THE SEPARATION OF EXECUTIVE AND JUDICIAL FUNCTIONS

THE SEPARATION OF EXECUTIVE AND JUDICIAL FUNCTIONS

A STUDY IN THE EVOLUTION OF THE INDIAN MAGISTRACY

BY

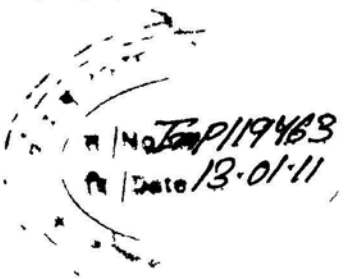
R. N. GILCHRIST, M.A.,

INDIAN EDUCATIONAL SERVICE; PRINCIPAL, AND PROFESSOR OF POLITICAL ECONOMY AND POLITICAL PHILOSOPHY, KRISHNAGAR COLLEGE, BENGAL.

PUBLISHED BY
THE UNIVERSITY OF CALCUTTA
1923

PRINTED BY BRUPENDRA LAL BANERJEE
AT THE CALCUTTA UNIVERSITY PRESS SENATE HOUSE CALCUTTA

Reg. No 5B, August, 1923—500



PREFACE

The original preface to this monograph was written in December, 1920. The present preface is dated March, 1923. The gap will explain some apparent discrepancies in the text. The original manuscript was prepared before the Reforms came into being ; it was sent to the press soon after the new legislative bodies met for the first time. During the passage of the earlier portion through the press, certain alterations were made to bring the text up to date ; but after the first forms were printed off, it was clear that the battle was to be fought over again. In Council after Council the controversy, which had remained dormant during the war and during the preparatory stages of the Reforms, was revived ; and, after consultation with Sir Asutosh Mookerjee, then Vice-Chancellor of the University, it was decided to postpone final publication till the Report of the Committee appointed as the result of a Resolution moved in the Bengal Legislative

Council to the effect that steps should be taken to carry the separation into effect, was available. This decision meant a delay of over two years. It was not possible to reprint the earlier forms, and although some anachronisms have been removed, traces of the period of waiting will be evident in both the paper and the subject matter.

The original idea of the monograph was to present in a historical and critical setting a problem which, in the author's judgment, was likely to be apparent when the new Councils found their bearings, and which would require attention in the University classes. Exhaustive historical or critical analysis has not been attempted; the problem indeed involves the whole administrative system of India, which would seem to require a complete overhaul in view of the introduction of semi-responsible Government, and the promise of responsible government of the Dominion type. How far the existing Imperial Services system with its extra-India recruiting authority, and its independence of the legislatures, can be reconciled with responsibility, is a question which raises issues both too wide and too delicate to be discussed here. The issues have already been raised, but by no means exhausted, in the legislatures and the press. A new Public Services Commission is on the threshold of India, but whether it will deal with the principles of

administration is not at the moment clear ; but this much can be said with a fair amount of certainty, that sooner or later the fundamental issues must be faced. Decisions, vital and final, must be reached as to whether the Secretary of State is to recruit layer after layer of men for all-India Services, for thirty years' periods of service, when Dominion self-government has been officially given forth as the culmination of the present half-way Reforms ; whether Provincial autonomy, now fairly real, can be reconciled with the existence of Imperial Services which perform provincial work ; whether the development of local self-government will remove the necessity for the present type of District Officer ; whether the present organisation of the permanent Secretariats can continue with the growth of a Cabinet system of government ; and whether the expense of England-recruited services is in consonance with the efficiency which the governments of the future may demand The practical bearings of applied self-determination are multifarious ; they are, too, often unexpected, but the rigour of logic will manifest itself. The present study touches on some of the above problems ; to work them out is not the present task of the author, though it would have been a most intriguing one.

In conclusion, I would offer my thanks to Sir Henry Wheeler, now Governor of Bihar and

Orissa, who, when Member of the Executive Council in Bengal, very kindly allowed me access to the Government papers on the subject; and to Sir Asutosh Mookerjee, who, as officiating Chief Justice of Bengal, kindly let me see the High Court documents.

March, 1923. R. N. GILCHRIST.

CONTENTS

The Separation of Executive and Judicial Functions

A Study in the Evolution of the Indian Magistracy

I

THE CONDITIONS OF THE PROBLEM

We have just seen the beginning of the new Councils in India. The creation of these Councils marks the biggest constitutional advance India has made. The modified or tempered executive government hitherto prevailing has been replaced by a type of responsible or parliamentary government. More and more the constitution and the internal affairs of India will be moulded and directed by an Indian personnel. Many of the old time-honoured administrative problems will be discussed and settled in a new atmosphere, and to the student of Indian political development not the least interesting aspect of our new system of government will be the changed temper in which problems, hitherto called grievances, will be settled. Hitherto the non-official Indian members of the Legislative

Councils of India have played the part of the party in opposition in the English scheme of things. All parties in opposition are more factious in their criticism than constructive in their policy. Their part as critics of the party in power, or the government, enables them to demolish, destroy and bring into contempt the efforts of the government. As a non-responsible, non-constructive agency, they are free to indulge in any captious criticism which may turn votes from one side to another. Such criticism, where genuine, is salutary and helpful; but often it is artificial, far-fetched, and embarrassing to the executive. Like the conventional Irishman, an opposition is "anti-everything," whether the measures are good or bad.

Place that opposition in power, and the whole scene is changed. The *ad captandum* phrases and criticisms are forgotten. The old opposition assumes the part and function of their late enemies. The moderating influence of power actually wielded, the responsibility to a majority vote and a public opinion, and the ever-present duty of administration breed a wonderful oblivion of extreme views and social millenia. The grip of the administrative vice is an effective soother of exaggerated and fanciful views. The all-pervading tentacles of a Treasury or Financial Department effectively check magniloquent schemes and make rash promises melt

into thin air. Construction is quickly recognised to be more difficult than destruction. The previous party in power—now in opposition—makes the erstwhile opposition feel the blast of its own icy breezes, and the erstwhile opposition, now in power, finds itself actually repelling the attacks it itself made on its predecessors.

So the political game goes on—the ever recurring struggle between the Ins and the Outs; on the one side, the in-genuine criticism, the vote-catching patriotism, the rash promises, the new social ideals; on the other side, the daily, nightly, weekly, yearly, the perpetual working of a huge administrative machine, a machine which, despite renewals and mendings, must continually be oiled, tested, and, above all, kept in motion. Ministers, flitting departmental phenomena, come and go, but the machine goes on for ever. Ministers may mould policy, they may increase or decrease departmental efficiency, but they are there a day, then gone for ever. Others arrive and take their places, perhaps with new ideas and ideals, but soon they come within the grasp of the same vice. The Department rules: nominally a servant, it is really the master. The minister leans on it as an old man on his stick. He becomes a slave to its procedure and traditions. With his fellow ministers he nominally rules the country: but the Department rules him, and, therefore, rules the country.

And no democracy has yet been able to rule departments. Ministers may come who try to break departments: they soon depart, for they themselves are broken in the attempt.

In India the opposition has now become the government in the subjects specially granted by law to ministerial control. With the new government a new opposition will rise up. The struggle will not be the old official *versus* the non-official: it will now be among two (or more) groups of non-officials. Where, in the days now rapidly disappearing, a non-official *bloc* vote could be counted on against the official vote, the new executive, or minister, must depend on his majority on the one hand, and on his department on the other. How the majority will work no one can prophesy, but the departments must go on as before. In general policy the minister will have to lead his followers. He will make new laws for his department to administer, and however virtuous his ideals, he will soon find his policy circumscribed by the mundane considerations of rupees, annas and pice.

One of the subjects on which the non-officials used to vote "solid" was the question of the separation of the executive and judicial. Ever since India, or its individual provinces, began to develop a national conscience, this subject has been urged upon the government as a most pressing reform. Much has been written, and more

spoken on the subject. In this paper I propose to give a short history of the controversy, and ultimately to analyse its importance and bearings. But the study is not one of a single question, *viz.*, the separation of the executive and judicial functions in government: it involves the evolution of the whole of the Indian magistracy. With the wider separation of legisative, executive and judicial I am not at present concerned.[1] On that subject suffice it to say that the only 'separation' that modern democracy has accepted is really a union, or a subordination of the executive to the legislative, in what is known as responsible government. The American non-parliamentary or presidential system has not been accepted by newer democracies. The older British system—the system which is the negation of the theory of separation of powers—has proved a much more acceptable instrument of government to modern democracy.

The present study leads me into historical high-ways and bye-ways of British India, and particularly in the earlier history of the subject, one is struck with the greatness of the administrative problems to be solved, as well as by the great ability of the administrators who solved, or tried to solve them. Their task was more

[1] For this subject see any constitutional history of India, or the Chapters on the Government of India in the author's *Principles of Political Science*—Longmans Green & Co., 1921.

difficult than that of the modern administrators. The modern administrator has to amend, recast, readapt and add to old institutions. The earlier administrator had to *create*. After studying their work and the conditions under which they worked, one must bow to them in respect and gratitude. It is not unusual to praise the past, but the past of India was one of peculiar difficulty and complexity. To *a priori* constitution-makers, of whom there recently has been legion, the task would have been well nigh impossible; but the British administrators were blessed with the strength—and weakness—of their own system, the habit of meeting exigencies as they arise.

The success of the Company is all the more remarkable in so much as the Company was primarily a trading body. Its personnel were merchants, not trained administrators, or even lawyers. The early history of British India in its constitutional aspect is a succession of Charters and renewed Charters, of conditions and revised conditions, of Acts and amending Acts, without any fixed principle. Gradually, as the vastness of the problems and immense possibilities became more apparent, Parliament began to interfere, and certain definite lines of policy were enunciated. Government as Government sprang up out of commercial exigencies, and, ultimately became separated altogether from

commerce. But even before the Company gave way to the Crown, before the Court of Directors was replaced by a member of the British Cabinet, the administrators of the Company had proved not only governors but statesmen. They had laid the foundation of an Indian Empire, and what is now more obvious, of an Indian nation, or, at least, of an Indian nationality. Nor had they to seek for their troubles. In their earlier days they were at the mercy of a somewhat capricious British Legislature. Though they had no public opinion in India to criticise them or hold them responsible for their actions, they were responsible to a more critical tribunal—the House of Commons and the British Courts of Justice. Gradually, as the result of the policies of the Company and the Crown, the centre of responsibility changed. For a British opinion grew up an Indian opinion. For a relatively uninformed public grew up a critic *in situ*, the Indian himself, who, as time passed, became not only a critic but a national voice. From the ruled he was educated to become the ruler, first unofficially, finally officially, for the responsibility of his governors has turned into responsibility to himself.

The question of separation of executive and judicial is really an epitome of the history of the administration of British India. The

controversy started with the servants of the Company. It was continued with the servants of the Crown. It is likely to end in a legislature to which the executive is, in part, responsible. In all probability the question will be solved before complete responsibility is attained: otherwise it would have represented the various historical stages of the evolution of the Indian system of government since the Company came into power.

It will, I think, clear the air somewhat if I first give a rough outline of the present executive and judicial system prevailing in India—the system at which so many shafts have been loosed. As an example I take the province with which I am familiar—Bengal, noting the chief variations existing in the other provinces of India.

The first point to be noted about the present administrative organisation in India is a difference in nomenclature due to a more fundamental difference in the principles of government, a difference which has now practically disappeared. Up to 1834, the method of legislation in India was by Regulations. These Regulations were issued from the three centres, or capital towns of the Presidencies—Fort William or Calcutta, Fort St. George or Madras, and Bombay. The Regulations, in the course of time, became both numerous and complicated. With the extension of the Company's territories, administrative

experience showed that the Regulations drawn up for the older territories were too intricate for the newer and less advanced territories. The territories called the North Western Provinces (or Agra) were placed under the Bengal system, but in other new annexations simpler rules and Codes were drawn up. Thus grew up the distinction between Regulation Provinces (Bengal Madras, and Agra) and the Non-Regulation Provinces. All the more turbulent territories and the more primitive areas were made Non-Regulation provinces. In any one province sometimes part was Regulation, and part non-Regulation, as in the old presidency of Bengal.

This distinction has now disappeared. In the Government of India Act of 1919 all the provinces are lumped together as Governor's Provinces, but the Act contains special provision for what under the old system would have been non-Regulation territories. These are now known as backward tracts, and for them the advanced system of government adopted for the rest of India is not yet suitable. But with advance in education and material wealth, the backward tracts, like the old Non-Regulation Provinces, will come into line with their Regulation sisters.

The old distinction has left traces in the administrative organisations. The differences are partly of fact and partly of name. The

differences of fact presumably soon will disappear. In describing the administrative divisions of India, I take as types the Regulation Provinces, after which I shall note the chief differences prevailing in the non-Regulation Provinces.

In the system under discussion, the heads of the Provinces were till the 3rd January, 1921, Governors in Council in Bengal, Madras and Bombay, and Lieutenant-Governors in Council in the other provinces, the whole, or part of which are Regulation areas. In January, 1921, all these Provinces became Governor's provinces. The old distinction between Governor and Lieutenant-Governor has disappeared. With the Governor is now associated a 'dyarchy.' For the administration of reserved subjects, he has an Executive Council: for the administration of transferred subjects he has Ministers. To suit the new conditions, internal reorganisation has been necessary in the Secretariats, but the general system is the same as in the old administration. Under the Governors and the Ministers are the Secretariats and Departments. Revenue questions are under Boards of Revenue, with its allied departments, except in Bombay where the revenue departments deal directly with the Government. The revenue administration of India partially combines executive and judicial powers; but it is not in the Councils,

the Ministries, the Board of Revenue, the Secretariat or the Departments that the question of separation lies. These various agencies are the ordinary centralised administration common to all governments, and they will continue under the new system of government. They form the permanent administrative departments of government, and, whatever the system of Government may be, they will continue to be responsible for the good administration of the country. It is in the territorial administration that the difficulty of the separation of functions arises.

The basis of the whole of the territorial administration of India is the repeated subdivision of territory. The unit is the district. The district is subdivided into smaller areas, the names of which vary from province to province; and a number of districts may be grouped into a wider unit of administration, the Division. This however is not universal. In Madras the final unit is the District; there are no Divisions, and, therefore, no Commissioners.

There is no set principle for the delimitation of district boundaries. Some are small; some are large. The areas and populations vary exceedingly. Nor do all districts have the subdivisional system; nor is there any uniformity in the area or population of subdivisions. A rough administrative expediency based mainly on

revenue collection is the main guide. Historically, districts have been frequently changed in area, and their subdivisions altered. New districts have been carved out of previously unwieldly districts, and new combinations of districts have been created for the wider unit of the Division, or the unit of police administration, the "range."

The chief district official is the Collector-Magistrate. The evolution of his duties we shall see presently. At present he is responsible for revenue work, and he is also the chief magistrate: his first and main duty is the collection of the land revenue. This duty in Bengal is comparatively simple, because of the Permanent Settlement, by which landlords pay a fixed sum. In Madras and Bombay, where the *ryotwari* system prevails, by which individual cultivators pay the revenue, the work is much more complicated and requires much more time. In Bengal the revenue duties of the Collector are increased by the fact that he is entrusted with the management of many private estates, held by the Court of Wards for minors and others.

The collection of revenue, as his name implies, is the chief duty of the Collector; but in reality it forms only a fraction of the sum-total of his work. His miscellaneous duties are extensive and of a very variegated character. As head of the district he is the agent of government in

all matters. He is responsible for many separate administrative departments, such as excise, income tax, stamp duty, and all new sources of revenue. He is in charge of the District Treasury, which is practically the local bank for government purposes. He has to provide information on all matters connected with the district. He is the chief district statistician. He receives, and forwards, reports on all sorts of subjects from all over his district. In some provinces he adjudicates in rent disputes between tenants and landlords. He is connected with local bodies either directly as President, or indirectly as permanent consultant. In any case in all matters connected with Municipal and District Board government he has to report to and advise the Commissioner or provincial government. The direct control by the Collector of local self-governing bodies, such as Municipalities and District Boards is now rapidly diminishing, owing to the policy of appointing non-official Chairmen. But this policy, where the Chairmen are not trained administrators, leads to internecine strife in these bodies, which ultimately requires examination by and report from the Collector. He is also the responsible district officer in all emergencies, such as floods or famines. The elections have added to his duties by making him a returning officer. In practically every new law, or administrative improvement in the

district, the Collector-Magistrate is somehow involved.

In the earlier years of British administration the Collector's duties were even wider, for new departments have been created which have taken the onus of much departmental work off his shoulders—*e.g.*, the Forest, Public Works, Jails, Education and Sanitation Departments. But in all these matters the Collector is the local chief consultant. If he has not actually to do everything, he must know about everything. His ear must always be open to hear complaints and grievances. His hand must always be ready to help and his voice to encourage. For all these ends he has to tour throughout his district, inspect every kind of institution, talk on all sorts of topics, settle all sorts of quarrels, make all sorts of enquiries, and finally make all sorts of reports to his superiors.[1]

With the growing complexity of modern administration, the Collector more and more is tending to become a post office between the

[1] It is impossible to enumerate the many duties that fall, or may fall to the Collector's lot. An amusing description by a Judge of the Upper Provinces is given in an appendix. Mr. Ricketts's description is a fair representation of the miscellaneous duties that fall to the lot of the District Magistrate. Of course some of the facts have changed but the general truths have not. Mr. Ricketts's letter was written on the 6th August, 1868, in connexion with the training of Civil Servants as Judges. Such letters considerably relieve the tedium of reading through the vast collections of papers and correspondence on the subject.

people of his district and the provincial government. The system of government is tending towards legislative centralisation, with administrative decentralisation. The Collector thus is becoming an interpreter of rules, an issuer and enforcer of orders of the central Government, and, of course, the head of a large staff necessary for such work. At present the rules and orders of government leave him much latitude for personal discretion, but the duties, if more numerous, are tending to become less onerous or responsible. The growing amount of work in the various departments under him has been accompanied by a growth in the efficiency of the officers of these departments, all of which makes a Collector's lot easier.

In addition to all these duties the Collector is a Magistrate. He is responsible for the peace of his district, and to this end he is endowed with wide powers for the prevention of crime under the Code of Criminal Procedure. These powers, it may be noted, have not to any great extent entered the controversy respecting the separation of powers. They are quasi-judicial, it is true, but even extreme controversialists have not proposed to divest him of them. The magisterial powers are of three kinds, first, second, and third grade. The Collector is a first grade magistrate, and, as such, hears appeals from lower grade magistrates. His judgments

are subject to appeals in the Sessions Courts. He has also certain judicial functions in relation to revenue collection, but these functions are now practically completely of an administrative nature, the more legal cases going to the Civil Courts. His revenue-judicial functions, like his semi-judicial preventive functions have not been prominent in the Executive-judicial controversy. The Collector also supervises the work of his subordinate officers. This, indeed, is one of his most important duties.

The executive control of the police is in the hands of the Superintendent of Police. As a rule he is a European officer of the Indian Police Service, though recently a number of Indians have been promoted to the same status. The Superintendent of Police is responsible for the discipline and internal management of the police, and in these matters is responsible to his own departmental superiors, the Deputy Inspector General and the Inspector General. In all other matters—in matters of the prevention and detection of crime, in preparing cases, etc.—he works in close co-operation with the District Magistrate. In the older stages of the controversy the Magistrate-Collector was much more intimately connected with Police work than he is now. Till the present organisation of police was started, the magistrate was personally responsible for all police work. With

the introduction of the present post of District Superintendent of Police, this position was materially altered, especially when this post came to be filled regularly by officers recruited for the Indian Police Service. The efficiency of these officers, and the police system gradually built up under them, made the magistrate's interference less necessary, and it may be added, less welcome The Police became the prosecutors, and traced evidence and committed persons for trial practically by themselves. Indeed so far back as the days of Sir George Campbell, who placed the Police Superintendent in strict subordination to the Magistrate Collector, there was a growing antagonism between the magistrate and police, which has not by any means disappeared. The police are recruited from the same class—both in India and in England—as the Indian Civil Service, and they have their own pride in efficiency, and their own *esprit de corps*. The Police Commission of 1902 expressly hoped that magisterial interference with the police would gradually cease, but the Decentralisation Commission adopted the opposite view. In practice the views of the Police Commission are tending to be realised.

In all the Regulation provinces save Madras, districts are grouped into divisions, the head of which is the Divisional Commissioner, or

simply, the Commissioner. In Madras the final unit is the District, and the Magistrate-Collector, therefore, is the head of the territorial hierarchy. The number of Districts in a Division varies from four to six. Commissioners date from 1829, from the days of Lord William Bentinck. They first were judges as well as administrators, but their judicial duties later were transferred to the District Judges. Their duties now are the same in kind as, but different in degree from those of the Collector. They are intermediaries between the Collector and the provincial government.

For administrative convenience districts are divided into subdivisions. These subdivisions are under Subdivisional officers, who are members of the Indian or Provincial Civil Services. Smaller charges are under officers of the Subordinate Civil Service. These subdivisional officers exercise the same kind of powers as the Magistrate-Collector, though the powers are more restricted. They are really Magistrate-Collectors on a small scale. The Subdivision is a replica of the district headquarters. It has its court house, sub-treasury, sub-jail, etc. The subdivisional officer is also a touring officer, for subdivisions are divided into smaller areas the names of which vary from province to province (taluks, thanas, tahsils), each under its own head (talukdar, tahsildar, etc.).

There are still smaller divisions, and minor officers, down to the village headmen and chaukidars. It may be noted that the village headmen 'unite' powers—for they collect revenue, act as magistrates, and also are petty civil judges.

In the Non-Regulation provinces and Non-Regulation districts of the Regulation Provinces there are some variations of the above system. The heads of the Provinces (Lieutenant-Governors or Chief Commissioners under the old system: under the new Act of 1919 they have become "Governors") their councils, ministries and Secretariats are much the same in position and authority as in the Regulation Provinces. The body of officials composed in other provinces of members of the Indian Civil Service is known as the Commission (*e. g.*, the Punjab Commission, the Burma Commission). Except in Oudh, which is under the Board of Revenue of the United Provinces (the old North Western Provinces) there is no Board of Revenue in the Non-Regulation Provinces. In Burma and the Punjab its place is taken by the Financial Commissioner; in the Central Provinces the Commissioners of divisions and revenue departments deal directly with the provincial government. The Collector in the Regulation Provinces is known as the Deputy Commissioner in the Non-Regulation. Assistant

Magistrates and Deputy Magistrates of the Regulation are known respectively as assistant Commissioners and extra-assistant commissioners in the Non-Regulation Provinces. The functions and powers of each are very much the same though the names are different. The chief difference between the two lies in the judicial organisation. The criminal powers of Deputy Commissioners are considerably wider than those of Collectors. There is much more combination of powers, and far less division of functions between the Executive and Judicial branches of the Civil Services. Commissioners in Burma, too, are the chief Civil and Sessions Judges. But gradually the separation is being effected which is common in the Regulation Provinces. The head Courts used to be Chief, not High Courts, but it is merely a question of time as to when there will be a complete series of High Courts. Already in the Punjab the Chief Court has been replaced by a High Court. In Upper Burma, the Central Provinces, Oudh, and Sind (the Non-Regulation area of the Bombay Presidency) the functions of the Chief or High Courts are performed by officials known as Judicial Commissioners.

So much for the executive administration. The judicial administration of India follows similar lines. At the head of the judicial system are the High Courts, or their equivalents,

Chief Courts, and Courts of Judicial Commissioners. The Privy Council, of course, is the final court of appeal. With these higher Courts, as with the Government Secretariats, the controversy of Executive and Judicial is not primarily concerned. The lower Courts are divided into two branches—District and Sessions Courts and Magistrates' Courts. The arrangement of the District and Sessions Courts is based on the same principle as that of the general administration. Normally in every administrative district there is a District and Sessions Judge. Each Province is divided into sessions areas for higher criminal jurisdiction—these areas need not be co-terminous with those of administrative districts In practice they usually are co-terminous with the district. The procedure of these courts is, on their civil side, governed by the Code of Civil Procedure, and, on their criminal, by the Code of Criminal Procedure. Below the District and Sessions Judge, for civil work, are the courts of subordinate judges and munsiffs. In the non-Regulation provinces, as we have seen, civil judicial work is frequently done by executive officers. With none of the purely civil functionaries does the difficulty of separation arises. The difficulty arises in the organisation of the inferior criminal justice. In the districts there are two types of criminal court—The Sessions Courts

and the Magistrates' Courts. The Sessions Courts are presided over by the Sessions Judge, or, as his full designation is, District and Sessions Judge. With him may be associated additional or assistant Sessions Judges. These courts are fixed at district headquarters, and try all cases committed to them according to the Code of Criminal Procedure, and they may inflict any punishment according to law, the death sentence alone requiring the confirmation of the provincial High Court, or its equivalent.

Below the Court of the District and Sessions Judges, are, for criminal work, the courts of the magistrates. The presiding officers in these courts, as we have seen, are the Magistrate-Collectors, additional magistrates, assistant and deputy magistrates, all of whom are executive officers The Code of Criminal Procedure defines the various classes of crime which may be tried by the various grades of magistrate. The powers of the first grade magistrate are to pass sentences of two years' imprisonment, or a fine of Rs. 1,000; of a second grade magistrate, six months' imprisonment and a fine of Rs. 200, and a third grade magistrate, one month's imprisonment and a fine of Rs. 100. First class magistrates may commit serious cases to the sessions. In Non-Regulation provinces special magistrates, invested with special powers, may be appointed for special cases. There are also Honorary

magistrates for trying petty criminal cases. Their decisions as a rule are subject to appeal in the Subdivisional officers' Courts.)

In the Presidency towns the functions are separated. There are special courts—such as small cause courts, for civil, and the courts of Presidency magistrates, for criminal work.

(In the Regulation provinces, therefore, the Courts are arranged thus:—

Criminal and Civil.	Civil only	Criminal only
High Courts. District and Sessions Courts	Courts of Subordinate Judges. Munsiff's Courts	Courts of Collector-Magistrates, Assistant and Deputy Magistrates Courts of Subordinate Magistrates with Second or Third Class Powers.

In the Non-Regulation Provinces the executive officials are civil and criminal judges, except at the summit, where there is the division into the Chief Courts or Courts of Judicial Commissioners, and the Secretariat. In Presidency towns there are special courts for both civil and criminal work.

Without entering into more detail regarding the administrative and judicial organisation of India, I may make special note of one or two points in connexion with that organisation, which will help to explain what follows.

1. In theory each magistrate is head of the police in matters concerning crime, and the detection of crime, and at the same time he is a criminal judge. In practice, however, magistrates try very few cases themselves. The percentage, as we shall see, was very small in Lord Ripon's time. It is even less now. Such judicial work as the magistrate does is usually confined to the hearing of applications for revision, and of appeals in petty cases, from magistrates of the two lower classes. He does not hear complaints, nor does he even distribute cases. Such work is usually performed by the Joint Magistrate, if there is one, or by the senior deputy magistrate. Such is the case in Bengal, and, largely, in other provinces. In Non-Regulation areas Magistrates also have the civil powers of a subordinate judge, but even where such a system exists subordinate judges are usually appointed to do the actual work. Only in very exceptional cases the magistrates in these areas do civil judicial work.

2. In the Indian judicial system there is an elaborate provision for appeals in criminal justice. An appeal lies from the convictions of second and third class magistrates to first class magistrates. Thus a Magistrate-Collector acts as an appeal judge. Any specially empowered magistrate with first class powers may hear those appeals. Original convictions by first class

magistrates, with certain reservations, are liable to appeal in the Sessions Court. The finality of appeals, as in all judicial systems, is arranged according to the courts and cases. From original convictions in the Sessions Courts appeal lies to the High Courts. A High Court may call for the record of any subordinate court, and pass judgment on the legality of the judgment, correctness of the procedure, and general propriety of the trial. Acquittals are usually final, but the provincial government may appeal against an acquittal and demand a retrial. The elaborate appeal system in vogue is a relic of older days, which, in the words of the late Justice Carnduff, were marked by the "inferior social standing of the native judiciary of the lower grades; the imperfect legal training of all the judges in early days, the general want, so far as the mofussil is concerned, of the wholesome restraint exercised by a strong bar, and the absence of public opinion and an intelligent press."

3. The District Magistrate, as we have seen, is a touring officer. He inspects all the work of the subordinate magistrates, but such inspection does not imply interference in actual cases under trial. His supervision is exercised over such points as faults in procedure, procrastination or postponement of cases, and past errors of judgment. His interference in cases under trial is confined to the prompt disposal of the case:

it does not concern the verdict to be given. He also reports regularly to the provincial government on the work of his subordinates.

4. The relations of the High Court to the District Judges are that in purely judicial matters judges are under the High Court, while in matters of transfer, personal misconduct, undesirable relations between officers, and such like, judges are under the executive government. The practice has grown up, however, of the provincial government consulting the High Court in matters of judicial appointment and transfer. The opinion of the High Court is always taken on promotions to the higher grades of the services. District Magistrates must not enter into correspondence with judges on the merits of cases, or cavil at their judgments. If District Magistrates have grievances, they must take the advice of the Legal Remembrancer, and, if necessary, refer the matter to the High Court.

The same general rules apply in regard to the provincial judicial service. Originally the appointments were made on the nomination of the High Court, but the provincial government used its own discretion in promotions, transfers, etc. Now, however, the High Courts control practically all matters regarding transfers, promotion, etc. Munsiffs are nominated by the High Court. The Commissioner and District Magistrate have no power over these services.

5. The personnel of the magistracy and judiciary are an important point. Generally speaking, District and Sessions Judges are members of the Indian Civil Service, which used to be purely European, but which has now a large Indian element, and which in the course of ten years will be practically half European and half Indian. (The same is true of the Magistrate-Collectors. They are normally members of the Indian Civil Service.) In recent years in both judicial and executive work Indians of the lower services have taken a large proportion of these posts normally reserved for the Indian Civil Service. The Indian Civil Services as a whole are by no means "preserve" for Europeans, as a glance at any Civil List will show. In the earlier days of the judicial executive agitation, however, the Indian Civil Service was mainly European, and this fact was not without importance in the agitation.

6. The system at present in vogue for the selection of judges in the Services varies from province to province. In the Non-Regulation provinces there is no set principle, as the functions are united. (In the older provinces, however, since 1873, the Indian Civil Service has been divided into two branches, the executive and judicial.) The young Civilian, on coming to India, is placed under an experienced Collector for about two years, as an Assistant Magistrate.

Immediately on joining his work, he becomes a third grade magistrate. During these two years he is trained in the various duties of the Magistrate-Collector—judicial, revenue, police, miscellaneous. He also has to submit records of cases to the provincial government and pass departmental examinations in law, accounts, and languages. After some two years' service he becomes a sub-divisional officer or officiating Joint-Magistrate, exercising the normal functions of the office. From this he passed on either to a joint-magistracy, which is practically the same as a Collectorship, or to a judgeship (District and Sessions) on an officiating basis. After a few years' service (the old rule used to be twelve; now it is about six) he is called on to choose either the executive or the judicial branch of the service. The final selection of officers for the judicial branch is made by the provincial government, whose decision is based on advice from the High Court, the officers' qualifications and wishes, the necessities of the public service, and actuarial considerations. Once an officer is selected for one branch he must stick to it. In Bengal at present an officer of the I.C.S. is confirmed as a judge where he has been some ten or twelve years in service.

7. A very important point to note is that there is a more complete union of powers *actually* in sub-divisional officers than in the magistrates of

districts. (The sub-divisional officer actually performs the work, the District Magistrate only theoretically performs the work.) The sub-divisional officer, moreover, is subordinate to the District Magistrate, and this subordination in cases has undoubtedly led to the interference by the magistrate in his double capacity with the sub-divisional officer in *his* double capacity. It may be noted, however, that the sub-divisional officer exercises no authority over the police, save that, according to the Code of Criminal Procedure he may direct an investigation to be carried out by any officer in charge of a local police station. (Joint-Magistrates and senior Deputy Magistrates at headquarters are very much in the same position. Other subordinate magistrates have nothing to do with police investigations, complaints, or criminal administration generally.)) The burden of the attack in the executive-judicial controversy has often been directed more against District Magistrate-Collectors than against the system as a whole, a fact which is proved by the relatively few instances in which the sub-divisional system, where actually union is most pronounced, has been arraigned.

8. (Finally it is to be noted that in the actual work done—I speak of Bengal—the spirit of separation exists. No definite theory of separation has been carried into effect. The system of appointing Additional Magistrates, for example,

though thought by some to be a first instalment of separation, was really instituted to relieve District Magistrates of part of their work in heavy districts. But magistrates not only observe the spirit of separation, but actually they are forbidden by the Code of Criminal Procedure to try cases in which they personally are interested as prosecutors. This last point is especially to be noted, as it is a typical legal curb on the Magistrates. In practically all his work the Magistrate-Collector is circumscribed by law or administrative rules, so that legally his chances of abusing his power are small.

The various arguments, both of fact and of fancy, which have been used by the controversialists of both sides will unfold themselves in due course. In the meantime it is well to remember these salient points in the existing system, and to compare them not only with the older and newer attempts at government and with the theories of Indian government, but also with the arguments which from time to time have been brought against the system.

II

THE HISTORY OF THE PROBLEM

The system of government prevailing when the East India Company took over the administration of Bengal, was somewhat inchoate. The police duties were performed by village chowkidars and the zemindars. Each zemindar had his own establishment, and, doubtless his own methods for preserving peace and order. Crimes and misdemeanours were tried in criminal courts, or Faujdary Adalats, the proceedings of which were superintended by the officials who collected the land revenue, or, as they came to be known later, Collectors. In 1775 Warren Hastings made over the whole of the criminal administration of Bengal to the Nawab Nazim of Murshidabad. This system, however, was short-lived. In 1781 Faujdars and thanadars (the latter controlled the criminal administration of thanas) were abolished, and criminal justice was given over to the judges of the civil courts. The English judges of the District Civil Courts, or dewani adalats, were made magistrates. In 1790 Circuit Courts were established, the superintendence of these courts being vested in English judges, assisted by Bengalis who were proficient in Moslem law. In Regulation IX of 1793 the organisation of

criminal justice was systematised. Zilla or district civil judges were endowed with magisterial powers. Their criminal jurisdiction was made co-extensive in area with their civil jurisdiction. Similar powers were conferred on the civil judges of the cities of Patna, Dacca and Murshidabad. Thus the civil judge was also the magistrate. By Regulation XXII of 1793 the police was also placed under the control of the magistrate or civil judge. The old zemindari police system was abolished, darogas being appointed in place of the zemindari officials, and the district authority was centralised in the hands of the judge-magistrate.

This centralisation of executive and judicial authority did not pass without protest, and the protest came from the highest authority in India, Lord Cornwallis, the Governor-General. In the Preamble to Regulation II of 1793, the following passage occurs—

"All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their raiyats or other persons concerned in the collection of their rents, have hitherto been cognisable in the court of Maal Adalat, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of

that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties (it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another.) Their financial occupations equally disqualify them from administering the laws between the proprietors of land and their tenants. Other security, therefore, must be given to landed property, and to the rights attached to it before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing, in its executive capacity, the rights and privileges, which, as exercising the legislative authority, it has conferred on the land-holders. (The revenue officers must be deprived of their judicial powers.) All financial claims of the public when disputed under the Regulations, must be subjected to the

cognisances of the Courts of Judicature, superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it."

This protest is directed mainly at the combination of judicial and executive powers in revenue officers, but as already noted, the weight of argument in later years did not turn on this point. The organisation of the revenue system for good reasons did not figure largely in the controversy. At the time of Lord Cornwallis the interference with the revenue courts by the Civil Courts was a very vexed question. The Regulating Act of 1773 had established a Supreme Court at Fort William, but it did not define the relations of the new Court to the executive. The new Supreme Court interfered with the revenue collection in such a way

as to make good government almost impossible. In 1781 the Governor-General and his Council were exempted from the jurisdiction of the Supreme Court.) The Company's Courts were definitely recognised, and both revenue collection and the Regulations were placed outside the jurisdiction of the Supreme Court. But the Company's courts were definitely recognised, and both revenue collection and the Regulations were placed outside the jurisdiction of the Supreme Court. But the Company's courts proved as eager to intervene in revenue matters as the Supreme Court, and the Governor-General had to solve the problem in such a way as to secure the revenue and at the same time guarantee justice.

(Lord Cornwallis first took the side of the executive.) In 1787, when Collectors of land revenue were made zilla judges, revenue cases were transferred to them in their dual capacity, a right of appeal lying to the Board of Revenue or to the Governor-General in Council. (Acting on the changed opinion of Lord Cornwallis as expressed in Regulation II of 1793, the Government deprived Collectors of their judicial powers, and made them amenable to the civil courts. After a century of wrangling this question may be said to have solved itself automatically. (At the present time the position is that the civil courts do not interfere in the purely fiscal side

of revenue collection, but all questions of title to land are now dealt with by the civil courts. Rent suits, notably in Bengal, are tried by the civil courts, though revenue courts still deal with them in some other parts of India. Where revenue courts exist the procedure is similar to that of civil courts, and, in cases, questions of title may be referred from the revenue to the civil courts.

The protest of Lord Cornwallis bore little fruit in regard to the general question of separation. As has been noted, two Regulations of the same year, 1793 (Regulations IX and XXII), completely amalgamated executive and judicial functions under the civil judge. In 1797 the amalgamation was extended, as the judges were empowered to employ their assistants and registrars on magisterial duties. In 1807 the judicial powers of judge-magistrates were still further extended. In 1810, by Regulation XVI, persons other than civil judges could be appointed district or city magistrates. The same Regulation empowered the Governor-General in Council to make rules as to the concurrent jurisdiction of civil judges, where it was found necessary, under the name of joint magistrates, and to appoint assistant magistrates. These assistant magistrates were to form an entirely different set of officials from the registrars and assistants of the civil judges, whom the civil judges had

previously been authorised to employ on magisterial duties. This Regulation, therefore, marks the beginning of the separation of functions. By it civil functions were separated from criminal functions. The first 'conjunction' of powers was civil and criminal, not revenue and criminal, as in the present system.

The shadow of separation cast in 1810 did not extend far; for by Regulation IV of 1821 the Governor General in Council was enabled to authorise a Collector or other revenue officer, to exercise the whole or part of the powers and duties vested in the magistrates or joint-magistrates, or to employ on revenue duties a magistrate, joint-magistrate or assistant-magistrate. Although not definitely stated in this Regulation, it seems that it was actually contemplated to combine the offices of the magistrate-collector and civil judge in one person. This Regulation remained in abeyance till 1829. In that year the police was re-organised. The post of Superintendent of Police was abolished and the supreme police powers were vested in an official now to be known as the Commissioner of Revenue and Circuit.

Thus the early Regulations of the Company combined the various powers in a very marked degree. The original district official was the magistrate. His primary function was to preserve order, and for this purpose he was the head

of the police of the district. In order to improve criminal administration, about which the Company had many complaints, the magistrate was also made a judge for criminal cases. Originally his functions were looked on as a subsidiary part of the duties of the civil judge. Gradually his powers and jurisdiction were extended and these powers created a new class of officials. These officials, like the magistrate himself, combined in them the various functions of government, although in practice their work may have been confined to separate functions. The civil judicial functions were cut off from the many other duties of administration. The other duties, the chief of which were revenue collection, police administration and criminal judical work, were concentrated in the magistrate-collector.

In 1837 a committee was appointed to enquire into the police system. Many complaints had reached the Government from landowners and indigo-planters regarding the unsatisfactory condition of the police system of Bengal. In 1838 this committee, the outstanding member of which was Mr. F. J. Halliday, afterwards Sir Frederick Halliday, first Lieutenant-Governor of Bengal, submitted a report. The members of the committee did not agree on all points. The majority recommended that the offices of magistrate and collector should be split up. The ground of their recommendation was not that

revenue and magisterial functions should not be united in one person as a general principle, but that the existing officers neglected their police and magisterial duties in favour of their revenue work. In the old system, the committee pointed out, the judge and magistrate had paid particular attention to the police duties, but under the system of magistrate-collectors the police duties had become of secondary importance. Their recommendations were that each district should be divided into sub-divisions and that deputy magistrates should be appointed with magisterial powers and given control over the local police.

Sir Frederick Halliday did not agree with the majority. In a minute of dissent he strongly urged the separation of police and magisterial functions on the ground of the recognised principle of jurisprudence that the separation of the judicial from the executive was a necessary element in good government. He declared that to combine the duties of a judge and a sheriff or of a justice of the peace and of a constable in the same individual was both absurd and mischievous. No magistrate should have a previous knowledge of the case on which he is to pronounce a verdict as a judge. The duty of preventing and detecting crime therefore, he said, should be thrown upon the police. There should be a separate organisation to catch thieves and to try thieves. Sir Frederick supported his theory

by a comparison of English conditions, in which connexion he wrote:—

"In England a large majority of offenders are, as here, tried and sentenced by the magistrates: but in the former country the cases so tried are comparatively of a trivial and unimportant nature. In India the powers of the magistrates are much greater; their sentences extend to imprisonment for three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subject of the criminal administration of the country. The evil which this system produces is twofold: it affects the fair distribution of justice and it impairs, at the same time, the efficiency of the police. The union of Magistrate with Collector has been stigmatised as incompatible, but the function of thief catcher with judge is surely more anomalous in theory and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied. For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy: the danger to justice, under such circumstances, is not in a few cases, nor in any proportion of cases, but in every case. In all the magistrate is constable, prosecutor, and judge. If the appeal

be necessary to secure justice in any case, it must be so in all: and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance. It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing *thana* reports. But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slumed over in two hasty hours of each day. I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders, should, without delay, be separated from the judicial function."

Sir Frederick's contentions were supported by two other members of the committee, Mr. Bird, the President, and Mr. Lowis. The strongly worded views of Sir Frederick are interesting enough in themselves, but doubly interesting when compared with a minute written by him in 1854 in which he made a complete *volte face*.

The real interest of these early controversies is that they show the honest desire of the early administrators of Bengal to organise a system of government which was at once consistent with western notions of administration and law, and at the same time effective among an eastern people. In 1886 the first battle in this subject was fought on the Congress platform. In 1899 the well known memorial of Lord Hobhouse and others was presented to the House of Commons, but half a century before the question became a "platform" of the Congress party, the servants of the Company among themselves exhausted their words, and often their tempers, on the same controversy. Long before legislative councils were envisaged, the civil servants of the first half of last century accepted the theoretical correctness of the juristic view of separation. By the strange irony of circumstances, we are now on the verge of a union they little dreamt of—the 'union' of legislative and executive, the executive being subordinate—while the question of the separation of executive and judicial is still unsolved.

Sir Frederick's proposals, as against those of the majority, were to take away the judicial from the executive functions of the magistrate. The judicial functions, he proposed, should be given to civil and criminal judges, and the executive functions to the police. He also

recommended that the revenue functions should be separated from magisterial functions. His later views—views expressed when he was in a position to enforce them—were the opposite of his earlier views. Like many another official before and after him, he was confronted with the rift between what is theoretically correct and what is practically advisable. He chose what, in the views of almost all his leading officials was practically advisable. Nevertheless, his earlier arguments remained sound, and they have often been quoted against the system of which later he was the chief sponsor.

On the recommendations of the Police Committee the offices were separated as vacancies arose in Patna, Murshidabad, and Midnapore. It was not without misgiving, however, that the Governor-General, Lord Auckland, and the Court of Directors accepted the change. In a letter to the Court of Directors, Lord Auckland said:

"The question of gradually separating the office of Magistrate from the Collectorships of the several districts of the Bengal Presidency is now under my earnest deliberation. It is one of great difficulty not merely on financial considerations, but with reference to the very doubtful points, whether in the present state of the covenanted service, a Judge, a Magistrate and a Collector of adequate ability could be allotted to each

district in the Lower Provinces, until, at any rate, existing operations under the Resumption laws be brought to a close, and, secondly, whether the small number of highly competent functionaries of grades below the judicial Bench being taken into account, the Police would, on the whole, be benefited by a division of labour which would assign a large proportion of those best qualified to administer it with effect to the Revenue Branch of the Service exclusively."

The Court of Directors gave a general assent to Lord Auckland's opinions, and actions. The Lieutenant-Governor of the North-Western Provinces had expressed strong views against the separation of functions. Nevertheless, the process of separation went on. By 1845 the offices were separated in practically all the lower provinces with the exception of three districts in Orissa, and several independent joint magistracies. Deputy magistrates were established in 1843.

The separation was short-lived. The first attack made against it was by Lord Dalhousie, the Governor of Bengal, and also at that time Governor-General of India. During Lord Dalhousie's tenure of office the administration of Bengal was separated from that of India. Sir Frederick Halliday was appointed Lieutenant-Governor of Bengal. On laying down the governorship of Bengal, Lord Dalhousie addressed a

long note to Sir Frederick on the system of administration in Bengal.

Lord Dalhousie's minute was based on a note by Sir Cecil Beadon, then Secretary to the Government of Bengal, afterwards Lieutenant-Governor of Bengal. In 1853 Sir Cecil reviewed the administrative position in respect to the separation of the functions of the Magistrate and Collector. "The experience of the past fifteen years," he wrote, "has led many to the conclusion that without gaining anything by the change, for the isolated cases of effective police administration are not more numerous now than they were before, we have reaped all the evils which Lord Auckland and the Court of Directors foresaw when yielding a reluctant assent to the separation of the two offices. We have suffered a grievous loss of power by maintaining a separate class of Collectors, charged with special duties insufficient to occupy their time and yet inhibited from rendering assistance to the other great branch of Executive Government. And we have a class of Magistrates, overworked, underpaid, with limited experience, energetic and zealous, it is true, but commonly wanting in the discretion which is only gained by experience, and frequently so young as not to command the respect of either the Native or European community, and to afford a plausible pretext for the vulgar objection urged

against the Government of employing boy Magistrates."

The collection of land revenue, said Sir Cecil, had become a matter of routine, and, especially where the land was permanently settled, there was not sufficient work to take up the time of a highly paid Collector. Not only so, but the work of the Collector did not bring him into close touch with the people. His main duties were supervisory, and those duties were not heavy where the revenue was paid directly into the Government treasuries without the intervention of intermediate officers such as tahsildars. The Collector, however, from his duties and position, possessed great personal and official influence with the zemindars, and, observed Sir Cecil, this power might be used to further the cause of law and order, whereas under the existing system it either remained barren or was actually used to thwart the work of the magistrate. The resources of the Government in personnel were not so great that they could afford to have senior Civil Servants occupying their time with routine duties. The arrangement, moreover, was objectionable from another point of view. In their earlier years of service the young company officials were entrusted with wide and responsible powers. They were the local representatives of the Government, or, more correctly, they *were* the

local Government. After their judicial and administrative training, they became revenue collectors, or office automata, in which posts their time was insufficiently occupied and their energies rusted till their turn came for promotion to the judicial bench.

Sir Cecil did not attach any importance to the argument of the Police Commission that Collectors of revenue might call in the police to their aid. No such instance had occurred in the North Western Provinces, where there had been no separation, and where, it may be added, there was no Permanent Settlement. In Bengal the Permanent Settlement made every man's dues clear and, with the right of appeal to the Commissioner or the Civil Courts, there was no question of the Collector being able with impunity to adopt questionable methods in his work.

Sir Cecil outlined a practical scheme in support of his contentions. The main features of the scheme were that at the head of each district there should be a chief executive officer, called either magistrate or collector, responsible to the Commissioner. This officer should have authority over every executive department in the district—revenue, minor criminal justice, police, registration, public works, education, jails. This officer should have an adequate staff of covenanted and uncovenanted assistants. In one or more districts there should be a European

judge, who would be responsible for civil and criminal justice. The judge should be responsible to the Sudder Court, but he was to be liable to have his executive arrangements and his supervision over lower judges controlled by the Commissioner. (Both the Collector or Magistrate and the Judge thus were to be under the Commissioner.) Sir Cecil also suggested that in every district there should be one or more covenanted assistants, who might be employed partly by the magistrate for executive work, and partly by the judge, as assessors or assistant judges. This would ensure a proper training for young Civil Servants, and, in time, Government would select them for either judicial or executive work as the inclinations and abilities of individuals warranted. The officers on the executive side would rise to be Commissioners; those on the judicial to the Sudder Bench. But Sir Cecil suggested that this should not be an absolute rule. Executive officers might become judges, and judges Commissioners.

One of the most interesting parts of Sir Cecil Beadon's note is his formulation of a definite theory of government for India. (His theory converted his chief, Sir Frederick Halliday, and is interesting as a definite acceptance by an administrative officer of what may be called the oriental theory of administration.) In Sir Cecil's own country the absolute theory had long since

been abandoned, and we find no traces in his statements of the possibility of India evolving from an absolute to a democratic system of government. Indeed few officials of his time envisaged a future India managed by Indians on the advanced administrative principles of the west. Occasionally a leading official, such as Sir Thomas Munro of Madras, recognised the possibility of evolution in Indian affairs: but even where western principles of jurisprudence were advocated, they were advocated as solvents to what were regarded as permanent and stationary problems of administration. Educational reformers, it is true, saw further, and, as we shall see, it was the result of their efforts that made the problem of separation of functions more acute, for the rise of an enlightened and able Indian bar made the problem of securing well trained and efficient judges more pressing than ever.

"The chief duties of covenanted English officers in this country," wrote Sir Cecil Beadon, "are those of superintendence and control. Such duties are best and most effectually exercised for the common weal when centred in one authority within a given tract of country. The principle, which holds good of a local governor in the Presidency which he governs holds equally good of a Commissioner within his Division, and of a Magistrate and Collector (or, as he would more

properly be called, a Deputy Commissioner) within his district, and the principle is capable of further advantageous extension to local sub-divisions of convenient extent like tahsildaries in the North Western Provinces, or those under Deputy Magistrates and Collectors in Bengal.)

It has always appeared to me that the further we have departed from the Indian system of centring all executive control within a given tract of country in the hands of one man we have weakened our hands and frittered away the administrative force, which, centred in one responsible officer, can be far better and more effectually exercised for the protection and improvement of society, than when under the specious argument of a division of labour, the same force is divided between two independent and frequently antagonistic departments.

. . . . . It seems to me that the true theory of Indian Government .....is the entire subjection of every civil officer in a division to the Commissioner as the head of it, and the entire subjection of every officer in a district to its executive chief."

(Sir Cecil recognised the validity of the argument for a separation of judicial and executive functions) thus—

"The only separation of functions which is really desirable is that of the executive and the judicial, the one being a check upon the other,"

and, he continued, with reference to the problem before him, "If the office of magistrate and collector be reconstituted on its former footing, I think it will have to be considered whether the power of a criminal judge now vested in the magistrate extending to three years' imprisonment with labour in irons might not be properly curtailed, whether the magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to police matters and the general executive management of their districts, and whether the moonsifs under an improved and simplified Code of Criminal Procedure might not be charged with the trial and decision of summary suits for arrears of rent."

But even for judges he adhered to his theory of subordination to a single executive chief, for, he said, "Even as regards judicial officers, I am satisfied that a great advantage is gained by placing them in all matters of an executive nature directly under the Commissioner, just as the Sudder Court in its executive capacity is subordinate to the local Government, and leaving them independent only as regard their judicial decisions."

Lord Dalhousie, who had been responsible for both the Government of India and Government of Bengal, accepted both the argument

and the schemes of Sir Cecil Beadon. He did not, however, make any reservations regarding the separation of the executive and the judicial functions of government. He was mainly concerned with the evil results of the separation as shown by the results. "For the result has been," he wrote, "that there is now in the Lower Provinces one class of officers, the Collectors, of mature standing, highly paid, and with very little work, while there is another class, the *Magistrates, inadequately paid, with very heavy* work, and without sufficient experience to enable them to do that work in such a manner as fully to command the confidence of the community, however zealous and active they may usually be. These are mischievous in themselves. They are doubly mischievous because they give colour to plausible denunciation of abuses alleged to exist equally in the revenue and judicial management of the East India Company, and lead a distant and ill-informed public in England to receive as startling truths all the outrageous exaggerations they hear or read about "boy-judges and idle Collectors shaking the Pagoda Tree." "The remedy, he concluded, consisted in reuniting the offices of Collector and Magistrate. Such a remedy, he said, seemed "not only simple, but certain."

He was also concerned about the bad system of training provided for officers of the Company

and the frequent changes of officers, both of which had been pointed out by Sir Cecil Beadon. "But when people, not acquainted with the details, are told that a young civil officer after being four or five years an assistant, when he is nothing in particular, is made a Magistrate; that after a few years, quitting the Magistracy for the Revenue Branch, he becomes a Collector; that after a few more years, his next step of promotion takes him from revenue duties and makes him a Judge, that if he be a man of ability, he will probably from a judgeship be moved to the office of Commissioner of Revenue, and that the same ability will in all probability next promote him from a Revenue Commissionership back to the judicial Bench in the Sudder Court—when people hear that a civil officer oscillates through his whole career between executive and judicial duties, and each step he gains is one which does not tend to fit him for the step that follows after; when people hear all this, what wonder can there be if the administrative system is condemned offhand, and that all the evidence given in explanation before Committees of Parliament and then buried deep in folio blue books, wholly fails to move the ill impression that has been produced?"

Lord Dalhousie's note was the occasion of a memorable controversy, the two chief disputants in which were Sir Frederick Halliday and Mr. J.

P. Grant, afterwards Sir John Peter Grant, Sir Frederick's successor as Lieutenant-Governor of Bengal. It has already been noted that Sir Frederick Halliday recanted from his former views. (It may also be noted that Mr. Grant, when later in a position of high authority, did not exert himself to carry out his own theories.) Sir John Peter Grant's administration was notable for many events. He originated primary education. He was responsible for the Indigo Commission. He settled many questions concerning surrounding Native States. (He re-established the system of Honorary Magistrates. He reformed the Police.) The Bengal Legislative Council was established in the last year of his "reign." (But the separation of judicial and executive was not one of his works. Nor, it may be added, did it characterise the administration of his successor as Lieutenant-Governor, Sir Cecil Beadon.)

(Sir Frederick Halliday thought that the proposed reunion of offices would be "a great improvement.") The complaints of the indigo planters of Bengal had forced Sir Frederick to commit himself to some line of action. The planters had made bitter protests against the existing defective police administration, and the Lieutenant-Governor promised that the offices of Collector and Magistrate should be reunited. The planters had pointedly complained of "boy

magistrates," and had indicated that for the preservation of peace and order more experienced magistrates were necessary. Sir Frederick, in his minute of the 23rd October, 1854, accordingly declared that "The districts in which the change is most urgently required are Nuddea, Jessore, Purneah and Tirhoot." These districts were "full of indigo planters."

Mr. Grant at once fixed on the root fallacy of Sir Frederick's position. Sir Frederick had supported the severance in 1838: now he supported the union. This argued Mr. Grant was a *non sequitur*. In 1838 the police system had been condemned, and the functions of Magistrate and Collector were disunited, on the recommendation of Sir Frederick. Now again the cry of the badness of the police had arisen, and Sir Frederick recommended a return to the old system which he had already condemned. "Are we," asked Mr. Grant, "never to get out of this round? Can it be right for the Government of this great country to spend its time and energy, and the time and energy of its officers, *always* in turning half a dozen into six, and then in turning six back again into half a dozen?"

Mr. Grant objected to making changes if the changes did not remove material faults of principle in what affected the functions of a good administration. Lord Auckland had expressed similar views. He disliked mere

transfers of authority from one person to another as solving fundamental adminstrative questions."

"I am deeply impressed with the feeling," he wrote, "that there has been with successive Governments of India too ready a disposition to adopt extensive changes of system in cases only requiring something of administrative reform. Under frequent changes of this kind no system is fairly tried; the confidence of the people is shaken, and they become utterly at a loss to know to what authorities or to what tribunals they are to look with consistent respect. We have a very limited number of trustworthy agents, we have a vast number of important and responsible situations: we must be sometimes disappointed in the efficiency and even the proper conduct of our officers. Yet I would not, upon occasional instances of such disappointment, be hasty to condemn our present means of enforcing a due performance of the public duties, or to look to new classes of agency."

Mr. Grant rightly pointed out that the core of the question was the organisation of the police. Bengal was then much behind the rest of India in its police administration. There was no adequate constabulary or staff of police officials, and, said Mr. Grant, the mere shifting of names and officers among the Civil Servants would not create a constabulary. The reunion was advocated largely to take away the stigma

of "boy magistrates." But if the magistrate's duties were much more important and more difficult than those of the collector's (whose duties were admittedly easy), why not make boys collectors and men magistrates? Much of the difficulty in the re-organisation—as indeed much of the difficulty all along in this question has been—lay in the status and pay of members of the Civil Service. In practically every administrative reform advocated difficulty has been experienced in regard to the training, pay, and prospects of that Service. In these early days of administration these difficulties were aggravated by the lack of differentiation of duties in other directions—police, public works, education, etc.—but as yet there was no question of responsibility to an enlightened Indian opinion. The responsibility of the officials was to their own intellects, or consciences, or public opinion in England, and the questions were debated on files as honestly, and in cases as hotly, as if the participants had been cabinet ministers dependent on the majority vote of a critical House.

Mr Grant's notes in particular have a parliamentary ring about them. One could imagine him arguing his point before a hostile audience. "On the point of principle," he wrote, "I have only to declare that these specialities which, in other parts of India it is by many maintained, justify the seemingly unpropitious union of the