their office without a successful impeachment instituted by the House of Representa-

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1 Section 102 (1) of the Government of India Act.

tives and heard by the Senate. But the law in the case of the Indian High Court Judges merely lays down that they hold their office during the pleasure of the King-Emperor and may be dismissed by Him. But actually they hold their appointment during good behaviour till the sixtieth year of their life when they are to retire from the bench. In case of a serious misbehaviour on the part of any Justice, he is not to be dismissed by the King-Emperor merely on the advice of the Government of India and the Secretary of State. A competent Commission is to be appointed to institute an enquiry as to his alleged misbehaviour and the Secretary of State is to advise the King-Emperor in the light of the recommendations of this Commission So the Justices of the High Courts in India enjoy practically as good a security of tenure as their compeers in England and the U. S. A. They do not also, like the Magistrates and the District and Sessions Judges, stand in constant fear of being transferred from one place to another by the Government. They have thus considerable opportunities of impartiality and independence. Without endangering their position they may guard the liberty of the people from the encroachments of the executive. Nor have the High Courts always belied the hopes of the people. The High Court of Fort William has not yet been wholly successful in living down the traditions of fearless independence and complete impartiality laid down by the first Chief Justice, Sir Barnes Peacock. Sir Barnes Peacock was a noted legal luminary of his days He was equally sensitive as to the independence of the Court over which he presided. Whenever the executive made any attempt to interfere in his affairs, he repulsed it with promptitude and vigour. The Governor-General, Lord Lawrence, who had been a Punjab Civilian and as such believed in the patriarchal form of justice and could not distinguish between the functions of the executive and the judiciary once poked his nose into matters within the jurisdiction of the High Court. Immediately Sir Barnes Peacock was on his guard and before his eagle eyes and stern attitude the Governor-General had to retrace his steps. Lest any frequent social intercourse

with the executive should instil an unconscious bias into his mind he declined all invitations to the Government House which were not strictly of an official character. He even refused to be the member of any club for fear of being closely associated within its precincts with the executive members of the Government. His example was followed by some of his Colleagues on the Bench and three of his successors in the office of the Chief Justice. They withdrew themselves from the Calcutta society dominated by the members of the Government and punctiliously remained aloof from the Government House. They did not allow their independent judicial discretion to be warped any way by the subtle and all-pervading influence of the Executive Government.[2] In this country the executive is so powerful and its influence is so great, that none can withstand it without a constant vigilance on their part. The executive already wields large and wide powers. But it wants to have everything in its own way. No obstacle will it allow to stand against its irresponsible career. It will brook no check on its supreme authority. If the High Court does not fall in with its pretensions and checks its illegal exercise of power, it must see to it that this Court is muzzled and its Justices are somehow brought under its influence. This purpose cannot be achieved by an exhibition of frown, it may be fulfilled by a show of favour or by some other sinister means of which the executive is capable. In subtle, sinister ways, the influence of the executive is brought to bear upon the Judges. Now prevention is better than cure and the Judges should regulate their movements so as to allow the executive no opportunity of exercising any influence upon them. They should avoid the company of the Executive Officers as far as possible.

During the tenure of office of the first four Chief Justices and again during the regime of Sir Lawrence Jenkins, the

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2 See *A. B. Patrika* for 13-2-06, 24-3-06, the *Statesman* for 18-4-09 and the Bengal Legislative Council Proceedings, Vol. XXXI, No. 3, pp. 365-370.

High Court of Fort William was truly recognised as the palladium of justice. It checked the vagaries of the Mufassil Magistrates and made every attempt to mete out justice to the people in an even-handed manner. It rebuked the Lower Courts for their lapses from the correct procedure and set aside the decisions not warranted by the facts of the cases and the laws of the land. It proved to be thus an excellent mentor for the Mufassil Magistrates and Judges and a sure guardian of the rights and privileges of the people. In its enthusiasm, however, for the correct procedure and the right decision, it became the *bete noire* of the 'strong' District Magistrates who would twist the law in order to punish an obnoxious person. The executive officers everywhere feared the High Court and on that account disliked it also from the bottom of their heart. It was the only curb upon their race for despotism. With the retirement of Sir Comer Petheram in 1896, the High Court Bench of Calcutta lost for years together its old reputation for independence. Sir Francis Maclean, the new Chief Justice, broke away from the traditions of his predecessors and established an entente between the High Court and Belvedere. For over twelve years, the Chief Justice of the High Court met the Lieutenant-Governor of Bengal frequently at the latter's dinner table and through the social intercourse was transmitted to the High Court premises all the influence of the Executive which had been absent so long from that building. The Criminal Bench of the High Court now took its cue from the Lieutenant-Governor and acquitted itself to his satisfaction. Such cordial relations between the High Court and the Bengal Government continued up to March 1909, when Sir Francis Maclean laid down his office as the Chief Justice of Bengal and retired from the bench. It was with supreme regret that the Government of Bengal took leave of Sir Francis. The Lieutenant-Governor, Sir Edward Baker, in a singularly indiscreet speech at the farewell function, expressed the reason of his regret at the retirement of Sir Francis Maclean. "I may be permitted to add," observed Sir Edward, "that during Sir Francis Maclean's term of office even the executive lamb has

learnt to lie down at night with some assurance that it will not be gobbled up by the judicial lion before the morning. And with some experience of past dangers and disasters, I will venture to affirm that that is no small gain to the country and to the public service."[3] The Lieutenant-Governor thus testified to and lauded up the pliancy of Sir Francis Maclean and deplored incidentally the independent attitude taken up by the former Chief Justices of the Calcutta High Court. The sentiments expressed by Sir Edward represented only the rosy executive view. "From the public stand-point, the fraternising of the executive lamb with the judicial lion, indicates an unholy alliance." Even the "Statesman" of Calcutta could not see eye to eye with the head of the Bengal Government in his commedation of the alliance between the Government and the High Court. It pointed out in a leader that throughout the classical period of the English bench up to the death of Cairns, the judges kept aloof from the executive society and lived in comparative seclusion. If this precaution was necessary on their part, it was certainly all the more desirable on the part of the judges out here in India. The more they could be free from social entanglements, the greater would be their opportunities for independence and the more would be the confidence inspired in the people. It was hence "by no means to the true interests of the country that the lion and the lamb of Sir Edward Baker's fable should enter into an impossible partnership."[4]

With the installation of Sir Lawrence Jenkins as the Chief Justice of Bengal, the High Court again returned to its old traditions and rehabilitated its old reputation as the haven of impartial justice and the sure protector of the rights and privileges of the people. At the time Sir Lawrence joined the High Court of Calcutta, the province was passing through the darkest period of judicial subserviency. Face to face with the Swadeshi movement, and the introduction of the cult of bomb, most of the judicial officers in the districts lost their balance and became ready tools in the hands of the panicky and vindictive execu-

3 A. B. Patrika for 13-3-09. 4 Statesman for 18-4-09.

tive. It is to the eternal credit of Sir Lawrence Jenkins that his stern and independent attitude made it at least out of the question that the Mufassil Judges should get support and encouragement from the High Court. If he could not repress the enthusiasm of the Magistrates and Judges for punishing heavily any and every man sent up by the police, he could at least set aside the decisions and give back to the innocent men their freedom. After the retirement of Sir Lawrence Jenkins, the Government have made persistent efforts to make the High Court an instrument in their hands. The political movement in the country has thickened and persons alleged to be guilty of political offences have been taken into police custody from day to day. A strictly independent High Court would however, be a thorn on the side of the Government. Sedulously therefore, attempts have been made by the Executive to mollify the attitude of the High Court. The Government want the Judges to be lions but lions under the throne.

We must see now if there is any constitutional remedy for the weakness which the High Court may have shown since the retirement of Sir Lawrence Jenkins. Before, however, suggesting any such remedy, we must study in some details the present constitution of the High Court. It must be remembered that the High Court superseded the Old Supreme Court which had been established in 1774 under the Regulating Act and the Sudder Court which had been the highest Tribunal of the East India Company. In the Supreme Court all the Judges were recruited from practising lawyers in Great Britain by His Majesty and held office during His pleasure. The Judges of the Sudder Court, however, were recruited from the Company's Civil Service in India. In the personnel of the High Court which was instituted in 1861 under the Royal Charter of August 6 of that year, both these elements came to be represented, and under the Government of India Act[5] one third of the Judges whose total number may be twenty at the maximum, must be barristers or members of the Faculty of Advocates of Scotland. Another one third must be recruited

5 Section 101 (3) and (4).

from the judicial branch of the Indian Civil Service and the third portion is to be recruited from pleaders and vakils and from members of the provincial judicial service.

In the rapid survey I have given of the attitude of the High Court, it will be seen that the Chief Justice holds a position of much responsibility, power and influence. Upon his attitude rests to a great extent whether the High Court will put up an independent front to the Government or become subservient to their wishes. It is he who forms the different benches and if he thinks one Judge on the Criminal bench is not discharging his duties to his satisfaction, he may remove him the next day and give him a place elsewhere. Whether, therefore, the Criminal Bench of the High Court will act independently and impartially or look to the Government for inspiration depends to some degree at least on the relations between the Chief Justice and the Government. Now we have to see if any constitutional amendment of his position is necessary to ensure his complete independence. It must be conceded, of course, that his independence involves various psychological factors over which no external agency may have any control. But it will not do to forget that it is dependent also on some institutional conditions. The Chief Justice under the law must be a barrister or a member of the Faculty of Advocates of Scotland.[6] Like his colleagues he holds his office during the pleasure of His Majesty. This, however, as we have seen, amounts in practice to service during good behaviour and he cannot be removed without a Commission enquiring into any of his alleged offences. So far the conditions are not unfavourable to his assertion of independence. Sir Sankaran Nair in his evidence before the Islington Commission in 1912-13 as a Justice of the Madras High Court pointed out, of course, that no man associated with the Government for a sufficiently long time as a Law Officer should be appointed to the office of the Chief Justice or for the matter of that to any Judgeship.[7] This

[6] Sec. 101 (4) of the Government of India Act.

[7] Report of the Royal Commission on the Public Services in India, Vol. II (Cd. 7293), p. 463.

would preclude the Advocate-Generals, the Standing Counsels and other Government Counsels from ever reaching the bench. Sir Sankaran Nair thinks that lawyers associated with the Government in these capacities will be too much saturated with Government views and ideals to discharge their duties properly when promoted to the bench. In England, we find an Attorney-General of yesterday is, with perfect propriety, the Chief Justice of to-day. But England is not India. There the Lord Chancellor may be a member of the Cabinet and without any public scandal be at the same time the head of the judiciary. The circumstances of the two countries differ widely. There the judiciary has long centuries of independence behind it. The deep-seated traditions of impartiality keep the Judges straight in the discharge of their duties. The same public opinion which demands impartiality from the bench also holds the executive to account for anything untoward it may have done. In this country on the other hand, the executive is irresponsible and all-powerful. It does not in the least respond to the demands of public opinion. It does not also let go any opportunity to bring the judiciary into its clutches and make it a ready instrument in its hands. It is not unnatural, therefore, for people to be very cautious as to the selection of the Judges of the Supreme Tribunal. No doubt long association with the Government as their advocates and advisers inculcates, to some extent at least, an executive bias, in the Government Counsels. But it is questionable if it is possible and desirable to divide the practising lawyers into two groups—one working with an ambition to reach the bench and the other to fill the office of the chief law officers and advocates of the Government. The advocates, as a rule, cherish an ambition to sit, some time in their life, on the bench. It is not desirable to shut out certain men from this healthy aspiration simply because they happen to act as legal advisers of the Government. After all, their association with the Government is only legal. They do not participate in formulating the general policy of the Executive Government. Besides to shut out certain able men who have enlisted themselves as Government Counsels is to narrow down

the circle from which the Judges are to be recruited. The Chief Justice should hence continue to be recruited as at present. The system should be modified only to make the "Indian" lawyers also eligible for the post. There is little distinction in training and experience between a barrister-advocate and a vakil-advocate. Nor as Judges have the barristers shown greater independence and efficiency than their colleagues recruited from the vakil bar. The Chief Justice should hence be appointed from the leaders of the bar no matter whether they were called to it in India or England. While this way the field of his recruitment should be widened, it should be restricted in another sense. The office of the Chief Justice should never be filled by the promotion of a Puisne Judge. For ensuring the independence both of the Chief Justice and of the Puisne Judges, such promotion should be constitutionally made impossible. In India so far no hard and fast rule has been observed in the selection of the Chief Justice. On some occasions he has been appointed direct from the bar in England. In some cases we find him recruited from among the eligible Puisnes of the different High Courts. No doubt an efficient and learned Puisne Judge cherishes naturally an ambition of rising to the top and securing the Chief-Justiceship either in his own Court or in any other High Court in the country. The Government also feel tempted to give him a lift and ensure thereby the appointment of a suitable Chief for the highest tribunal in a province. But in the light of other considerations, this healthy and natural ambition of an efficient Judge has to be checked and the temptation of the Government resisted. The simple fact that some Puisnes are eligible for the highest judicial office has been the cause of much mischief. Whenever there has been a chance of a vacancy in the Chief-Justiceship in any province many of the eligible Puisnes in the different High Courts have been on the run for the job. Now canvassing for promotion is an evil in every department of administration, and it is certainly a most dangerous evil in the judiciary and that too in its highest rung. All the wirepulling that has to be made, all the back-stairs influence that has to be summoned interfere with the independ-

ence of the judges. A Puisne Judge who is on the look-out for a higher office is tempted naturally to keep in humour the powers that be. He cannot but respect the wishes and opinions of those who hold in the palm of their hands the strings of patronage. Then again a Puisne Judge who after sedulous attempts has satisfied the executive and secured his promotion to the Chief-Justiceship cannot assert the independence of his position. He is mindful of his obligations to the Government and cannot certainly rise above them. He has the calls of gratitude to answer. And through him, the Government now establish an influence and control over the High Court which instead of being an independent tribunal now turns out to be a tool in the hands of the executive. The present system is thus an evil in both ways. It hampers the independent action of the Puisne Judges. Instead of being the taskmaster of the executive, they are now tempted to act up to its wishes and uphold its action. It also drags the Chief-Justice from behind and prevents his following an independent and steady course. It will be wise therefore to give the go-by to the present arrangement and always recruit the Chief-Justice direct from the leading men of the bar. This will take away the temptations from across the path of the Puisne Judges and relieve the Chief Justice of all obligations to the Government. This will be hence a proper step towards the independence of the High Court.

In order that the Puisne Judges may be relieved of the control which the Chief Justice has an opportunity to exercise over them, some reform should be made as to the formation of the different Benches. It is now the Chief Justice who forms them from time to time. He would not place on the Criminal Bench any Justice whom he may think too independent. Those only who think in the same way as he are generally allotted to the Criminal Bench. Too much discretion is thus given to the Chief Justice in this matter. If perchance he comes under the influence of the Government, the whole Criminal Bench also comes under the same control. It will be hence wise to take away this responsibility from the shoulders of the Chief Justice. Easily the allotment of the Justices to the different Benches may

be made by lot. Generally the Justices in a High Court are not concerned with any special departments. They move from one Bench to another. They sit in judgment upon criminal as upon civil cases. So the principle of lot may not be inappropriate.

Another practice which has made possible, if not inevitable, the exercise of influence by the Government over the High Court, is the recruitment of one-third of the Justices from the Indian Civil Service. We have seen already that the District and Sessions Judges belonging to this Service are impregnated with an executive bias and cannot discharge their judicial duties with impartiality and fairness. It should not be expected therefore, that Justices recruited from these Sessions Judges would all at once turn over a new leaf and become Daniels in their Judgments. The Justices belonging to the Indian Civil Service can never in fact forget that they are members of the great corporation responsible for governing India. An Ethiopian may change his colour but an I. C. S. man whatever his actual calling can never forget that he is a limb of the bureaucratic body that maintains British rule in India. He is first and foremost a member of the Indian Civil Service and only secondarily is he a Justice of the High Court. His first duty therefore is to remain true to the traditions of his Service and if they collide with his function as a Judge of the Supreme Criminal Tribunal, the latter must give way to the former. Even twenty years of judicial experience cannot efface the habit formed and the outlook created during the ten years of their executive life, nor can it by any means shut out the influence which the long traditions of the Indian Civil Service exercise over its members of both the branches. The Judges of the High Court are required to be altogether independent of the Government, they are not to be swayed in the least by the wishes and opinions of the Supreme Executive of the country. The I. C. S. Judges, however, cherish a different relationship with the Government, they are not to be independent of them, they are a limb of the same. The wishes and opinions of the Government are therefore the wishes and opinions of the I. C. S. Justices as well. If hence, the High

Courts are to be raised from the rut and given a position of independence and impartiality, the reservation of one third of the seats for the Indian Civil Service should be discontinued without delay.

Another practice which the Government have encouraged has been responsible for the lowering of the independent tone of the High Courts. When the extra-judicial ambition of the Judges is carefully fostered, an axe is certainly laid at the root of their independence. If they are allowed to expect at the hands of the Government some office more lucrative and more influential than their present job, it is but human that they may like to remain in the good books of the Government and do nothing that may prejudice their interests. A membership of the Executive Council, either of the Viceroy or of a Provincial Governor, has in the eyes of all, a greater glamour about it than the Judgeship of a High Court. It yields greater emoluments and has opportunities of greater power and authority. Now the Government have by certain appointments fostered the impression that from the High Court Bench to the Council table at the Government House is an easy step. Mr. Krisnaswami Iyer was raised from the Bench to the Executive Council of Madras. Sir Abdur Rahim had been a High Court Judge before he became a member of the Government of Bengal. Sir C. Sankaran Iyer was similarly recruited to the Viceroy's Executive Council from the High Court Bench. The late Sir Sams-Ul-Huda was also promoted from the Bench of Fort William to the Executive Council of Bengal. Sir B. K. Mallik was also, though temporarily, taken into the Executive Council of Bihar and Orissa soon after his retirement from the High Court of Patna. In Bengal similarly, temporary vacancies in the Executive Council have been filled by the Justices who have retired from the Bench. Sir Nalini Ranjan Chatterji was the stop-gap between the late Maharaja of Nadia and Sir Pravashchandra Mitter, and Sir B. B. Ghose has recently been appointed to officiate in the place of Sir Pravashchandra Mitter. After these appointments, Justices of the High Courts may naturally think that the supreme execu-

tive offices of the Government are quite within their reach. Unconsciously a desire to remain in the good graces of the Executive Government has grown in them. A spirit of co-operation with the Government is now in the ascendant among the Judges. They seem to be unwilling to place themselves in opposition to the Government that have the strings of patronage in their hands. An unhealthy atmosphere has thus been created. The Judges are expected to be the task-master of the Executive and if they are to discharge their functions carefully and conscientiously they must now and again go against the interests of the Supreme Executive. Sooner therefore the temptations of executive appointments are removed from the path of the Judges, the better for the future of the Indian Judiciary. Once they are raised to the Bench, they must expect no further promotion at the hands of the Executive. This way all incentive to satisfy the Executive Government and remain *persona grata* with them will be removed and the Judges will not be hampered in any way in the exercise of their discretion and independence.

CHAPTER VII.

Arguments against Separation Criticised.

We have traced in some details the evils of the union of the executive and judicial powers in the same hands. We must now appraise the strength and value of the arguments that are trotted out so often in favour of continuing the present system. The first objection that the Government raise to the separation of the two functions is that it would militate against the traditions and genius of the Indian people. It was as early as 1853 that Sir Cecil Beadon enunciated his favourite oriental theory of Government. He tried to bring it home to the Government that in the East people would always appreciate and profit by the concentration of all administrative powers in the hands of a single officer in some district. It was futile and even dangerous to set up different functionaries in one area with separate and independent duties to perform. The enunciation of this view by Sir Cecil impressed the first Lieutenant-Governor of Bengal, Sir Frederick Halliday. He also now gave it out as his experience that the separation of powers was a scheme foreign and unintelligible to Asiatic notions. The Europeans might comprehend and appreciate it but the Indians would be confused and aggrieved by it. Four decades later towards the close of the nineteenth century, Sir Charles Elliott declared the same opinion and pointed out that "the keynote to our success in Indian administration has been the adoption of the oriental view that all powers should be collected into the hands of a single official so that the people of a 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." As recently again as 1925, during the debate on this question in the Punjab Legislative Council, the representative of the Provincial Government defended the combination of the judicial and

executive duties in the same functionary on the ground that it "has been in existence in this country from time immemorial." It was an inheritance from the remote past and as such it has certain distinctive advantages. "Institutions are to some extent good in exact proportion to their age. When a man has got used to a particular thing he is able to tolerate it much better than if it were new."[1] Now to classify Governments as oriental and occidental is highly irrational and unscientific. India under the Moghuls was India under absolute despotism. The will of the Monarch was the only constitution of the country. All the powers were concentrated in his hands and in the hands of his agents. But if such concentration of authority was a characteristic of Medieval India, it was no less a feature of Europe before and even after the French Revolution. Long before Louis XIV, France was under an absolutist system of Government and in the time of this great King and his successors the country was under the iron heels of the ruler. The King's wish was the law of the land. All the threads of administration were collected in his hands. Literally, he was the fountain of all authority and the source of all powers. No less stringent was the despotism of the Hohenzollerns in Prussia. They might have been benevolent despots, but absolutist they were all the same. They might have been first servants of the state but nothing could be done without their consent and leadership. All the strings of administration were collected in their hands. Now if France and Prussia could break away from such traditions and take to the "occidental" administrative arrangement, if they could give the go-by to the combination of all powers in single hands, it is not easy to see why India should even in these days of the second quarter of the twentieth century cling to the coat-tails of Medievalism and continue to place executive and judicial powers in the hands of the same functionary. Old institutions have no doubt a claim upon the reverence of the people, but that should not mean that a proved anomaly must not be removed simply because it has a history

1 Punjab Legislative Council Debates, Vol. VIII, No. 15, p. 726.

behind it. Society everywhere has an organic growth. The east also is not unchanging. Indian social and political conditions have changed and changed in many aspects beyond recognition during the last one hundred years. The so-called oriental theory of Government might have suited the conditions of this country in the later eighteenth and the early nineteenth century. But it is in every way out of accord with the temper of the modern days. The physician must prescribe his medicine in the light of the symptoms of the disease and the physical conditions of the patient. He would be mad or inept if he clings to a prescription simply because it was effective in conditions which have changed. It is again absolutely a false reading of the Indian mind that it cannot comprehend and appreciate the difference between the duties of several public functionaries. Sir Frederick Halliday would have us believe that the Indians would be confused and aggrieved if the same man who put them under arrest did not also try them and send them to prison. This is quite the travesty of the state of things we see. The Indians are specially noted for the subtlety of their intellect. They have been famous for recognising the most minute differences between things which are apparently similar. Even the distant village people can point out with surprising accuracy as to how much power a particular officer possesses. It is high time therefore to shelve the oriental theory of Government and speak no more of traditions and genius of the people.

The second ground on which the Government have opposed the separation of the two powers is that the prestige of the District Officer would suffer in the estimation of the people in case he was deprived of his judicial functions. This argument, we have seen already, was adumbrated by Sir James Stephen. The District Officers are the "mainstay" and "keystone" of the fabric of British Administration in India. They are the eyes and ears of the Government. Their prestige and their authority must hence be maintained at any cost. The exercise of criminal powers, pointed out Sir James Stephen, was the most

distinctive mark of sovereignty. The man who could punish was recognised as the ruler everywhere. Unless, therefore, the District Officer remains invested with criminal jurisdiction, the people in his charge may not fully appreciate his authority. He must have the power to punish otherwise he may not inspire the people with sufficient awe. The representatives of the British Government have no doubt denied now and again that this question of prestige stands in the way of the reform. In 1893, the Secretary of State, Lord Kimberley, definitely pointed out in the House of Lords that the prestige of the District Officers was no valid argument against the separation of the two functions. In 1908, Sir Harvey Adamson observed in the Indian Legislative Council that the union of the two powers in the hands of a District Officer not only did not add to his prestige but actually weakened it to a considerable extent. But two years later in 1910, when Mr. Madge, an official member, again revived the question of prestige and thought it would be undermined by the separation of powers, Sir Harvey of course dissociated the Government from this view but yielded at the same time to the objections raised. Now if we analyse this much talked of prestige, it is found to be something very poor and rickety indeed. An executive power which inspires no respect unless it is coupled with some criminal jurisdiction is certainly hollow and artificial. It means that the people have no regard for, and no attachment to, the District Executive but they are kept under check by the right to punish which has also been given to it. The union of the two powers is hence a clear declaration that the executive as such exercises no influence and inspires no obedience ; its authority is only upheld by the threat of punishment which it may award in its judicial capacity. Under these circumstances, both the executive and the judicial powers suffer considerably. People lose their faith in criminal justice because they know it is abused for upholding executive action. They also cherish no confidence in the executive because they are sure it has no strength and resource of its own. That the people have ceased to place any confidence in the criminal courts is evidenced by the fact that

the political offenders now-a-days enter no defence against the police prosecution. The Magistrate, they think, is there only to sanctify the action of the police, it is hence quite futile to defend oneself against the contention of the prosecution counsel. The executive also, sure that its action would be upheld at any rate by the Magistrate, does not care to be right and honest in the discharge of its duties. It has as a result lost the moral back-bone which alone can evoke the sympathy and confidence of the people. The union of the two incompatible powers has thus instead of adding to the prestige of the executive undermined its strength which can be born only of the people's confidence in it. Sir James Stephen had argued that the union of executive authority with criminal justice was indispensable for the safety of the British Dominion in India. But the result of the union seems to be completely otherwise about. It does not provide for the safety, it is only sapping the foundations of British rule in this country. The union may be intended for inspiring fear among the people. But fear cannot be a permanent deterrent against anything. People would think many times before opposing a District Officer who is noted for his moral integrity and honesty of purpose. But they would easily stand up against the man whose policy is to strike terror by virtue of his dual power of arresting and imprisoning them.

The third argument of the "Unionists" is that the present system does not really militate against the independence of the courts of law. The District Magistrate who is the head of the police seldom tries a criminal case now-a-days. "The District Magistrate who combines in his own person the duties of the thief-catcher, prosecutor and judge," observed the Home Member of the Government of India in 1907, "does not exist in India and has not existed for the past half-century."[2] It is unfortunate that the Government Member made this statement which is at best inaccurate. No doubt the original cases the District Magistrate takes up himself in the older provinces are only few in number. But even in these few cases which he

2 Proceedings of the Legislative Council of India, Vol. XLV, p. 181.

tries the District Magistrate may be interested as the head of the District Executive and as such he may so try and decide them as to grind his executive axe. He may subordinate his judicial powers in these cases to the exigencies of his executive position. Again in the older provinces the number of cases he tries may be few but that is not the case in the so-called Non-Regulation Provinces. There the Deputy Commissioner has himself to try many original criminal cases. Everywhere again the Sub-divisional Officers combine in them both judicial and executive functions. Nor do these officers try cases only now and then. Their judicial duties they have to discharge regularly, most of the political cases specially they have to try. It cannot hence be said with the least accuracy that the combination of police and judicial powers in the same functionary is a feature of by-gone days. It cannot be gainsaid that it is equally a characteristic of to-day. Then as to the evil of the control which the District Magistrate exercises over the Subordinate Magistracy, it also is in the eyes of some no longer potent and dangerous. The Police Commission of 1902-03 minimised the danger to judicial independence from this source. The majority of the Commissioners were of opinion that the subserviency of the Deputy Magistrates had already diminished to a considerable degree and it would disappear altogether in the near future. In the nineteenth century, the subordinate Magistrates, ill-educated as they were, had little sense of the dignity and responsibility of their position and could not as such assert their judicial independence. But by the start of the twentieth century, these Magistrates were being recruited from a highly educated class of the people and they introduced a new tone in their service. All that remained of the old subserviency would also be stamped out, the Commission hoped, in the next few years.[3] But this was too rosy a picture of the situation with which the Commission deluded itself and tried to delude others. It did not in the least agree with the actual facts. In 1908, Sir Harvey Adamson had to admit in his speech in the Indian

[3] Report of the Indian Police Commission of 1902-3 (Cd. 2478), p. 81.

Legislative Council[4] that "the exercise of control over the subordinate Magistrates by whom the great bulk of criminal cases are tried is the point where the present system is defective." He could not resist the conclusion that "if the control is exercised by the Officer who is responsible for the peace of the District there is the constant danger that the Subordinate Magistracy may be unconsciously guided by other than purely judicial considerations." Here and there there may be high-spirited conscientious Deputy Magistrates who are not ready even at the sacrifice of their future prospects in the Service, to allow their judicial discretion to be warped by the behests of their official superiors. But they are only exceptions which prove the general rule that the Subordinate Magistrates act up, in their judicial capacity, to the orders and desires of their executive Chief. Nor can it be otherwise. However educated and cultured, every officer has an instinctive regard for promotion in his service. He has hence a natural desire to keep satisfied the promoting authority. And as long as the Magistrates have to depend upon the favour of the Chief Police Officer for advancement in their Service, they will have the incentive to gratify his wishes. They will keep him in humour and act up to his behests. Sir Henry Wheeler observed in 1921 in the Bengal Legislative Council that the whole thing was "singularly uncomplimentary to the Subordinate Magistracy."[5] In a similar vein spoke Sir John Maynard in the Punjab Legislative Council in 1925. "A man," he said, "who will depart from the dictates of his own conscience at the bidding of another man will also depart from the dictates of his own conscience at the bidding of a section of the public or his own community."[6] Here the tempter is himself the accuser. You place irresistible temptation in the way of a man and then accuse him of having yielded to the same. The Magistrate

4 Proceedings of the Legislative Council of India, Vol. XLVI, p. 247-48.

5 Bengal Legislative Council Proceedings, Vol. I—No. 6, p. 270.

6 Punjab Legislative Council Debates, Vol. VIII—No. 15, p. 740.

himself is not here so much to blame for the subserviency he may show. The responsibility for his weakness must be fastened on the system that makes it inevitable. We may not give compliments to the Magistrate for his conduct but it must be admitted at the same time that there is nothing surprising and unnatural in it. To say that he will be subservient to his community simply because he cannot, under the peculiar circumstances, resist the influence of his superior officers is to say the least irrelevant. Such a conclusion does not arise at all. It need only be emphasised that so long as their future prospects are determined by the Executive, the Magistrates will continue to be its slaves and judicial independence will be a misnomer. The examples given in a previous chapter go to illustrate the methods by which the Executive interferes with the normal course of justice. Still the Government never cease to protest that there is no interference with the judiciary. But they really protest too much. Some arguments innocently adduced by the Government Representatives for the maintenance of the *status quo* constitute a decisive testimony to the executive interference with the law courts. When the Bengal Government set their face against the Adamson scheme of separation in 1908-9, one of the arguments they presented was that in the abnormal political situation of the time, the separation of criminal justice would weaken the hands of the District Executive. Similarly in 1928, Sir Geoffrey De Montmorency pointed out in the Punjab Council that in view of the extraordinary wave of crime in the province during these years, he thought it inadvisable to weaken the Executive by taking away from its hands the criminal jurisdiction. This was certainly an open confession that criminal justice was used as a hand-maid to executive authority. Without its co-operation the Government could not meet the situation with expedition and success. In other words with criminal justice in the hands of the Executive, the Government could secure convictions with greater ease and rapidity than in case it were in independent hands. The Government think this to be a valid argument in favour of the continuance of the present system. But in fact it only declares the dangerous character of the combination of

functions that now rests in the hands of the District Executive. It is thus a potent argument not in favour of but against the continuance of the present arrangement.

The financial bogey has also been raised by the Government to ward off the reform which they cannot challenge quite effectively otherwise. Whenever in debates on the merits of this question the Government members have been cornered, they have taken shelter under the wing of finance. It was in 1893 that this financial argument was for the first time introduced to explain the unwillingness of the Government to undertake the reform. The Secretary of State for India, Lord Kimberley, gave it out in the House of Lords that he appreciated the evil of combining criminal justice with executive authority But the separation of the duties would involve a heavy expenditure which the existing financial position of India would be unable to meet. But it was soon proved that finance was not a serious impediment in the way of the reform demanded, it was only a cover. Mr. R. C. Dutt published in the course of the year a scheme of separation that would put very little strain on the public purse. If the Government were serious about the reform and if they considered finance the only obstacle in its way, they should have welcomed the scheme of Mr. Dutt with open arms But the Secretary of State did not even look at it. Sir William Wedderburn asked in the House of Commons if the Government would appoint a Commission to examine how far Mr. Dutt was accurate in his estimates. But the Secretary of State had been advised already that no scheme could be put in operation without a large addition to the public expenditure. It was not till this scheme of Mr. Dutt was appended seven years later to the great Memorial presented by Lord Hobhouse and others that the Government thought it necessary to pay their tardy attention to it. During the last thirty years whenever there has been a debate—and debates have been many—one of the principal arguments against the separation has been the lack of funds. Even when the budget of a province was a surplus one and the non-official Members of the Council pressed for utilising this money for this purpose, the Government

members all on a sudden became the champion for the extension of nation-building work and waxed eloquent for economy in other departments. This was certainly a strange language in the mouth of the Government, and it sounded strange to all that heard it. The Government in every province would again magnify the expenses which the reform would entail. An expert Committee of their own choice may, after due enquiry, come to some conclusions as to the capital and recurring expenditure necessary for the reform. But if they do not agree with the preconceived ideas of the Government, they would be turned down as incomplete. The Greaves Committee which formulated the scheme of separation for Bengal in 1921-22 estimated the total recurring expenditure for the reform to be Rs. 4,48,650 and the non-recurring cost to be only Rs. 1,53,000. The Government of Bengal, however, would not accept these figures as the correct estimate of the new expenditure necessary. Sir Hugh Stephenson practically attached no importance to the Committee appointed by the Government and consisting of some highly experienced experts. In the Punjab, the LeRossignol Committee estimated that the total recurring charges would be Rs. 8,21,976 annually and the non-recurring cost would be Rs. 5,89,860. The Bihar Committee which was presided over by Justice Sir B. K. Mallik came to the conclusion that the recurring cost entailed by the reform would be Rs. 1,90,656 while the capital expenditure would be Rs. 5,96,000. The conclusions of the expert Committees have thus nowhere justified the alarming prognostications of the Government. Of course the estimate of these bodies is only approximate and we may take it that the scheme, when in operation, may entail some greater expenditure. But any way nowhere the complete separation of the two functions would involve an outlay of more than ten lacs a year. In some provinces it would be far less. Now if the Government have the mind, they can easily find this amount to carry out so much-needed a reform. During the last fifteen to twenty years the Government have, in the teeth of consistent public opposition, increased by many lacs the police expenditure. They have added also considerably to the expenses under different other items of General Admini-

stration. When so much money could be found for these departments, we do not quite see why the small amount necessary for separating criminal justice from executive control cannot be found by the Government. The financial difficulty, if it is not a ruse, can easily be met.

CHAPTER VIII

Lines of Separation suggested.

After recounting the evils of the existing system and meeting the arguments against its immediate replacement, we must now proceed to enunciate the principles on the basis of which the separation of executive and judicial functions should be effected. Since the publication in 1893 of the plan of separation by R. C. Dutt, many attempts have been made to work out a detailed scheme for the complete bifurcation of the two powers. Mr. C. W. Bolton, Chief Secretary to the Government of Bengal, put forward his scheme in 1900. Some eight years later, Sir Harvey Adamson, Home Member of the Government of India formulated a new plan for effecting the separation. In 1913, Sir (then Mr.) Pravashchandra Mitter published a detailed scheme of his own. After the inauguration of the Reforms in 1919, the Provincial Legislative Councils took up the matter and in four provinces, expert Committees were set up which took a considerable evidence on the subject and each put forward its own scheme for separating the criminal justice from executive control.

The bulk of criminal justice is administered by Deputy Magistrates, the officers of the Provincial Civil Service. A portion of it only is discharged by the I.C.S. men. Now the Deputy Magistrates combine in them both executive and judicial functions and are amenable to the control of the Executive Chief of the district. They are recruited by the Provincial Government, and can be suspended and dismissed by the same authority. If the separation of judicial and executive functions is to be complete and if the criminal courts are to be, in every sense, independent of Government control, the Provincial Executive Service should be debarred from Magisterial duties. Mr. R. C. Dutt in his scheme thought it sufficient that a Deputy Magistrate while discharging judicial duties should be exclu-

sively concerned with them alone and should for the time being pass under the control and supervision of the District Judge. He should not, during this period, take up any executive duty and come any way under the control of the District Officer. But at a later date he might revert to executive work and as such become a subordinate of the District Executive Officer. This scheme is, on the face of it, defective and unscientific. An officer who alternately performs executive and judicial duties, may, very naturally if not inevitably, develop an executive bias which will detract from the merits of his judicial work. Again if he comes at intervals under the control of the Executive Chief, he will not, even while dispensing criminal justice, be able to resist executive influence. The recent schemes have considerably made good this defect of the plan of the late Mr. Dutt. It is now admitted that those who will be in charge of criminal judicial duties must not be given ever afterwards any executive function. They must have their career now limited to the judicial line. There are some of course who advocate that for the first five or six years of the service all the officers should alternately perform executive and judicial duties. At the end of this period, like the members of the Indian Civil Service, they will be given the right to select the executive or the judicial line. Henceforward there will be no interchange of duties. Those who will select the judicial line will continue in that branch. This was the scheme of Sir Harvey Adamson and it has been supported by the minority of the Bengal Committee[1] and the majority of the Bihar and Orissa Committee of experts. They argue that this way the officers will gain a wider experience which will be beneficial to both branches. "We think it essential," points out the Bihar and Orissa Committee, "that the executive and judicial services should each have the experience of the work of the other. A judicial officer is handicapped if he knows nothing of the important branches which the Collector controls. . . . On the other hand the executive has many judicial duties to

1 The Report, p. 6.

perform."[2] "We suggest therefore," continues the Committee, "that there should be one system of recruitment and one combined service for judicial and executive officers up to a certain point."[3] This scheme is no doubt an improvement upon the plan of the late Mr. Dutt, but it is still inconsistent with the principle of complete separation of the powers. In the first place as to recruitment, one method cannot apply to both the branches. The executive officers have to be recruited on the basis of their general education and outlook. It will be unwise to demand of them any specialised knowledge. Those, however, who will be required to perform judicial duties, must have a comprehensive legal training. To the executive officers the knowledge of law, if necessary, is only of secondary importance, and it can be picked up at the time of departmental examinations or as exigencies arise. Law is, however, the life-breath of the judges. Thorough and scientific knowledge of law is of primary importance to them. Nor is merely the theoretical knowledge of legal principles enough. They must have some years' practice at the bar to get accustomed to legal procedure and the atmosphere of the law courts. Experience of some executive departments may to some extent broaden the outlook of the future judge. But a sufficiently long practice at the bar no less develops in him an insight into human nature and a knowledge of men and things. Besides, it gives him a valuable experience of the happenings behind the scenes. The law courts are themselves a training ground. Here they move in a legal atmosphere and come into touch with diverse people and various objects of study. A judge recruited from the lawyers of some experience hence enjoys many advantages from the absence of which his colleague who has never before his promotion to the bench, been inside a law court, must suffer. The methods of recruitment cannot, we may see at once, be the same for the criminal judge and the executive officer. Nor is the experience of the one of the other's departmental business any way necessary and beneficial. As for

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[2] The Report, Vol. I, p. 18. [3] *Ibid*, p. 17.

the judge, it is rather detrimental to the quality of his work. If he moves in an executive atmosphere for some years and accepts the executive officers as his colleagues and superiors, he is sure to acquire some executive prejudice which dies hard. We may, therefore, wholeheartedly accept the note of dissent in the Report of the Bihar and Orissa Committee by Rai Bahadur Dwaraka Nath. "The scheme of a combined service," he says,[4] "does not commend itself to me. It offends to my mind against the principle of the complete separation of the Executive and Judicial functions." The Magistrates should on no account belong to the same corps as the executive officers. They may be amalgamated with the Munsiffs and the two together may constitute a separate judicial Service. The Deputy Magistrates already in service should be asked to decide as to which line they will take up. They may prefer executive duties and remain in the executive line or they may choose a judicial career. In the latter case, their names should be withdrawn from the executive list and embodied in the proper place of the new judicial cadre. All the members of this combined judicial service may engage in both civil and criminal cases either simultaneously or at different times. In places, where there are at present two Munsiffs to dispense civil justice and two Deputy Magistrates to try criminal cases, there may not be enough criminal and civil work to keep the two pairs fully engaged. But simply because civil and criminal justice constitute two separate departments, four men are required. But in case a Munsiff may take up some criminal work and the criminal judge some civil work three men may satisfactorily perform these duties. Then again, some subordinate judges who have all along their official life administered civil justice are entrusted to-day with the powers of an Assistant Sessions Judge and are in some cases promoted to be the District and Sessions Judge as well. If they have had experience of trying criminal cases they will be able to discharge their duties of the Sessions with greater confidence and efficiency than at present.

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[4] The Report, p. 29.

Sir Hugh Stephenson tried to prove in a speech in the Legislative Council of Bengal that civil and criminal justice are of different species. They require also different training on the part of those who administer them.[5] But this statement is unsubstantiated by any valid argument or fact. The District and Sessions Judges and some of their assistants and subordinates everywhere perform both civil and criminal functions and nowhere there has been any complaint that they are ill-matched in the same hands. There have been complaints no doubt that the I.C.S. Sessions Judges do not fulfil their civil duties with efficiency. But that is not because they exercise at the same time criminal powers but because they have had no legal training and no experience of civil cases. The late Justice Sir Narayan Chandravarkar in his evidence before the Islington Commission pointed out that during the famine when the executive officers were on famine duty in the Bombay Presidency the subordinate Judges were temporarily invested with criminal powers and they exercised them with exemplary promptitude and efficiency.[6] Mr. Justice Jwala Prasad had also had the same experience. In his written evidence to the Mallik Committee, he observed "to my mind, there must be the same standard of training both for the civil and criminal officers, before they enter service. The two branches of civil and criminal law are inter-woven and it is impossible in the beginning to make any hard and fast distinction between them. . .. It is also impossible to make out a particular lawyer as a civil or a criminal lawyer and to divide the service into civil and criminal officers. The two must be combined together and a judicial officer must try both kinds of cases."[7] The Munsiffs and the Magistrates should hence be combined in the same cadre and discharge both the criminal and civil duties. In case a Public Service Commission is started in every province, the appointments of these judicial officers may be vested in that

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5 Bengal Legislative Council Proceedings, Vol. XI—No. 5, p. 51.

6 The Report, Volume VI, (Cd. 7579), p. 298.

7 The Report, Vol. II, p. 36.

body. Otherwise they should be recruited as the Munsiffs are at present, by the High Court. All powers of transfer, promotion, reduction and dismissal should also be vested in this latter body. The Executive Government should be rigidly excluded from any authority over the members of the combined judicial service. In the first place they will have no executive functions in the discharge of which they may have to come under the control of any executive officer. Throughout their official career their duties will be confined within the judicial field. They will be concerned only with the administration of justice, civil and criminal. Immunity from executive control to this extent is not, however, enough. In the Presidency Towns, Calcutta, Madras and Bombay, the Police Magistrates are not immediately under the control of any executive officer. Nor have they themselves any executive duty to perform. So far as these Towns are concerned, the principle of judicial and executive separation has been observed. The Presidency Magistrates are supposed to be independent of all executive control. There is no District Officer here who is also the head of the Magistracy. The Chief Presidency Magistrate is purely and exclusively a judicial officer. Nor has the Commissioner of Police any legal authority over the Magistracy of the Presidency Town. But all the same we find these courts do not inspire any public confidence. The reason for it is not far to seek. These Magistrates like the Magistrates in the Districts are appointed by the Executive Government. They may be promoted, reduced and even dismissed by the same authority. They are liable also to be transferred in case they are not in the good books of the Government. They are again members of either the Indian Civil Service or the Provincial Service (Executive). And as such they are expected to have some executive bias of their own. Any way they are under the control of the Provincial Executive Government and they must keep this authority in humour otherwise their future prospects may be blighted. If a Magistrate in a District or Sub-divisional town dismisses too often the police cases or fail to take the same view as the police with regard to an important case, the

Superintendent of Police will immediately lodge a complaint to the District Magistrate against the trying Magistrate and the former will see to it that the latter behaves well in the future. In the Presidency Town, similarly, the Magistrates must keep on well with the Commissioner of Police and his underlings. Otherwise complaints will go against them to the Chief Secretary and the Home Member of the Provincial Government who control their official destiny. The Presidency Magistrates are thus no more independent than the Magistrates in the districts. The very fact that their future prospects depend upon the good will of the Executive Government inspires suspicion in the public mind. Recently in the Tilak Procession case of Bombay (August 1930), there was a proposal of calling in the Home Member, Sir Ernest Hotson, as a Court Witness. Sardar Vallabhbhai Patel, one of the accused, thought, however, that it might prove to be embarrassing to the Court to call a witness "who is a superior officer of the Court." Mr. Dastoor, the Chief Presidency Magistrate who was presiding over the Court protested that the Court was not subordinate to the Home Member, it was only under the control of the High Court of Bombay. Sardar Vallabhbhai retorted that this was only in theory ; in practice the Home Member of the Provincial Government was the real superior.[8] When such was the suspicion in the mind of the accused, they did not naturally expect any justice in that tribunal. Their suspicion might be right or wrong but it was there all the same. Steps therefore, should be taken for the radical removal of any suspicion of this kind. It is not enough that the members of the combined judicial service would have no executive duties of their own and would not serve under any executive and police officer. It must also be arranged that they should be immune from all control of the Government. All powers of transfer and promotion and all other disciplinary control over the members of this combined judicial service should be vested in the High Court. The Provincial Government must have nothing to do with them.

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[8] See the *A. B. Patrika*, 10-8-30.

All the District and Sessions Judges and their assistants should be recruited by promotion from the members of the combined judicial service. The promotion as now should be determined by the High Court on the basis of seniority cum efficiency. Any promotion that is not automatic may admit of some evils in the judicial line. But the evils would have been serious only if it were determined by the Executive Government. In the hands of the High Court which would have generally no axe to grind, the principle of promotion is not expected to be misused. Now-a-days the Munsiffs not only become District and Sessions Judges but may also aspire to sit on the High Court Bench, though their promotion to this highest tribunal has only been rare. It would be better to limit the promotion of the new judicial officers to the District and Sessions Judgeships. The wide outlook, thorough and detailed grounding in law and the many-sided experience which the High Court Judges are expected to possess will be sought in vain in the judges of the lower courts. They move always in a circumscribed atmosphere and have seldom handled any complicated and intricate case. It will not be unwise therefore to recruit the Judges of the highest tribunal in a province directly from the bar. Nor will the members of the Judicial Service have any complaint, if they are not raised to the High Court Bench. Beginning as a Munsiff and a criminal Judge with third class powers, they will have opportunity to rise to the position of a District and Sessions Judge. This will be a promotion not in the least mean and negligible. The District Judgeship is practically now-a-days the highest ambition cherished by a Munsiff.

So all the civil and criminal judges in the districts will form a distinct cadre of their own, which will be completely immune from any control of the Executive Government. The members of this cadre will be concerned exclusively with judicial duties and will have no executive and police duties to perform, nor will they be associated any way with an officer who is entrusted with such duties. The High Court Judges will of course be appointed by the Government. But they will

enjoy a tenure of office during good behaviour and will expect no promotion at the hands of the Executive Government. The Chief Justice will not be recruited from among the Puisnes but direct from the bar. And neither while on the bench nor after their retirement, should the Judges expect any other appointment at the hands of the Government. This principle should be observed, if not statutorily, at least by convention.

The Indian Civil Service must cease to have any connection with the judiciary. We have already analysed its position too clearly not to find that its association with the courts of law is detrimental to their independence and impartiality. Whether it is not yet time to dissolve this governing corporation altogether and stop the recruitment of any officer to this Service is beyond the scope of this book to discuss. But it must be emphasised and reiterated that the members of the Indian Civil Service must not be allowed any longer to sit on the bench either in the districts or in the High Courts. The discontinuance of the practice of appointing I.C.S. men to the judicial posts in the districts will release a few lacs of rupees annually in every province. This sum will go a great way to meet the new expenditure necessary for effecting the complete separation of the judicial and executive functions. If again the District and Sub-divisional officers are relieved of their judicial duties, they will have time and opportunity to devote more attention to their executive and police functions. It is to be investigated if under the altered circumstances these officers could not take the responsibility of maintaining law and order without the assistance of all the Police officers that are now at their elbow. It is to be seen if the Sub-divisional Officers could not maintain the peace within their jurisdiction without the help of an Assistant Superintendent of Police. In certain Sub-divisions, the chief Police Officer whose help is available to the S. D. O. is an Inspector. In the heavy Sub-divisions, however, there is an Assistant Superintendent of Police. Now if the S. D. O. is relieved of all his judicial duties, he should be expected to manage with the assistance only of an Inspector. In certain districts there is not only the S. P., but an Additional S. P.

as well. If the District Officer is relieved of his work of supervision over the Magisterial Courts, he could possibly organise law and order without the co-operation of an Additional S. P. Any way it is expected that the present establishment may be curtailed to some extent at least and some funds may be released this way to be expended elsewhere.

There has been some controversy as to the powers which the Magistrates now exercise under the preventive sections of the Criminal Procedure Code (Sections 106 to 147). Even those who advocate an immediate separation of Judicial and Executive functions are not agreed as to whether these powers should be exercised exclusively by the criminal judges or should be vested partially at least in the executive officers. The Greaves Committee as well as the Mallik Committee are divided in their opinions and recommendations on this question. In the eyes of some people, these preventive powers are not really of a strictly judicial character, they are of a quasi-executive nature. An officer cannot be said to be discharging a judicial function when he asks a person suspected to be of a dangerous character to show cause why he should be bound down to keep the peace for a specified period of time. It seems rather to be an executive business. But while this aspect of the preventive power may be of an executive character, the subsequent proceedings are certainly of a judicial nature. When witnesses are examined, evidences are taken and a decision has to be arrived at, the presiding officer is of course performing a judicial duty. In any scheme for the separation of the two powers, the initiation of the proceedings under the sections of Chapter VIII of the Criminal Procedure Code may hence be left to the District and Sub-divisional Officers. The proceedings should then be sent over to a proper judicial officer who would now hear the case and issue the order. The interests of law and order should be satisfactorily served, if the executive officers have the right to call upon a person to show cause why he should not be bound down. Whether actually he should be bound down or not is, however, a purely judicial function which is likely to be misused in the hands of the executive. If the man is really

dangerous and cherishes an intention to do anything unlawful, it may be easily judged on the merits of the evidences taken by the judicial officer. It will not certainly jeopardise the interests of public peace, if nothing is proved against the man and he is discharged. If on the other hand his bad livelihood is proved or his criminal intention is brought out into relief, the presiding judge will of course bind him down to be of good behaviour. If this step is taken promptly, purposes of law and order are served thereby. This arrangement is hence conducive to the interests both of individual liberty and public peace. If, however, the executive officers themselves hear the case and issue the order, they may be guided by other extraneous factors than the merits of the evidences before them. In the name of law and order, the liberty of the citizens may not be infrequently endangered at their hands. Cases in fact are not rare in which innocent men who have somehow incurred the hostility of the executive officers have been harassed by them in a most unjust way by the exercise of these preventive powers. It is on this account that a section of the public wants to make over all the powers under the preventive sections to the independent criminal judges. They, however, by virtue of their position will be out of touch with men and things in the different localities under their jurisdiction. They are likely to be in the dark as to the movements of persons who may really mean mischief to the community. The executive officers on the other hand will have their eyes and ears constantly open. The duties of their office will keep them ever in touch with every nook and corner of the area under their charge. They are thus quite in a position to know as to which persons may be suspected of living a bad and dangerous life and harbouring a criminal design against the interests of the State. The initiation of the proceedings under the sections of Chapter VIII of the Criminal Procedure Code should therefore be left to the District and Sub-divisional Executive. But the hearing in course of which the suspected persons should have the opportunity of clearing their position and proving their innocence must take place before an independent criminal judge. The procedure

recommended for the exercise of preventive powers in Chapter VIII is equally applicable to the other preventive Chapters as well. The situation in a district may turn out at a particular time to be abnormal, due either to communal tension or to the political attitude of the people. The executive now has to remain constantly vigilant and take prompt steps to avoid and avert everything that may accentuate the situation. It may think that the presence of a certain person who is on his way to the locality may be harmful to the interests of the district. It may thereupon serve upon him a notice prohibiting him from entering the area of its jurisdiction. Now the gentleman upon whom the notice has been served may question the legality and propriety of the notice. If the hearing takes place before the executive officer himself, the notice would in all probability be declared to be in order. It is hence desirable that as soon as the notice has been served, the papers relating to the subject should be sent over to an independent judge before whom the hearing must now be made. This procedure will leave sufficient power to the executive to tackle a critical situation and at the same time make impossible the serving of panicky and unjustifiable notices that harass so much at the present time even the most well-intentioned of our public men. Similarly, if two parties come to a dispute over the possession of any piece of immoveable property and threaten thus a breach of the public peace in the locality, the executive should have the power to meet this emergency. Such disputes and such breaches of peace have been rather common in this country. It is hence desirable that the executive officers who are in direct and constant touch even with the remotest corners of their jurisdiction should be provided with the requisite powers to prevent the outbreak of the conflict.

CONCLUSION.

The Judges who preside over the criminal tribunals must necessarily be independent of all external control. Their duty is to see that the law of the land is not violated by any body, private or public. If the Executive Government, in violation of the law, encroach upon the privileges and rights of an individual, the criminal judge, on the case being referred to him, must rebuke the Government for their illegal action and give the individual back his liberty. But if this Judge were placed under executive control, he would be in a false position. The executive being his master, he would not be able to declare it to be in the wrong and set aside its action. The individual who has been injured by the executive will now have no opportunity to have the wrong righted. In British India, the executive and judicial functions were placed in the same hands in unsettled times. The officers who discharged police duties also presided over the criminal tribunals. This duality of powers was attacked when the situation in the country became comparatively normal. In 1861 was passed the Police Act which is the bed-rock of the police organisation in India to-day. It took away the police powers from all the Magistrates excepting the District Magistrate and placed them in the hands of a separate police department. The District Officer alone continued to be the link between the police and the judicial departments. The Government spokesman held out the promise at the time that this last link also would not be maintained for long. It would be snapped as early as possible. But this promise has not yet been redeemed. Not only the District Officer is still the head of both the departments of police and magistracy, but with the development of the sub-divisional system, the Sub-divisional Officers also have to exercise both the functions. The situation to-day is thus worse than in 1861. The District Magistrates in some provinces do not indeed try many cases themselves. But the Sub-divisional Officers every-

where regularly preside over the criminal tribunals. The Chief Police Officer himself thus holds the trial. But it really does not matter much if the District and Sub-divisional Officers themselves sit in judgment. The other Magistrates in the district who dispense criminal justice are completely under the control of the District Officer and look to him for promotion and advancement in the Service. They must keep him satisfied by their pliability as judicial officers, otherwise their future prospects may be blighted. Executive control over the Magisterial courts is thus direct and intimate, and as a result any person who incurs the displeasure somehow of the executive Government may be harassed and punished for nothing in different ways. People hence have got to live with the sword of Damocles hanging over their head. Their rights and privileges are at the mercy of the executive and police officers.

Over the Sessions Courts the control of the executive Government is not indeed so intimate but all the same it is there. Their tenure of office and the other conditions of their service compel them to hearken unto the wishes and opinions of the executive. They cannot afford to exercise in all cases their own discretion and independence. They have to be subservient to the Government, otherwise they may be transferred to unhealthy places, they may be debarred from promotion and in extreme cases they may be even dismissed from the service. Again many of the Sessions Judges are recruited from the Indian Civil Service. The traditions of this governing service imbue its members whether on the executive or the judicial branch with executive bias and prejudice. The I.C.S. Judges cannot as a rule take an independent view in a case which may have some political colour. They have the executive mentality and take the same attitude in such cases as the executive.

The High Courts also do not seem to have acted always up to the expectations of the people. During the last seventy years the Government have persistently tried to bring them under their control. And the I.C.S. element has throughout facilitated an entente between the Government and the High

Courts. It is time that this jarring element should be withdrawn from the High Courts.

Agitation for separating the two functions has covered almost the track of a century. Opposition to the union of police and judicial powers in the same hands began under official auspices. Until the seventies of the last century it was some officers of the Company and the Crown who tried to bring home to the Government the tyranny of the existing system and the necessity of the separation of the two powers. The publication of the historic minute of Sir James Stephen in 1872 hushed, however, all the voice of opposition in the Indian Civil Service. And henceforward the agitation for separating criminal justice from executive control passed to other platforms. But the attempts of the reformers bore no fruit. Even the great Memorial to the Secretary of State submitted in 1899 over the signature of many eminent and experienced men ended in a fiasco. The introduction of the reforms in 1919 brought of course new hope to the mind of the Indian public that the century-old grievance would now be satisfied But this hope also turned out to be a mirage. The persistent efforts of the non-official majorities in the Provincial Legislatures have proved unavailing. The Government everywhere on one pretext or another have eluded the reform.

The grounds on which the Government have so long resisted the separation of the two powers are altogether flimsy. They carry no weight at all. The financial bogey which has been invoked for the last forty years against the reform has been proved to be without its claws. The fresh expenditure that the separation of criminal justice from executive control may involve will constitute no serious strain on the public purse. It can easily be met. Nor is the objection that the principle of separation is not suited to the genius of an eastern people any way material and valid. The real objection which the Government Members generally want to keep concealed but which now and again peeps out in their utterances is, of course, not unknown to the people. The present system gives the Government ample powers to tackle any inconvenient

situation and bring to book any inconvenient person. If the criminal courts become independent of the executive influence and control, the Government will lose these extraordinary powers. It is here that the shoe pinches and it is here that the real objection lies. The Government are not ready to forego these powers.

But it is high time that the separation of criminal justice from executive authority should be frankly undertaken. The progress towards democracy that is being made in the country will be absolutely hollow, if the liberty of the people be at the mercy of the executive officers. The reform which is over-due should not be delayed any longer. Criminal justice in all its grades should be immediately liberated from the executive shackles

APPENDIX

(Some recent cases illustrating Magisterial vagaries.)

A

The judgment of the Calcutta High Court on the 16th December, 1930, setting aside the order of the Additional District Magistrate of Midnapur against Mr. B. N. Sasmal under Section 144 Cr. P. C. points out afresh that the Magistrates under the inspiration of the police are ever ready to twist the law in order to restrict the activities of inconvenient persons. Midnapur is the home district of Mr. Sasmal. He has also a landed estate in the district. He, as a barrister, practises no doubt before the High Court in Calcutta, but now and again on professional calls as also for looking to the management of his property, he has to visit his native district. Mr. Sasmal has never been *persona grata* with the police authorities, rather he has been since the days of the non-co-operation movement the *bet noire* of the guardians of law and order. He has not of course cast in his lot with the civil disobedience movement, but all the same the police looks upon his presence in the Midnapur district in these troublous times as inconvenient. His influence over the people there handicaps the police authorities. It is hence desirable, the police officers conclude, that Mr. Sasmal should be sent away from the Midnapur district. Confidential reports were accordingly submitted to the District Magistrate against Mr. Sasmal and the Additional District Magistrate issued an order on the strength of these reports under section 144 Cr. P C. directing Mr. Sasmal "to abstain from staying at the town of Midnapur or any part of the district and to leave the district by the next available train." Mr. Sasmal contested the legality and propriety of the order under section 144. But the Additional District Magistrate upheld it by adverting to facts and arguments which give a dark picture of Mr. Sasmal as a public man. But he made no

attempt to show that section 144 could be legally applied to the case. The case was now carried to the Court of the District and Sessions Judge of Midnapur who looked upon the order as illegal and referred the case to the High Court with a recommendation for its reversal. The Criminal Bench of the High Court constituted by the Chief Justice and Mr. Justice Graham held the order to be bad and illegal and quashed it accordingly. The Chief Justice in delivering the judgment of the Court, observed that Section 144 gave power to order a person to abstain from doing a certain act. The Magistrate in Midnapur did not ask Mr. Sasmal to abstain from a certain act but to do a positive act—to leave the district in which his own house and landed estate were located and that too by the next available train "I am quite clear," his Lordship continues, "that it was never intended by Section 144 of the Criminal Procedure Code that a man might be ordered to remove himself not only from his own house but from his own district, and to do so by the next available train." The Additional District Magistrate had thus twisted the law to serve the interests of the police and but for the correct attitude of the superior courts, the liberty of Mr. Sasmal would have been illegally restricted.

B

Another recent case (*Lachmi Devi and others* v. *the King-Emperor*) disposed of by the Calcutta High Court illustrates the powerlessness of the Magistrates to protect innocent citizens from the vagaries of the executive police. On April 21, 1930, an order was promulgated by the Police Commissioner of Calcutta prohibiting all processions in the city and suburbs without a licence, with the sanction of the Governor-in-Council to extend the operation of the order beyond seven days. On the morning of November 11, 1930, Lachmi Devi and five other ladies were alleged to have formed a singing party in Chitpur Road without a licence. On charges of having organised a procession for furthering the interests of the civil disobedience

movement, in violation of a lawfully promulgated order, and having obstructed traffic, the ladies were arrested by the Calcutta police and sent up for trial under seection 188 I. P. C. and 62-A of the Calcutta Police Act. The fourth Presidency Magistrate in whose court the trial took place accepted the contention of the police, found the accusted guilty and sentenced them all to simple imprisonment for four months. On a motion being made in the High Court, the case came to be heard by the Criminal Bench, constituted by the Chief Justice and Mr. Justice Mallik. On the 8th December 1930, the judgment of the court was delivered by the Chief Justice who looked upon the order which was the basis of the prosecution as altogether bad. The point at issue was whether subsection 4 of section 62-A of the Calcutta Police Act empowered the Police Commissioner to issue a general order prohibiting all public processions. "In my opinion", said his Lordship, "no such power was contemplated by the statute." He could prohibit a particular procession or some processions upon a particular occasion for the preservation of public peace or safety. But a general order prohibiting all public processions was an arrogation of power not contemplated by the statute in question. The Chief Justice also observed that the trying Magistrate had further failed to see that a mere disobedience of an order did not constitute an offence under section 188 I. P. C. It must have certain consequences or tend to have certain consequences before it would become an offence punishable under section 188 I. P. C. In the present case, the Chief Justice observed, the evidences did not point to any such consequences or any tendency to such consequences. He accordingly quashed the sentences and acquitted the accused.

C

How section 144 Cr. P. C. is twisted to suit the exigencies of police administration has been testified to by a recent judgment of the Calcutta High Court. A judgment of the Madras

High Court similarly brings out into relief the frivolous application of the section by Magistrates invested with executive responsibility. A few months ago, the District Magistrate of Guntur came to suffer from Gandhi-cap-phobia. He was determined to stamp out all Gandhi-caps from the town of Guntur. To fulfil his objective, he issued an order under section 144 to the effect that all people within the municipal town must abstain from wearing Gandhi-caps. The matter was carried over to the High Court of Madras, where it came to be dealt with by Mr. Justice Pandalay. He laid down that the object of section 144 was to protect public peace. He, however, could not see what danger was threatened to public tranquillity by the wearing of Gandhi-caps. The reasoning of the District Magistrate that the wearing of such caps was a symbol of sympathy with the civil disobedience movement was unacceptable. He further added that the order instead of preventing any breach of the public peace, was likely to upset the people's mind and cause thereby some disturbance. The order was unnecessary and uncalled for. He, therefore, set it aside in the interests of the public.

D

How in political cases the Magistrates seldom dare to be fare and impartial is illustrated by a recent case which the High Court of Lahore dealt with, in exercise of its powers of revision. By a notification on the 3rd of July, 1930, the Congress Committee of Gujranwalla was declared an "unlawful association," within the meaning of section 16 of Act XIV of 1908. On the 5th of July, a Sub-Inspector of Police lodged a complaint in the Magistrate's court at Gujranwalla against Lala Pars Ram Dang alleging that he was a member of the Gujranwalla Congress Committee and praying that he be dealt with in accordance with the law. A warrant was now issued and the Lala was taken into custody. His case came up for hearing in the court of the Additional District Magistrate,

Sardar Bishan Singh. The accused did not take part in the proceedings. The prosecution examined three witnesses, none of whom deposed that after the declaration of the Gujranwalla Congress Committee as an unlawful association the accused did any overt act which might prove that he was still a member of the body. The prosecution also relied upon three documents which later on came to be characterised as mere waste-paper by the Sessions Judge. The trying Magistrate, however, gave no consideration to these facts. He accepted the contention of the police, convicted the accused and sentenced him to three months' imprisonment with hard labour under section 17 (1) of the Criminal Law Amendment Act (1908). The illegality of the sentence was brought to the notice of the Sessions Judge in a petition by a member of the local bar. The Sessions Judge, after hearing both the petitioner and the Public Prosecutor, referred the case to the High Court on revision side. The revision came up for hearing before Mr. Justice Teckchand. The three documents on which the prosecution had relied in the Magistrate's court were not only no better than mere waste-paper, as the Sessions Judge had pointed out, but what is more, taken separately or collectively, they did not prove any way that Pars Ram Dang was a member of the Gujranwalla Congress Committee either before or after the issue of the notification. The oral evidence of the Sub-Inspector of Police and the two Constables also did not prove that they had any personal knowledge of the accused's membership of the Gujranwalla Congress Committee. None of them moreover deposed that after the declaration of this body as unlawful, the accused had done any overt act which might establish his connection with the unlawful association. The Assistant Legal Remembrancer argued that if it was shown that the convict was a member of the Gujranwalla Congress Committee before the day of the notification, it was not necessary for the prosecution to establish that he did any overt act as such, after the Committee had been declared illegal. His contention was that every person who was a member of the association at the moment of its

being declared illegal automatically became guilty under section 17 (1). Mr. Justice Teckchand, however, thought otherwise. If this contention was accepted, he observed, "it would lead to manifest absurdity, as it would be tantamount to giving retrospective effect to the Statute so as to punish a person for an act done at a time when no illegality attached to it." "Ordinary rules of justice and commonsense require," he continued, "that those who were connected with the association at the time it was declared unlawful should be given *a locus poententiae* to withdraw from its membership within a reasonable time of its notification as such." The conviction, he thought, "cannot be sustained either on facts or in law." "The case appears to have been conducted and tried throughout," he added, "with very little regard for the rules of evidence and of procedure prescribed by law." He, accordingly, accepted the reference, set aside the conviction and acquitted the convict.

INDEX

ERRATA.

Page 1, line 19, for lew read law.
Page 17, line 11, for Distrct read District.
Page 31, line 21, for Magistrates read Magistrate.
Page 39, line 4, for list read lists.
Page 51, lines 12 and 23, for Reginal read Reginald.
Page 64, line 15, for Easau read Esau.
Page 69, line 18, for clercial read clerical.
Page 72, line 28, for does read did.
Page 94, line 28, for drunkard read drunken.
Page 119, line 3, for has read had.
Page 140, line 24, for immoveable read immovable.
Page 11 line 20 for Convenantes read Covenanted
Page 148. I am I not sure