sated consciences recoil on the enormities they think they have committed in their earlier lives. They therefore use their annuities to recant: they make a new declaration of political faith. To some the well earned period of leisure is spent in the fulmination of ancient grudges, or in condemning a system to which they only give lip, or pen service in the days of their activity. Others relieve their breasts of pent-up personal differences. When the official whip no longer stings, when the higher post no longer allures, when the coveted decoration is lost or won, the tongue and mind are free. The reckless word or speech, the unorthodox theory, the insubordinate temper no longer meet the angry frown of superiors. In the clubs or drawing rooms, in the pamphlets and press, the retired magistrate is as good as the ex-lieutenant-governor. The only person that suffers is the forgotten toiler in the districts of India, struggling with a new and perverse generation, whose task is made the more difficult because of the free tongues and pens of his now unemployed predecessors. Some of these predecessors, more thoughtful or more honest than others, hasten to forget their past difficulties in the resumed environment of their youth. Others, in signing memorials or writing pamphlets have the modified honesty as they write to sigh—"Yes—but thank God, I've retired from the service."

The Hobhouse memorial was a weighty document, not so much because of its arguments and presentation of the case, but because of the names appended to it. Its first signatory was Lord Hobhouse, who had been Legal Member of the Governor-General's Council from 1872-1877. Following his name were those of Sir Richard Garth, and Sir Richard Couch, both of whom had been Chief Justice of Bengal. Sir John Budd Phear had been a Judge of the High Court in Calcutta, and, later, Chief Justice of Ceylon. Sir William Markby, Sir Charles Sargent and Sir John Scott had been Judges of the High Court in Calcutta. Sir William Markby, later, was Reader in Indian Law at Oxford, and is in the first rank of modern jurists. Sir Roland Wilson was a distinguished lawyer. Sir William Wedderburn was a successful Bombay Civilian who afterwards became President of the Indian National Congress. Mr. Reynolds was in his time Secretary to the Government of Bengal and one of the most distinguished revenue administrators Bengal has known.

Imposing as is the list of names, one or two salient features are worthy of remark. In the first place, the list contains the names of only two men with administrative experience, Sir William Wedderburn and Mr. Reynolds. In the second place, of these two

Mr. Reynolds was mainly a Secretariat man. His experience of district administration was relatively small. In the Service, too, he was known as inclined more to philosophical speculation than to facing facts as they stood. In the third place, one or two of the members had been known to express themselves differently on the question, *e.g.* Sir John Scott who in 1900, in the Proceedings of the Society of Arts had declared the matter to be "of small urgency."

The mass of articles, memoranda, and evidence produced with the memorial was equally open to criticism. Sir Richard Garth in particular indulged in extreme language scarcely to be expected from a man of his training. He wrote of the disgraceful state of things in Bengal, of the "grievous injustice to which it is constantly giving rise," the utter fallacy of the excuses which are made by the government for not rectifying "this shameful abuse." The real truth is, he said, "that the government of India *approves* this scandalous system, and (whatever the Secretary of State may say to the contrary) would be sorry to see it altered. In point of fact, if the government had its will, the independence of the judges would be still further controlled, and the High Courts themselves made subservient to the will of the Executive."

Such statements from an ex-Chief Justice did not help the memorial. The history of the

case shows that there was reason for the system, and the imputation regarding it was not only undeserved but unjust. The extreme and violent nature of Sir Richard's statements were brought into bold relief by the moderation of his fellow lawyers.

The authority of Sir Robert Reed, who was at one time Attorney General, was also enlisted—unnecessarily, for no one, either lawyer or administrator, had questioned the truth of the juristic principle of separation. Sir Charles Elliott's article was introduced as a stalking horse. The replies of Mr. Reynolds, Dr. Field (an ex-Judge of the High Court, whose experience of administration was practically nil), and Sir John Budd Phear, were the real reasons for the inclusion of Sir Charles' article.

Another weakness of the memorial was its ready acceptance of the fact that Mr. Dutt's scheme would cost nothing. In Bengal alone it was calculated that a recurring expenditure of eleven and a half lakhs would be necessary, with about another four lakhs for non-recurring expenditure (houses, court-houses, offices, etc.). This estimate included the savings possible under the scheme. These estimates were made in 1901, and were the scheme revived, they would probably now amount to twenty-five lakhs.

The memorial did not have immediate effect, but it had real effect some years later, when the Government of India definitely declared its intention to introduce separation in selected districts in Bengal. The mouthpiece of the Government of India was the Home Member, Sir Harvey Adamson, later Lieutenant-Governor of Burma. Sir Harvey Adamson's scheme was propounded in the Imperial Legislative Council in March, 1906. He informed the Council that the Government of India had decided to advance 'cautiously and tentatively' towards the separation in those parts of India where the conditions were considered to be appropriate. The experiment, he said, would be costly, but the Government of India thought it 'worth while.' The experiment was to be started in the Bengals (Eastern Bengal was then a separate province). The reasons why Bengal was chosen were several. First, most pressure had been applied from Bengal; second, the intellectual character of the Bengali was supposed to be more adaptable to changes; third, the revenue system of Bengal, the easiest in India, was the best field for experiment; fourth, in Bengal, there was no machinery except the police to perform duties which in other parts of India were done by the better class of revenue officer; fifth, as Sir Harvey expressed it, "There are more lawyers in Bengal than elsewhere"; and sixth, at least as Sir Harvey "suspected,"

the District Magistrate interfered more with police functions than in other provinces.

The principles enunciated by him are:

1. Judicial and Executive functions to be entirely separated to the extent that an officer who is deputed to executive work shall do no judicial work, and *vice versâ*, except during the short period when he is preparing for departmental examinations.

2. Officers of the Indian Civil Service to choose after a fixed number of years' service whether their future career is to be judicial or executive, and thereafter to be employed solely on the career to which they have been allotted, the allotment to depend on choice modified by actuarial considerations.

3. Officers of the executive branch of the Provincial Civil Service and, if possible, members of the Subordinate Civil Service to be subject to the same conditions as in (2), though the period after which choice is to be exercised may be different.

4. During the period antecedent to the choice of career officers of both services to be gazetted to Commissioners' divisions and to be deputed to executive or judicial duties by the Commissioner's order.

5. During this period deputation from executive to judicial, or *vice versâ*, to be made at intervals not longer than two years.

6. High Courts to be consulted freely on questions of transfer and promotion of all officers allotted to the judicial branch.

7. Two superior officers to be stationed at the headquarters of each district—the District Officer and the Senior Magistrate.

8. The District Officer to be the executive head of the district, to exercise the revenue functions of the Collector and the preventive magisterial powers now vested in the District Magistrate, to have control over the police, and to discharge all miscellaneous executive duties of whatever kind.

9. The magisterial judicial business of the district to be under the Senior Magistrate, who is to be an officer who has selected the judicial line, either an Indian Civilian or a Deputy Magistrate of experience. He is to be the head of the Magistracy, and his duties are to be (1) to try important criminal cases, (2) to hear appeals from second and third class Magistrates, (3) to perform criminal revision work, and (4) to inspect Magistrates' Courts. In districts where these duties may not give him a full day's work he is to be appointed an Additional District Judge and employed in civil work and in inspecting civil courts. If, where the Senior Magistrate may be an officer of the Provincial Civil Service, it may be considered inexpedient on account of his lack of experience to give him

civil work, he may be appointed Assistant Sessions Judge. In either capacity he would give relief to the District and Sessions Judge.

10. At head-quarters of districts where there are at present Indian Civilians, Deputy Magistrates and Sub-Deputy Collectors, a certain number to be deputed to executive, and the remainder to judicial work.

11. Sub-divisional boundaries to be rearranged, and each district to be divided into judicial sub-divisions and executive sub-districts. The boundaries of these need not be coterminous. The area of a judicial sub-division to be such as to give the judicial officer in charge a full day's work, and similarly with executive sub-districts. Boundaries to be arranged so as to disturb existing conditions as little as possible.

12. Thus the whole district is divided into:—

A. Executive—

(*a*) Head-quarters. (*b*) Sub-districts;

B. Judicial—

(*a*) Head-quarters. (*b*) Sub-divisions.

The staff is divided into—

A. Executive, under the District Officer, namely:—

(*a*) The District Officer.

(*b*) A certain number of Indian Civilians. Deputy Collectors and Sub-Deputy Collectors at head quarters.

(*c*) An Indian Civilian or Deputy Collector for each sub-district.

B. Judicial, under the Senior Magistrate, namely :—

(*a*) The Senior Magistrate.

(*b*) A certain number of Indian Civilians, Deputy Magistrates and Sub-Deputy Magistrates at head-quarters.

(*c*) An Indian Civilian or Deputy Magistrate for each sub-division.

13. The District Officer to be empowered as a District Magistrate, and certain other executive officers to be empowered as first class Magistrates, solely for the performance of the preventive functions of the Magistrate [as in Chapters VIII (omitting section 106) to Chapter XII of the Code of Criminal Procedure.]

Many other schemes, or suggestions have been put forward from time to time. Some have suggested that the present system should in the main continue, but that the appellate powers of Magistrates should be withdrawn and transferred to the District Judge. Others have suggested that while the present powers of the Magistrate in other respects should be continued, the powers of supervision and control over the lower magistracy should be taken from the District Magistrate and given to a judge of lower status than the District Judge, a Divisional Judge being created as the head judicial

officer in each division. It has been suggested that the powers of supervision by the Magistrate should be merely nominal, no special machinery for supervision being suggested. It has also been suggested that the police should take over absolutely the police functions, leaving the judicial functions with the Magistrate. Various schemes for the division of functions in the subordinate magistracy have been put forward, many of them on the lines of Mr. Dutt's scheme. Others have suggested a special magisterial service of government, on the lines of the Indian Civil Service but distinct from it.

Many of the schemes suggested have an air of unreality about them. A more earnest scheme, however was propounded in 1913 by Mr. P. C. Mitter, in his monograph on *The Question of Judicial and Executive Separation.* Mr. Mitter's is one of the best worked out practical schemes that have been written on the subject. He accepts, in the main, Mr. Dutt's scheme, but he goes beyond it in placing the Judicial Department of Government under the High Court, and in advocating a Judicial Service in India, which, he recommended, should be divided into two parts, Imperial and Provincial, and should be recruited partly by a competitive examination in London and partly by local recruitment from the bar. Mr. Mitter worked out his scheme in great detail and with much care. He included

a complete course of legal training and a detailed estimate of the cost. In suggesting a Judicial Service Mr. Mitter brings to a head the century old controversy regarding the training of judges. His scheme also compels one to consider the whole system of "Service" government, a matter on which I shall speak presently. (Mr. Mitter's is the last scheme of any importance that has been published.)

The last important debate which took place on the subject before the Reforms was in March, 1913, when the Hon'ble Sir Surendranath Banerji in the course of the Budget debates, moved that the grants to the provincial governments should be increased so as to enable them to carry out the experiment outlined by Sir Harvey Adamson. The debate was a very moderate one, the speech of Sir Surendranath himself being very non-provocative in tone. Sir Surendranath was supported by all his Indian non-official colleagues in the Council, but his motion was negatived by the official *bloc*. The debate was somewhat unreal as a debate, as it was raised on the budget estimates, which in all countries are inelastic as far as non-official proposals are concerned. The motion was more an expression of opinion on a much debated topic than a real test of political or official strength.[1]

[1] The question has already been raised in several of the reformed Legislatures (in 1921).

III

CRITICISM OF THE PROBLEM

To appreciate the problem of separation, one must first attack it in its most general aspect. The separation of executive and judicial functions is only a part of wider separation—legislative, executive and judicial. I have already noted that the question of separation of the legislative powers does not concern us intimately here. But it may be noted that the separation, or, rather distinction between legislative and executive has to a certain extent been achieved in India. Up to the end of 1920 the Government of India was an executive government. In spite of the existence of legislative councils for over half a century, the executive government was able to get its own way. "Getting its own way" does not by any means imply that its rule was either oppressive or opposed to the wishes of the people. In another place [1] I have tried to show how the political sovereignty of India has been behind and has moulded the legal sovereignty. In a few notable instances, it is true, the measures of the government have been in sharp antagonism to the declared will of non-official members of the

[1] Indian Nationality—Longmans, Green & Co. 1920.

Legislative Councils; but on the whole, the executive-legislative governments of India worked single-mindedly with the representatives of the people for the good of the people of India.

Now the executive is partially responsible to the legislature. Such responsibility is not separation: it is subordination. Modern democracy has preferred not to adopt the American thoroughgoing separation of legislative, executive, and judicial functions. Indeed, America herself despite her Constitution has found extra-constitutional methods of reducing an *a priori* theory of liberty to the terms of executive practicability. As an aftermath of the most recent constitutional *bouleversement* of all—that of Germany—we find that the most advanced democracy of to-day,—at least in name—Germany, has accepted that type of separation which is really union—*viz.*, responsible government. Nor again, in modern constitutions do we find the rigid separation of executive and judicial which separation theorists demand. From the very nature of executive work, every executive action presupposes a judicial decision—except in cases of sheer unreason. Judicial work, too, involves executive work. Apart, however, from these general facts, the executive and judicial are closely interlinked by the prevailing method of appointing judges. The method most approved by administrative experience for the appointment

of judges is appointment by the executive. Other methods of appointment, it is true, exist. In many American states the judges are elected by the people. In some governments they are appointed by the legislature. The prime desideratum in a judge is independence—both as regards his opinions and his financial prospects. Thus the rule has grown up that judges should receive a fixed sum as salary unalterable during the tenure of their appointment. This secures, or should secure financial independence; but even more important is independence of opinion. Popular election obviously does not secure such independence, especially where such election is for a short term and re-election is possible. A judge thus becomes little more than a popular puppet. Election by modern legislatures means party elections, and party judges are bad judges. The very conditions of election by party are the negation of the judicial frame of mind. Selection by the executive is the most satisfactory method of appointing judges, such selection being made, as it is in well ordered governments, after consultation with the recognised head of the judicial system, or a panel of judges.

The classic theory of Separation is that of Montesquieu, which, because it is rarely quoted in full, I quote:—

"In every Government there are three sorts of power: the legislative; the executive in

respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

"By virtue of the first, the prince, or magistrate, enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the State.

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted that one man be not afraid of another.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or Senate should enact tyrannical laws to execute them in a tyrannical manner.

"Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control. Were it joined to the

executive power, the judge might behave with violence and oppression.

"There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Blackstone, the English jurist, in a much quoted passage, expresses the theory in these words:—"Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself.

"Were it (the judicial power) joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their opinions, and not by any fundamental principles of law, which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union would be an overbalance of the legislative."

Without the usual academic analysis of the various bearings of the theory, I may note several salient points. First, the theory was adopted

in the American Constitution so thoroughly that there was a danger of deadlock between the executive and legislative. The thoroughgoing nature of the American party system is largely explained by the rigidity of separation. It is an extra-constitutional method of overcoming legal difficulties.

Second, the English constitution is a direct negation of the theory, yet the English constitution was Montesquieu's ideal type. The English system exemplifies almost complete union. The King is nominally head of the three powers. Actually, the executive (the Cabinet) is composed of members of the Legislature. One house of the legislature, the House of Lords, is a supreme Court of Appeal. Several of the highest legal functionaries, including the chief, the Lord Chancellor, are members of both the executive and legislature.

Third, the American system proves how a people may actually suffer in order to test a theory. The rigidity of the separation is accountable for the prevalent elections in America to both minor executive and leading judicial posts. Election for judicial posts is particularly pernicious in principle and in practice, though actually the abuse in America is not so great as might be expected.

Fourth, in France and continental Europe generally, the system of administrative law, by

which executive officers are subject to different law and procedure from private citizens, contradicts the theory. Administrative law is opposed to English ideas, yet it is an ingrained part of continental constitutional practice. In two notable modern constitutions—those of Japan and Germany—the system has been adopted. The recent adoption, or rather, continuance of administrative law by Germany, with the most democratic constitution of recent times, is most significant.

Fifth, the state is an organic unity, and the theory of separation forgets that the machinery of the state is the organisation of an organic unity. The theory attempts, as it were, to separate artificially the arms, legs and trunk from the body politic. A body can function properly only when its parts function properly with the whole.

The theory of separation, whether it be the separation of three powers, or the two powers with which we are concerned is an excellent instance of modern theories of liberty. It is also an instance of a modern theory controverted by fact. *Primâ facie*, the statements of Montesquieu and Blackstone seem final, but on analysis or comparison with constitutional fact, they pass into the limbo of many of our modern shibboleths of liberty. Liberty does not depend on system. The passion for system made many constitutions

and reformed many effete governments in the last two centuries; but it did not secure liberty. No amount of general statements of freedom written down in a constitution, no *a priori* system of separation of powers will produce liberty if the spirit of liberty is wanting. A people is free because it breathes the spirit of freedom. America separated the "powers." She built walls round them, placed spikes and broken glass over them; but the American people surmounted the walls. The very theory of government which promised their liberty actually threatened them with autocracy. They could not amend the constitution by the ordinary legal process, but they invented a party system which circumvented the separation Nevertheless, the separation exists in America, more than in any other modern constitution. In England, according to the theory of separation, absolutism, oppression, tyranny, every extreme of wickedness in government should be rampant. But it is not. In England the "powers" are mixed up like an apothecary's mixture. Yet England is notoriously a free country. And why? Because her people love neither oppression nor anarchy: they love the Rule of Law, where every man and his master or servant are subject to the same legal process. Neither constitutions nor laws are steel girders; they are the mind—or moral—matter of a people; they are the

reflexion of their *selves*. Among a free people laws, if too stringent, will bend or break; but in themselves they cannot continue to oppress. System, laws, rules, departments do not make liberty. They may help, but unless they are helped in return by the moral force of the people, they are futile. Nowhere is this more evident than in India. Nowhere is there a greater tendency to circumvent laws, and, it may be added, nowhere is there the same success in circumventing them. Much as our new democratic institutions have been lauded, the warnings of many thinkers that the social and mental composition of India may not give democracy though the *forms* of democracy exist, are not without reason. The recent experiences of social boycotts and non-co-operation have more meaning than the casual observer may note. They are the first manifestations of an intolerance and autocracy which are inherent in the traditions of the people. If America, with her separation, and if England with her mixture—and both the separation and mixture are cardinal constitutional facts—are free with them or in spite of them, does it not argue that separation in itself is not the fulcrum of freedom?

The union of powers, as Sir Harvey Adamson excellently pointed out, and the separation of powers suit communities according to their stage of development. The extreme case is martial

law, where the executive becomes supreme. It is its own legislature and its own judiciary. In cases of great disorder or of revolution the rigid forms of laws or the elastic arguments of lawyers are out of place. Action, not argument, is the essence of martial law, and action of this kind requires the supremacy of the executive. Then, again, in simple primitive or savage communities the best system is personal rule. Historically this has been so. In all early communities the rule of the priest or king, or chief magician, or priest-king, or magician-king was responsible for law making, and the execution and the interpretation of the law; and, as Sir J. G. Frazer points out, these rulers were responsible for the first stages of social progress. Order is the prime necessity of progress, and order requires "strong" government. "Strong" government means a quick, decisive executive, untrammelled by legalism.

And so we may advance, up the scale. In developing communities, the social consciousness of which is strong enough, or is becoming strong enough to resist the more primitive instincts towards disorder, partial union and partial separation may be necessary or advisable. In India, therefore, the question of separation turns on the stage of development of the country and its respect for order. But the peculiar circumstances of India must be taken into account. The development of India varies from that of

primitive tribes to advanced provinces where complete separation is already practically a reality. Even in advanced communities latent possibilities of disorder, due to religious, social and political differences always exist. In the controversy the lawyers have made the most of their case. They argue that the greater part of India is sufficiently developed to bear separation. The executive, on the whole, have taken the opposite view. Their function is to preserve peace: they therefore wish the most effective weapons for that purpose. "Each profession," to quote Mr. George Bernard Shaw, "is a conspiracy against the laity." Each tries to make the most of its own duties and responsibilities, and the oscillations of the professional needles must be governed by more or less neutral authorities. The pragmatic sanction of experience is ultimately the test.

The argument, therefore, that the separation of functions is necessary to prevent oppression, or for the freedom of the people, while it sounds well, may not actually work out well in practice. It is not without reason that many public servants and private individuals in India have insisted on the union of powers as essential to the freedom of the individual. This point of view has not been expressed from the general idea that the greater the peace and order of a community the greater the freedom. The gist of official argument

indeed has been that the District Magistrate, as responsible for law and order, must perform these double functions. As such the union is conducive to freedom. But from actual administrative experience it has been argued that the aim behind the separation controversy has been to place the criminal courts in the hands of an agency free from the interference of the District Magistrate, and thus serve the interests of lawyers. Perhaps no agency more than the district magistracy has so unflinchingly and unswervingly hunted out and put down false cases—a curse of India's public and private life. False evidence, the use of professional witnesses, the institution of cases from *zid*, or the desire to vex, harass, or ruin. have been rigorously and uniformly opposed by the district magistrates, as well as the judges. It is also argued by "separationists" that the magistracy is distrusted. The implication seems to be that the civil courts are trusted. But, it may be asked, are the civil courts more trusted by the people than the magistrate's courts? In the average villager's mind which does he fear more, or, rather, which does he trust more? It is at least arguable that the villager is more oppressed by the technicalities and legal formalities of the civil courts than by the direct action of the magistrates' courts. No one who has the slightest acquaintance with the civil courts of Bengal will say that they are

not capable of improvement from the point of view of justice, or oppression. Nor again is it obvious that the 'weak and oppressed,' or poor classes would fare better under a more legalistic system. Does anyone honestly believe that in civil justice at the present time the poor man has an equal chance with the rich, or the *Bhadralog* classes.

The general theory of Separation of Powers thus teaches us to beware of general statements or theories of liberty. It is very easy to voice general propositions or theories, as the Indian lawyers and English philosophical radicals who have given their support to separation have done—and to draw deductions from them in respect to actual facts. But first these general statements and theories should be tested. The minor premiss and conclusion of a syllogism are valueless if the major premiss is untrue. In these days, unfortunately, we only too often find instances of what may be called the Fallacy of the Major Premiss. It is the duty of scientific and judicially minded men to give to the people correct major premisses. This is peculiarly the case with the Political and Economic Sciences, which so vitally affect the everyday lives of citizens. The main functions of these Sciences is, in the first place, to establish correct theories or major premisses, and in the second place to drive these home to the people at large.

So, in India, the general idea of separation has been often accepted without an adequate notion of what is implied by separation, and how separation has worked in actual practice. Behind the many debates and memorials on separation has been a vague idea of liberty—an idea as vague as the connexion between liberty and mere government organisation is vague. Nowhere more than in India are we liable to fall into the fallacy of the Major Premiss in regard to political and economic doctrines. In a country which has so rapidly assimilated western ideas, transition in thought from what is good for Europe to what should be good for India is easy enough and natural enough. But it is dangerous. India is not Europe, and never will be Europe, and one of the chief virtues of the modern nationalistic movement in India is to drive that into the minds of Europeans and Indians alike. But for good or for bad, the administrative machinery of the West, and, largely, its economic machinery have been imported into India, and we must make the best of them. We must find them their place among the indigenous rolling stock. Above all, we must beware of sudden shocks or breaks. What is most wanted is gradual adaptation of western means to Indian ends, and in the subject before us we have a most excellent example of the process.

The indigenous system of government of India when British administration first began to take hold was a sort of patriarchal absolutism. True, the government was partially a foreign or Muhammadan government. Alike for Hindus and Muhammadans the recognised system of government, as laid down by their recognised sacred writings, was absolutist. For Moslems, the ruler was absolutist, combining the three functions in himself. Both the example and the teaching of the Prophet bear this out. The early agitation, however, was conducted by Hindus. What then, we may ask, is the Hindu system ? The late Justice Dwarka Nath Mitter, a name honoured in Bengal, and one who in his time as a High Court Judge, had to write notes on the controversial issues which came before him as an official, wrote, "The history of the Hindu polity is the development of the moral system of Manu. The national mind has rested, as it were upon his teachings. That the moral system of Manu has so long preserved its influence is due simply to the fact that it was precisely adapted to the conformation of the Hindu mind and its surroundings. To understand Manu is to understand Hindus. He was the incarnation of the national character, a mouthpiece of national feelings.....The system established by the institutes of Manu can only disappear with the

national genius, and history knows no calamity more dreadful than the destruction of a nation's genius."[1]

What then does Manu teach? "For the king's sake," says the *Institutes*, "the Lord formerly created his own son, Punishment, the protector of all creatures, an incarnation of the law formed of Brahmo's glory. Having fully considered the time and the place of the offence, the strength and the knowledge of the offender, let him justly inflict that punishment on men who act unjustly. Punishment is in reality the king.....If the king did not, without tiring, inflict punishment on those worthy to be punished, the stronger would roast the weaker like fish on a spit.....A king desirous of investigating law cases must enter his court of justice, preserving a dignified demeanour, together with Brahmins and experienced counsellors. There .....let him examine the business of suitors, daily deciding one after another.....If the king does not personally investigate the suits, then let him appoint a learned Brahmin to try them."[2]

Such is the teaching of Manu, and, according to the late Justice Mitter, such is the national mind of Hindus. The interpretation

[1] Quoted from a letter, dated the 9th July, 1900, written by the late Mr. J. Monro, C.B.

[2] *Vide* the *Institutes of Manu*, Chapter VII. 1-37.

of that mind is largely the cause of the insistence on union of powers by the earlier English administrators. Their notes and minutes are full of references to what they call the "oriental" system of government. The "Native," they said, could not understand separation. They would never appreciate the reason why the *Hakim*, when he caught a thief could not punish him. The 'over-much occidentalists,' they said, were urging a system alien to the nature of the Hindu. In his family life he was used to the *Korta*, or head of the family, whose word was law. In the land system the zamindar was maker, interpreter and executor of law. So also, they expected their government to be. The principles of western organisation would not only not appeal to them, but, by their short-circuited logic, they might conclude that if the *Hakim* could not punish even if he caught, then retribution for malefactors was problematical.

This is not true of India only. It is true of practically every political community. All early forms of political organisation were absolutist; but in spite of religious teachings they have not remained absolutist. The Bible does not teach democracy as a form of government. Yet the Christian world is democratic—it may be the result of the Christian spirit, but not of Bible politics. The Jewish governments were theocratic—and theocracy is a most stringent form

of absolutism. Yet no one argues from this that Jews should always have a theocratic form of government. There is truth in Justice Mitter's remarks, insomuch as an organisation of government is a reflection of the mind of a people; but as Sir John Peter Grant pointed out, India is not quite in the patriarchal stage now, and his remark was much less true when he wrote than it is to-day. The evolution of administrative machinery in India has been from the patriarchal to the democratic. Sir John Grant was a little ahead of his time in his theories. He tried to force the pace of administrative evolution too much. He thought he could compress into a few years a system which had taken many centuries to evolve in the West. But three quarters of a century after his time the Governments of India have passed from the absolute system to the popular. To say that separation is not fitted for India, or that India is not fitted for separation, as many controversialists have done, is practically to deny the right of India to evolve or progress. Moreover, it is a terrible condemnation of the whole system and spirit of British administration. The British system has consistently aimed at the uplifting of India, at the progress of India, and to deny the possibility of progress is to deny the main objects of British administration. Thus to rule out the advanced

administrative forms of the West from India is illogical and inconsistent with the aims of the British connexion with India. One might as well argue that because of Louis XIV's statement, *L'état c'est moi*, that there should be no French democracy. French democracy, be it noted, was largely the result of the obstinacy of men of the *L'état c'est moi* way of thinking, men to whom progress was either anathema on religious grounds or undesirable on personal and political grounds. The French administration broke to pieces because it could not evolve.

It may be questioned, if there had been no British in India, and the present system had evolved, whether the question of separation would have ever arisen. Had Hindus themselves worked out the system, the actual separation might not be so marked as it is now. For, say what we will, the Hindu mind remains the Hindu mind in spite of all our western organisation and education. For good or evil, the western system has been introduced, and for good or evil again, we must tread the paths that the western system has beaten out for us. I am prepared to admit, with Dr Rabindra Nath Tagore and Mr. Gandhi, that the whole of our western machinery, science, and everything else, is upsetting the best traditions of the Hindus; but if the Hindus, or Indians generally, wish to

survive as a nation in this modern degenerate world of greed and discord, they must accept the recognised methods by which survival is made possible.

One of these methods is the modern system of administration, which, introduced by British administrators, is now carried on by Indians. Once introduced, we must be prepared to apply to it the ordinary canons of western administration. On this ground the logical procedure is to grant total separation of functions. It is true that India, as compared with England, is going forward at express speed. Only very recently were English J. P.'s deprived of executive functions, but in India already separation has been largely achieved in practice. What is more important, a large measure of responsible government has been introduced. It certainly seems illogical to withhold separation of executive and judicial functions, on any grounds of oriental or absolutist theories, when such a non-absolutist instrument as responsible government is already legalised. On no theoretical grounds of this kind, therefore, does a continuance of union of the powers seem justified.

On the juristic theory there has never been any dispute. It is admitted on all hands that juristically union of powers is unjustifiable: as Sir Francis Maclean, Chief Justice of Bengal, pointed out, the question of continuance is not

for the lawyer, but for the statesman to decide. The question thus arises, on political or administrative grounds is the continuance justifiable? The answer to this question is a very decided negative. For, in the first place, it is inexpedient politically to continue a system in theory which is in practice almost renounced, and which is theoretically universally condemned. It is all the more inexpedient to continue the system because it has been condemned by prominent representatives of the people and officials alike. If the system in practice is abandoned or practically so, why should not the theory be abandoned? It seems futile for any government to give reasons for grudge or complaint when they could be removed with so little difficulty or departure from existing practice. The removal of abuses is a recognised function of government; and even though the abuse be not marked, even though the agitation be artificial and unreal, the government cannot suffer by adopting a Cæsar's wife principle. Take away the cause of complaint and complaints will not arise. Assuredly other complaints will be found, but let *this* one, which has so much to be said for it, be removed.

In the second place, it is not expedient administratively. The question very naturally arises. Why, if separation in practice is the rule, does not the Government finally abolish it? One

reason is financial, but to that I pay no heed, as ways and means *can* be found if the government makes up its mind to change the system. Financial considerations have never stood, and will never stand in the way of remedy to abuses, provided the abuses are regarded as of sufficient enormity to divert public funds from other channels. In matters of this kind, financially speaking, usually where there is a will there is also a way. Were it a mere matter of finance the question could at least be solved gradually, as Sir Harvey Adamson proposed and as Sir Surendranath Banerji's Resolution in 1912 in the Imperial Legislative Council showed. The administrative question lies deeper and may be analysed from several points of view.

(*a*) It has been stated that the concentration of authority in the magistrate's hands is essential to the continuance of British rule in India. This argument, as stated by Sir James Fitz James Stephen, was often repeated after him, as a final verdict. Since Sir James's time, however, the underlying basis of this argument has completely changed. In his time the personnel of the magistracy was European, and the lack of trained Indians made the argument more effective. But the whole scene has changed. The proportion of European district officials to Indian is very small indeed. In the Indian Civil Service, in the course of the next ten years, almost fifty

per cent. of the Service will become Indian. Not only so, but the development of the Provincial and Subordinate Services has been rapid. The officers are highly qualified: they usually have taken honours degrees at the provincial Universities, and their course of training is as complete as that of officers of the superior Service.

More important still is the complete change of outlook regarding the future of India, the chief index of which is the famous "pronouncement" of August, 1917, regarding responsible government. This changes the whole administrative vista. It definitely marks out India for the Indians. The question of British rule therefore no longer applies, neither in the sense of the rule by British personnel or British services, nor the rule of Whitehall in policy. The principle of self-determination implies the gradual withdrawal of the British officials, a withdrawal which already is much in evidence. How such questions as the executive-judicial controversy will fare when there is no longer any question of foreign domination or foreign "bureaucracy" to be considered is a matter of conjecture. The whole history of India, as well as its social composition, points to a reversion to "prestige," if not to bureaucracy. But these contingencies need not trouble us here. All one need say is that the historian of the transitional period will have a most interesting task.

(*b*) It has frequently been contended that the concentration of power is necessary for the prestige of the Indian Civil Service, or for the position of the magistrate as the representative of the *Raj*. In one aspect this argument is a repetition of the previous one, in so much as the I.C.S. was for many years purely a service for Europeans. In another aspect, it implies the necessity of the prestige of the visible local representative of the central governments, whatever the personnel of the representative. Normally these representatives are members of the Indian Civil Service, a Service which for a record of single-minded work for India and for its high Service standard of efficiency has been unequalled in the history of administration. The position of the district officer, according to this view, is that of a benevolent despot. In the older days this was undoubtedly so. The District Magistrate, who used to stay much longer in his district than the present day officials do, was known by sight and by name to practically every inhabitant of his district. I say "his" district, for districts were often known as "So-and-so's district." He was a real live entity. He dispensed justice (perhaps more justice than law) in his tours; he settled disputes of all kinds, and helped generally where help was needed. He was a combination really of the three powers, for he frequently made laws

of his own. These laws are not written in statute books; they were more the *a priori* assumptions of equity or commonsense and fair dealing. But all this has changed. The Collector-Magistrate is no longer the well known benevolent despot. He is a mere temporary phenomenon. Five years is the usual tenure of his office in one district, so that when he has really come to know his district and be known by the people, he goes to another district to repeat the process. The *personality* of the question has thus practically disappeared. The man has been replaced by the system; personal rule has given way to the rule of law, so that even the unlettered ryot no longer speaks of "So-and-so Sahib" but of the Magistrate or Collector Sahib. The prestige of the person, however, does not affect the prestige of the position; but the departure of the prestige of the person makes a transference of prestige from one office to another easier. Prestige, however, is no argument for the continuance of a system if that system is bad, or if that system has served its day and may now safely be replaced by a more logical system. Sir Harvey Adamson, in his statement on the subject of separation in 1908, remarked:—

"Can any Government be strong whose administration of justice is not entirely above suspicion? The answer must be in the negative. The combination of functions.....is a direct

weakening of the prestige of the Executive. The fetish of prestige in the larger sense has been altogether discarded, and no longer forms an operative part of the policy of the Government of India."

The Hobhouse memorial also dealt severely with this "prestige." "For reasons which are easy to understand," it said, "it is not often put forward in public and authoritative statements. But it is common in the Anglo-Indian press, it finds its way into magazine articles written by retired officers, and in India it is believed, rightly or wrongly, to lie at the root of all the apologies for the present system." The memorial went on to show that the power of inflicting punishment was the main element in this prestige. The contention that the District Magistrate should have the power of inflicting punishment as the representative of the sovereign, it continued, "is based on a misapprehension. The power of inflicting punishment is, indeed, part of the attributes of sovereignty. But it is not, on that ground, any more necessary that the power should be exercised by a Collector-Magistrate, who is head of the police and the revenue system, than that it should be exercised by the sovereign in person. The same reasoning, if it were accepted, would require that the Viceroy should be invested with the powers of a Criminal Judge. But it is not suggested that the Viceroy's "prestige" is lower

than the "prestige" of a District Judge, because the Judge passes sentences upon guilty persons, and the Viceroy does not."

These statements, like many others in the memorial, provided excellent openings for the official jousters of the time. Sir Harvey Adamson said, and Lord Curzon agreed, that the faulty presentation of the memorial delayed the reform.

The death blow to "prestige" seems to have been dealt by Mr. Montagu, whose words at Cambridge, spoken in 1912, were quoted with effect by Sir Surendranath Banerji in the Imperial Legislative Council Budget Debate in 1913—

'Oh India! how much happier would have been your history if that word (prestige) had been left out of the English vocabulary.' But there you have Conservative Imperialism at its worst. We are not there, mark you, to repair evil, to amend injustice, to profit by experience. We must abide by our mistakes, continue to outrage popular opinion simply for the sake of being able to say 'I have said what I have said'..... We do not hold India by involving this well-mouthed word. We must uphold it by institutions, and more and more as time goes on by the consent of the governed."

(*c*) Apart from the question of prestige, why, it may be asked, if separation exists in practice,

should it continue in theory? The answer seems to be that although there is separation in practice, the theory allows, *if necessary* the full use of magisterial powers. Now this can be only for two purposes. One is that the magistrate may be prosecutor and judge, if he cares, the theory and practice of which equally have been disavowed by all responsible authorities, official and otherwise. The other is for the prevention of crime, possible at present under specific sections in the Code of Criminal Procedure. In the former case, the use of his powers by the magistrate would likely justify the most extreme language that separatists could use. Though objection has sometimes been raised to the preventive powers of the magistrate, the second purpose is really a question of public policy. It is a matter for the statesman to decide. If it is necessary for public reasons to grant such powers then such powers should be granted. The social composition of India being as it is, few responsible statesmen would propose to remove these powers from the magistrate or district officer: many indeed would like to see them increased. In any case, it would be possible by legislation so to define the preventive powers of the magistrate as to prevent oppression. For such a purpose I am heretic enough to support the system of administrative law, about which I shall have more to say presently.

(*d*) As an administrative question, it involves, as we have seen, the question of the training of the judiciary. In modern India, with its numerous and well trained bar, the old adventitious system of appointing judges and collectors interchangeably is out of date. In fact, the question of judicial appointments in many respects is the cause of the controversy. In the old days, when either a rough justice was necessary in criminal cases, or the codified law made judicial administration simple, the question of judicial training was not of prime importance. Early in the history of British administration it was recognised that civil, as distinct from criminal judicial work, required both special training and special conditions of service. In early days, too, the notion prevailed that in justice the normal British sense of equity was as valuable as training in legal codes. Even now judicial work in India is relatively simple owing to the elaborate codification of law; and even case-law is simplified by the ample Digests. But modern judicial work requires a considerable amount of specialised legal training. The first recognition of this by the Government was due to the rise of a trained bar. A trained bar makes an untrained judiciary an anomaly and a jest. No system of government should lay itself open to the charge of an inefficient judiciary, whether civil or criminal. The Courts are the guarantees

of rule by law, and both for the confidence of the people and the good of the administrative system they should be above suspicion.

In India an additional difficulty presented itself. The judicial work was done by specially recruited services. The miscellaneous duties of the chief service, the Indian Civil Service, gave only too easy a ground for the rising bar not only to cast aspersions on its lack of judicial training but also to bear a grudge against it on more personal grounds. In many other countries normally the bar looks upon the bench as a crown to its labours. In India, however, though junior appointments were granted to pleaders, the Indian Civil Service kept to itself all the "big jobs"—the District Judgeships and a large proportion of the High Court Judgeships. In the High Courts a certain proportion of appointments is open to the bar; but as these appointments are few, the bar still looks with longing eyes towards the district posts. The whole subject was brought up before the Public Service Commissions, the last of which, the Islington Commission, recommended that forty of the higher judicial appointments (for all-India) should be reserved for the bar. But the difficulty will continue so long as the present service system exists, and so long as the personnel of the Indian Civil Service continues to be in any way European. The difficulty really raises the whole

question of the suitability of the service system as it at present exists for judicial work. Whatever one's views on that subject may be, this at least seems clear, that the existing service system cannot be dropped in a day. For a young Civilian who is afterwards to be a judge unquestionably the best training is in executive work. By it he comes to know the social, political, economic and family circumstances of the people, as well as their point of view. His executive experience is the raw material on which his judicial work will rest. Combined with specialised training in law and procedure, it equips him well for work as a judge. This question, however, will in all probability soon solve itself, as in the near future the English element in the Judicial Civil Service will rapidly diminish, and, one may prophesy, will gradually disappear. The whole question of the district judiciary will then be changed, but one may predict that the future Indian Bar will have a stern struggle to uproot the vested interests of an Indian I. C. S. Even so, it must be remembered that no judicial system can be absolutely rid of some of the salient features of a service system. There must be higher and lower posts, with the higher exercising some control or supervision over the lower. Thus, in England there is a judicial hierarchy, which has been very largely accountable for the correction of mistakes

by the lower judiciary, and, incidentally, has preserved the judiciary from external attack.

Mr. P. C. Mitter really hits at the heart of the problem when he suggests a judicial service. Whether a judicial service on the lines of the present service system would be an improvement is doubtful; but Mr. Mitter's suggestion at least recognises that judicial work in a modern well organised government is a specialised function. It does more. The very word "service" suggests senior and junior, superior and subordinate positions, it suggests training, inspection, reports (administrative and personal), promotion and degradation. In this it recognises the absolute impossibility of getting rid of some of the reproaches cast at the existing system by its enemies. It is said that a District Magistrate can make or break a subordinate by his reports. If the subordinate officer does not 'convict' when the Magistrate is known as a 'convicting' magistrate, then that officer's future is marred. Or, it is said, a magistrate may not interfere in the course of criminal justice, but the officers *feel* his influence as all-pervading. They *know* that his favour counts for much, they *know* that their steps in promotion depend on his good opinion, whatever the official forms may say, or however remote his actual interference may be.

To transfer the function of supervision and report to a judge does not alter the position one whit. Judges are known as "hanging" or "lenient" judges; and if so their subordinates (not literally, of course) must be "hanging" or "lenient" judges. The judge may not interfere; he may seem to take no notice of cases except when brought before him on appeal. But all the time he may be noting in his mind or files the fact that So-and-so is an "acquitting" judge, because acquittals do not involve reversals of appeals or hard remarks. And, if there is a service system, there simply must be training, and therefore, supervision, which implies blame and praise. To receive such praise or blame from a judge does not make it substantially different from receiving it at the hands of the Magistrate-Collector.

And this must pervade the whole system, even to a Lord Chief Justice or a Lord Chancellor. Standards of judgment must be laid down, and in judicial work such standards are difficult to establish. One judge may 'work for returns'; another may acquit to avoid appeals; another may be severe, but his many convictions may mean many appeals; the judgments of another may be noted for their display of legal learning. The personality of the judge, his popularity, a thousand other

things may be taken into account. The fact is that finally a choice must be made when an appointment falls vacant. One judge will take one point of view; another may differ from him: ultimately the executive must do its best and appoint whom it considers the most suitable man.

For a service system this much may be said, that it reduces the likelihood of political appointments to a minimum. But the service system can only be successful if it is sufficiently elastic in its method of recruitment to give a fair chance to barristers and pleaders. A service system cannot secure the independence of a judge. Where he is amenable to conduct reports, where his pay is on a time-scale or a graded scale, where there is the regular routine of promotion, he must always act as if the eye of his superior were turned upon him. Personal idiosyncrasies, likes and dislikes, and personal whims must enter into the question of recommendation and promotion.

Presumably a good judge will give as fair a verdict in appraising the work of his subordinates as he would in a civil suit. To compel such verdicts to follow rules is open to the objections already mentioned. The only fair method would seem to be to balance personal judgments by the judgments of others; in other words, a bench should recommend names for

promotion to the executive government, which, though it has the final word, should show reason why it diverges from the opinion of its judicial advisers. This system, it is true, does not commonly exist, but a variant of it used to exist in Austria, where the nominations for the Reichsgericht were made by the Reichsrath to the Executive, which had to make appointments from the list given. In Belgium the Senate provides a list from which the executive must choose. The drawback to such systems is that, except where the practice has grown up for select and expert Committees of a legislative to choose lists, the judges are party candidates.

In connexion with judicial training in India much has been written on the difficulty of securing officers competent for both executive or judicial work. At one time it is stated that, under the combination system, an officer neglects his judicial at the expense of his executive work ; at another it is said that an officer neglects his executive at the expense of his judicial work. At one time complaints are made that able officials prefer judicial work : at another, that they prefer executive work. Some officials have claimed that the best minds are required for executive work, others have claimed the best for the high post of judge. As we have seen, the force of circumstances compelled the

Government to make a division of functions in the Civil Service, in the Regulation Provinces. Behind all these contentions and complaints lies the essential difference between executive and judicial work, and the force with which each type of work appeals to individual temperaments. Sir James Fitz James Stephen wrote—

"There is an obvious difference between the judicial and executive temper. A judge must go by strict rules. His work comes to him instead of his going to it. His duty is discharged where he has given a decision according to law, and he is unconcerned with its consequences in the particular case and with the process of carrying it into effect. An executive officer, on the other hand, must constantly look beyond rules. He must frequently have an eye rather to the particular cases than the general rule. He has to take the initiative in a thousand ways and for all sorts of objects. He has to watch the execution and carrying out of his measures, and their practical effect, and he is thrown into continual personal and informal intercourse with every class of the people."

The conditions of the judicial—fixed routine, office, court, etc.—also differ from the conditions (touring, inspecting, etc.) of the executive.

Sir James also expresses himself on the question of preference between executive and judicial duties as follows:—

..... "but to expect one man to carry on both functions at the same time appears to me unreasonable. It is not in human nature that he should not allow the one towards which he happens to be most strongly drawn to give the tone to the discharge of his duties in the other. I believe that this has actually happened in the Punjab to a very great extent, and that the legal element, especially amongst the younger officers, predominates over the executive."

The reasons he gave are these—that in executive work, much discretion is left to officers, and that there is no definite test as to whether an officer is doing good or bad work. Only time and experience can test his work. But with judicial work all this is reversed. Each judge has to keep an account of every minute of his time. Forms have to be filled in, cases decided, evidence taken, judgments given with reasons. He has to know the Codes of Civil and Criminal Procedure. Above him is the superior Court which may call for his records and definitely pronounce a verdict on his work. "The effect of all this is that a district officer, who has both executive and judicial functions to discharge, perceives, that his hope of promotion and his personal comfort alike require him to discharge

his judicial duties with entire exactness and punctuality, but that no such precise test is or can be applied to the discharge of his executive functions. Hence the executive functions were neglected for the more lucrative and comfortable judicial functions.

In the same year (1872) Sir George Campbell, Lieutenant-Governor of Bengal, complained that the best officials were required for the executive work in Bengal, and to secure this he initiated his well known scheme of parallel promotion. In 1896 Sir Charles Elliot showed that the judicial line had become unpopular because of a block in promotion.

To many officials the type of work is a matter of indifference: the things that matter are pay and prospects. Many men are Collectors only because they were not chosen as judges, who used to be better paid. Many men are judges who, had it not been for pay and the general conditions of the position, would have been Collectors. In a service system therefore, due regard must be paid not only to types of mind or temperament, but to the actual conditions of service. The executive officer has a reasonable ground for complaint if his brother officer of the same seniority gets more pay and has an easier life, because of his peculiarly judicial temperament and the necessities of an independent judiciary, or, on the other hand, if, because of his own peculiar abilities as

an executive officer, he has a more trying life, with less pay.[1]

(*e*) A further note to be made in connexion with the controversy is that in India the judicial powers exercised by District Magistrates have certainly served a good purpose. By no means the whole of Indian educated opinion, since such an opinion has expressed itself, has been in favour of separation. A large number of responsible Indians even to-day gravely doubt

[1] The difficulties of the service system may be illustrated from the following conclusions of Sir Ashley Eden and Sir Charles Elliot, both Lieutenant-Governors of Bengal :—

In an official letter (of 1894) from the Government of Bengal to the Government of India, the following passage occurs:

"Looking at the results of the present system on the officers now in the service, Sir Charles Elliot believes that the disadvantages which Sir Ashley Eden perceived have gone on increasing and that the system cries for reform more loudly than it did in 1881. The failure may briefly be summarised as coming under the following heads:—(1) antagonism between the two branches of the service; (2) unequal promotion; (3) want of experience in the Judges. As to the first head, the Lieutenant Governor does not think that the feeling of separation occasioned by the system is a healthy one: it tends to divide the service into two camps and to destroy its *esprit de corps* as far as the judges are concerned it gives a bias to their minds and leads them to criticise executive action unfavourably, while in the case of magistrates it serves to encourage a mental attitude of opposition to judicial authority. In regard to the second head, the proper relations as to seniority and promotion are thrown out of gear. It is clearly desirable that a Judge should (if possible) always be senior to the Magistrate whose appeals he hears, and from the nature of the case this cannot always or even often be so under existing arrangements. He is frequently his junior, and, not only this, but it constantly happens that the same man acts as Judge in the hot weather, hearing appeals from a Magistrate who is his senior but in the cold weather he loses his acting appointment, and becomes a Joint Magistrate serving under the orders of the very Magistrate whom

the wisdom of reducing the control of the Magistrate in any way. Mofussal India is still as it was hundreds of years ago, save for a layer of educated men at the top. The difficulties which confronted magistrates one or two generations ago have not been eradicated. Public feeling on crime is not what it is in the West. False cases, bribery, offences of a kind peculiar to India, such as dacoity, unnecessary delays in trials—frequently the result of very questionable causes—all these are common to-day. One important change has taken place; that is in the efficiency of the subordinate magistracy. Wrong judgments, faulty procedure, prolonged trials in petty cases, unnecessary adjournments, timid sentences, or unnecessarily severe sentences, sometimes from

---

he may have censured or instructed in his official position. This cannot be good for the temper and discipline of the officers concerned. As to the third head, the rapidity of promotion in the Civil Service has created a new difficulty which practically counterbalances whatever benefits to the administration have arisen from the setting apart of a body of men for the work of the Bench. It is true that Judges continue longer in the Bench, and acquire, towards the end of their service, more judicial experience, but, on the other hand they take their seats on the Bench at an earlier age and before they can have obtained the requisite experience for their work. No early judicial training is possible, and a Civilian when first appointed a Judge has to learn the detail of civil work, without wide knowledge of the people and the mature experience which the older system entailed. Sir Ashley Eden considered that a man cannot be a good Judge without knowledge of settlement and Zemindari management, and to this Sir Charles Elliot would add that an officer cannot be a good judge until he has had considerable experience as a Magistrate. At present men are made Judges who have often had no experience as Magistrate of a district, and they are apt to set up an ideal standard of evidence, not knowing what are possible standards."

petty motives, used to be reported regularly of the subordinate magistracy. The one correcting influence was the Magistrate-Collector. These abuses have not disappeared, and nothing is more certain than that if the present system is abolished, an equally or more effective system will have to take its place, otherwise the terrible prophecies of a century of executive officials may only come too true. As it is, the power of law, the spirit of the work of generations and the width of appeal have prevented abuses in the present system.

No doubt unconsciously, the Hobhouse memorial paid a very high compliment to the existing system. As has been noted, with the memorial was a collection of twenty cases illustrative of the evil of union. Since then a few other cases have been added. Some of these cases are dubious examples of the principle they were chosen to illustrate. But even supposing all were true, it reflects no little credit on the Indian Civil Service that during the many years of the 'iniquitous' system which has so oppressed the people, only twenty or thirty cases can be quoted where abuse has resulted. In open cases of abuse, moreover, the officers received condign punishment from the Lieutenant-Governor. But where hundreds and thousands of cases are tried by these officials from year to year, and where the chance of abuse exists,

surely no higher compliment could be paid to any human service than that the enemies of the system can produce so few examples of abuse. Few systems of government could produce such a record. The "personal" government of the service system may well claim that the "personal" element has meant justice to the people. Whatever failings the much abused I.C.S. may have, certainly injustice or the misuse of its powers cannot justly be brought against it. In the few years that the British element in it have to run they will have free consciences if they live up to the standards of their predecessors. The Indian Civil Service may pardonably speak of "prestige," and part of its "prestige" has been to prepare India to dispense with the type of men who originally composed it.

One wonders how many "cases" of abuse could be brought against the Civil judicial system in India. These cases would not prove the union of powers to be correct; but they would help to balance the judgments of those who read or hear one side of the case.

(*f*) I have already noted that, especially in the early days of the controversy, exception was taken to the union of purely revenue and judicial powers. The objection appeared at various intervals and in various places in the controversy. But it never became a prominent issue. It was mentioned in the Hobhouse memorial:

it is mentioned in the short note on the general question by the Islington Commission. (This Commission did not pronounce any judgment on the merits of the case, as such was outside their terms of reference. It merely marshalled the arguments, for and against.) But for good reasons it was not made a leading issue. (The land revenue is the chief source of income for the provincial governments. Its essential nature in the scheme of things is well indicated by the usual name of the District Magistrate—the *Collector*.) The system of assessment varies from one part of India to another. In Bengal it is fairly easy owing to the permanent settlement. But in every case revenue collection requires special training and special machinery. The reasons for special revenue judicial administration are that only the revenue officials know the departmental business, and that it is their duty to enforce government rights in revenue matters. Moreover, it is always open for revenue payers to appeal to the civil courts against the decisions of revenue courts. The revenue courts themselves are conducted like ordinary courts, and that there is no need for a change may be proved by the records of the Board of Revenue, which show that in many cases the revenue courts have decided in favour of appellants.

The Board of Revenue, and the general administration of land revenue, are so constituted

as to be practically a self-contained judicial authority. All such agencies—*e.g.*, the Board of Inland Revenue in England—must have considerable powers of decision, with, at the same time, latitude in the right of appeal to the ordinary civil courts. Land revenue is so essential to the general scheme of government in India, that any *a priori* theory of separation which affects them requires the most careful consideration. The fundamental assumption of separationists in this case is that injustice is done to revenue payers. As a matter of fact, such injustice does not exist to any noticeable extent, if at all. But when we talk of the rights of the people we must also not forget the rights of government. Government is legally a corporate personality, liable to be sued by any subject. It must defend its own rights, and in all separationist theories of liberty, there is a tendency to speak of the independence of the judiciary. The other side of the question, the free working of the executive, is not mentioned. Revenue Courts are a case in point. Revenue must be collected regularly, and, of course, equitably. But to place the revenue authorities in the hands of courts, which might have a permanent bias against the government, would not only introduce delay and confusion in revenue administration, but would obstruct the whole business of government. Not only so,

but such courts would have to be specialised courts. Some sort of revenue appellate authority would be required in each district, so that not only would the cost be enormous, but it would be wasteful. For the present smooth working machinery it would introduce obstruction and delay. It would upset the administration.

It may be noted that Mr. Dutt, who had a long revenue experience, did not include this aspect of the question in his scheme. Nor did the memorialists, conveniently enough perhaps, suggest any alternative to the present scheme. Perhaps those behind the memorial were aware of the difficulties of separation, an index of which is the enormous number of appeals which the Civil Courts have to hear after the periodical settlements. These appeals usually require an officer on special duty for several months.

The subject of Revenue Courts raises a much wider question. Revenue Courts are partly in the nature of the administrative courts of continental Europe. They are presided over by government officials, and government in practice reserves certain subjects for them. The law and procedure of the courts are prescribed by statute; actual trial is not, as in the continental courts, inquisitorial, but normal, like those of a civil court. The chief difference is that the judges are executive officials. Appeal also lies from the

revenue courts to the civil courts and, in cases, to the High Courts.

At present, legally speaking, the Government of India is a unit. It is a corporate body, which may sue or be sued. This characteristic is explained by its origin. The present Government of India is the lineal descendant of a commercial company. In the days of the Company actions against the Company's servants were actions against the Company, and they were heard in the ordinary courts of law. When the Company became the Crown, the Secretary of State in Council assumed the corporate character of the Company. Thus the Indian citizen enjoys the guarantee of the law courts against illegal action by the Government. The administration, moreover, cannot act without prior legislative sanction for its acts, otherwise the acts may be tested in the law courts. The government, as Sir John Strachey pointed out, is amenable to law as well as the subjects. Hitherto the executive control of the legislature has enabled the executive to have laws passed to suit administrative expediency. But the principle of the rule of law has been technically observed. Another important feature of the administrative system which prevents arbitrariness must be noted. It has been the habit of the executive government to restrict by a large body of administrative rules the latitude granted

by law to the administration. Every official, whatever his work or his Department, is only too well aware of these rules. They are more effective than the general Acts of the legislature. The highest and lowest officials are bound by them. There are, too, the traditions of services or the customs of administration which bind officials to certain rules. No one has put this more plainly than one who himself was both subject to and made these rules,—Sir John Strachey. Speaking of the post he himself held, he said—"The checks against the wrongful exercise by the Lieutenant-Governor of arbitrary powers, are complete. There is no branch of the administration in which he is not bound either by positive law or by the standing orders of government or by the system which has gradually grown up under his predecessors." This is even more true of district officials, for not only have they definite laws and administrative rules, but they are actually subject to supervision and correction.

The question arises whether in India, with its many official hierarchies, the continental system would not be more beneficial than the present system. To my mind one of the most extraordinary features of British administration in India has been the easy transference of English legal principles and constitutional practice to a land where the contrasts between it and England are so notable. Not only in the racial and mental

characteristics of the people is the contrast notable, but their whole social and economic composition is different. The mixed nature of the population, and the peculiar composition of the government make the actual problems of government unique. Apart from the personal element in government work, government, in laws, regulations and institutions, meets the people at every turn of their lives. The Governments of India are the most socialistic in the world, yet hitherto they have been content to carry on with the legal and administrative maxims which have been applicable to an individualist type of government and to a more or less homogeneous population. In spite of their alien composition, hitherto the personal and legal relations of the government services have been wonderfully free from untoward incidents or cases. Such cases, of course, do occur, but the infrequency of their occurrence is remarkable. Now we are in a transition period. In the next few years the government administrative services will rapidly, and almost completely, pass into Indian hands. It behoves us therefore to cast round for a means of guaranteeing rights, both of the people and of the government, among a people and for a government whose traditional moral outlook is different from that of its past administrators.

One of the most notable differences between India and England is the general attitude

adopted towards government by the people. In England normally individual initiative is the motive force in the ordinary civic and economic life of the community. In India government is the 'father and mother.' Individual initiative is woefully lacking. Government is looked on as not only all-powerful but as a benevolent father. It must, through its servants, encourage, drive, advise, or actually do things itself—usually the last. Thus, in India, a vast amount of activity which in other countries is conducted by private agency is done by government. This means government institutions and government services. For the efficiency of the work as work, and for its effectiveness among the people two things are necessary. On the one side there must be latitude for personal or individual action, without undue extrinsic interference. On the other side there must be guarantees against the arbitrary use of departmental powers conferred by government, or the abuse of power as a government servant on the part of administrators, for government service in itself confers a prestige or *izzat* which may lead to abuse. In a future India, which has forgotten its racial animosity towards the alien Europeans, the government services will be manned by a personnel which will inevitably clash with existing social, religious and economic interests. Hindus will have troubles arising from caste; both