Government of Maharashtra

Report of the Committee on the Separation of the Judiciary from the Executive 1947

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RESOLUTION.

Home Department, dated 1st February 1947.

The question of the separation of the Judicial and executive powers of the executive officers of Government has been under the consideration of Government for a long time. It has, therefore, been decided to appoint a Committee to consider the matter and to present a report to Government with its own recommendations setting out fully the advantages and disadvantages of its proposals in comparison with the existing system. The Committee, in making the recommendations, should consider the report of the Committee appointed by the Madras Government on the same subject in July 1946.

2. The Government of Bombay accordingly appoints the following gentlemen on the Committee :—

Chairman.

The Honourable Mr. Justice N. S. Lokur.

Members.

1. Mr. R. A. Jahagirdar, M.A., LL.B.
2. Mr. C. K. Daptary, B.A. (Cantab.), Bar-at-Law, Advocate General, Bombay.
3. Mr. B. N. Datar, M.A.
4. Mr. A. A. Khan, M.L.A.
5. Mr. Y. B. Chavan, B.A., LL.B., M.L.A., Parliamentary Secretary.
6. Mr. S. D. Patil, M.L.C., Khandesh.
7. Diwan Bahadur Chunilal M. Gandhi, B.A., LL.B. (Surat).
8. Mr. Himatlal Shukla, B.A., LL.B.
9. Mr. S. S. More, LL.B.,
10. Mr. G. G. Drewe, C.I.E., O.B.E., I.C.S., Secretary to the Government of Bombay, Home Department.
11. Mr. W. N. Gallagher, I.C.S., Deputy Secretary, Home Department (who will also act as Secretary of the Committee).

Mr. A. S. Bam, I.C.S., Deputy Secretary to Government of Bombay, Home Department, who later succeeded Mr. Gallagher as Secretary.

FOREWORD

The Committee began its work on 15th February 1947 and drew up a questionnaire (Appendix A) which was circulated to the Judges of the High Court, Session Judges, Revenue Commissioners of Divisions, Secretaries to Government, District Magistrates, Heads of Police in the Province, Bar Associations, prominent individual members of the Bar and several others. The questionnaire was also published in the press and members of the public were invited to send their replies. Although replies from the public at large were not numerous, there was still a select body of opinion that showed detailed acquaintance with the subject and a strong desire to see all control over the Judiciary by the Executive removed. It so happened however that our proceedings coincided with the Sessions of the Constitutent Assembly and the public mind was so occupied with the very much wider issues which that body was considering that it was inevitable that its deliberations should over-shadow our discussions. Even so, the Committee had the advantage of a very large and varied body of opinion. Almost all the persons to whom the questionnaire was sent gave replies and the points of view were various and different. The Committee had also the advantage of being able to examine several distinguished gentlemen, some of whom had first hand experience of the working of the system of separation. A list of the gentlemen, who were selected to be invited to give oral evidence before the Committee is at Appendix B. They were examined in the Council Hall, Bombay, and the proceedings at that stage were open to the public and the press. The Committee held twelve sittings in all in Bombay, besides a meeting of the Sub-Committee.

In accordance with the terms of reference, the Committee fully considered the Madras Committee's Report, which was mainly concerned with the question of separation of the judiciary from the executive in the mofussil. In this province also the separation virtually exists in the presidency Town of Bombay, so that the desire for emancipation of the judiciary from the executive was more prominent in the minds of those who came from the districts than those from the presidency town. In fact, at a very early stage of the proceedings, the latter were of the opinion that the terms of reference were too narrow and their evidence tended to focus more on the future of the High Court and its independence from executive interference. They urged that a provision should be made in the new Constitution then being drafted in New Delhi to ensure that the High Court would be totally free from the control of any kind of the Provincial Government. It so happened that the Constituent Assembly was debating this very question of the independence of the High Court at the time when some of the witnesses were being examined,

and as many High Court Judges and eminent lawyers were expressing the views publicly on the subject and not a few of the more distinguished witnesses examined by the Committee devoted much of their attention to it, the Committee considered the subject as closely associated with the terms of reference although not strictly falling within them and decided to place its opinion on this matter also before Government. It is possible that by the time the report is out, the question would have been settled by the Constituent Assembly to the satisfaction of every one.

Some of the witnesses strongly advocated specialization inside the judiciary by separating the Civil work from the criminal from the top to the bottom. According to them there should be a bifurcation in the District Court by separating the office of the District and Sessions Judge into two judgeships—Sessions and Civil—and even in the High Court some of the Judges should devote themselves exclusively to criminal work. But as will be seen from the body of this report, this suggestion did not commend itself.

CHAPTER I.

Historical Survey.

The history of the separation of the judiciary from the executive goes back in India to the early days of the British Rule when great movements from despotism to freedom were sweeping over Western Europe, and the American Colonies had successfully fought their war of independence. The study of political ideas was regarded no longer as an academic pastime but was aimed at framing monumental constitutional codes that would declare and safeguard for all time rights and principles vindicated after centuries of struggle and suffering. The theory advocated was that Government should consist of three parts—Legislative, Executive and Judicial, the Judicial being a counter-weight to the executive to keep the state in balance, and great importance was attached to the independence of the judiciary for preserving freedom. So far as India was concerned this independence had a large meaning then than now, since at present there is virtually a separation of the judiciary from the executive except in the magisterial Courts in the mofussil.

Prior to the British rule, all power placed with the Judiciary and the executive was more or less concentrated in one head of a specified area, who often tended to be despotic and there was no effective means whereby the rights of an individual against the Ruler could be enforced. But after the advent of the British rule, the new Rulers had to decide the form of Government to be adopted and they decided not to attempt to sweep away the existing system, but to reform and perfect it. They aimed at cleansing the administration from corruption and high-handedness, but were also to alter the form of Government, to which the people had become accustomed and which they well understood. So contrary to contemporary ideas elsewhere, they concentrated magisterial and police powers in one and the same individual, who was designated the Collector and was made the head of the District. But this system which involved the subordination of the judiciary to the executive was disapproved from a very early stage, and as early as in 1793 Lord Cornwallis himself expressed his views that "Government must divest itself of the power of infringing in its executive capacity the rights and privileges which it has conferred on the land-holders. The revenue officers must be deprived of their judicial powers".

For many years in the beginning of the 19th Century, the views of British statesmen and administrators in India seemed to swing towards or veer away from the idea of complete separation of powers from time to time and discussions on the question were at that time quiet and academic in tone compared with the keenness which appeared in the debates during the latter part of the century.

After the memorable year 1857, there seemed to be a hardening of feelin in the attitude of the administration in India itself against any progressiv step being taken in this direction. Even the powerful influence of the gre liberal movement at the close of the 19th century which ushered so man reforms and which was the cradle of the Congress was unable to overcom the strong reactionary feeling on the spot. With the entry of the Congre into the lists, the struggle became one between the people and the Imperi Government and in the heat of debate many arguments were used whic would in these days appear almost incredible. After the turn of the centu the movement became somewhat slack by reason of the deferred hopes any reforms and interest in it gradually waned to give way to other great causes. The passage of time since then has brought two great wars. T infant Congress has grown to be the greatest political party in India, a has succeeded in securing independence.

Through all this panorama of changes and development, in spite disappointments and set-backs, as the more detailed story which is about to unfolded will reveal, there has still remained deeply planted in the hearts those who remember the earlier days a strong desire to see the comple emancipation of every Court and every Judge from every vestige of influen or control or interference by the State that might fetter his freedom to exerc the powers entrusted to him according to his own good conscience and t standards of uprightness.

2. For the convenience of narration, the long period during which t reform has been debated can be divided into five Sections as follows :—

History can be split upto into five periods.

(1) 1780 to 1838.
(2) 1838 to 1860.
(3) 1860 to 1908.
(4) 1908 to 1921.
(5) 1921 to 1946.

First period.

3. 1780 to 1838.—The East India Company displaced the Native Gove ment in the Lower Bengal and undertook the respon bilities of administration in that part of the count Under the per-British Government, the duties of police were discharged by village watchmen and establishments maintained by the Zamindars, and perso charged with crimes or misdemeanour were tried before criminal Courts Foujadary Adalats—the proceedings of which were superintended by Collectors of Revenue. The officials of the East India Company, desirous proceeding with caution, took particular care to frame their own system administration of criminal justice "on the oriental plan modifying only wh absolutely necessary to ensure real benefit to the people" (Minute by Sir Halliday, Lieutenant Governor of Bengal, dated the 30th April 18

paragraph 54). At the outset all executive and judicial, powers were combined in one officer, but this underwent a change. From 1780 to 1787 the offices of the Judge and the Collector were held by different persons. But in the latter year it was resolved that the offices of the Judge should be held by the person who had charge of the Revenue and from that time until the year 1793, the several duties of the Collector, the Judge and the Magistrate were discharged by the Collector.

4. In 1793 the first noticeable step towards separation was taken by Marquis of Cornwallis who decided to vest the duties of collecting revenue and administering justice in separate officers. In his Minute he emphasised the desirability of divesting revenue officers of the powers of administering justice. His efforts led to the passing of the famous Judicial Regulations of 1793. The following remarks in the preamble show the spirit in which the Legislation of 1793 was framed :

> "To ensure, therefore, to the people of this country as far as practicable the uninterrupted enjoyment of the interminable benefit of good laws duly administered Government has determined to divest itself of the power of interferring in the administration of the laws and regulations in the first instance, reserving only as a Court of Appeal or review the decision of certain cases in the last resort, and to lodge its judicial authority in Courts of Justice, the Judges of which shall not only be bound by the most solemn oaths to dispense the Laws and Regulations impartially, but be so circumstanced as to have no plea for not discharging their high and important trusts with diligence and uprightness. To deprive the Judges of the Courts of the power of delaying or denying justice, the Governor General in Council has determined to frame the constitution of Courts upon such principles as will enable every individual, by the mere observance of certain forms, to command at all times the exercise of the judicial power of the State thus lodged in the Courts for the redress of any injury which he may have sustained in his person or property."

5. The system thus brought into existence by the Regulation of 1793 came to be known as the Regulation system. This system denuded all District Magistrates of all judicial powers. But this was soon found to be practically intolerable and first in 1807 and afterwards at different intervals the judicial powers of District Magistrates were increasingly restored until the Regulation of 1821 gave legal sanction to the re-union.

Second period.

6. 1838 to 1860.—The combination effected in 1821 did not continue long. The voices clamouring for its redivision could not longer be unheeded. Consequently a committee was appointed in 1837 with Mr. Bird as its Chairman. The Committee submitted its report in the following year. Sir F. Halliday who subsequently became one of the

virulent opponents of separation, was one of the members of the committee and in his Minute of Dissent he scathingly attached the system of combination of functions. In accordance with the recommendations of the Committee, the separation of the offices of Magistrates and Collector was gradually effected throughout the lower provinces so that by 1845 they were every where disunited except in the three districts of Orissa. But the separation did not endure long without being severely criticised. It was assailed by Lord Doulhousie in his Minute dated the 24th April 1854. He was both the Governor of Bengal and the Governor General in India. He asserted that the separation of the two offices had been injurious to the character of the administration and to the interest of the people (paragraph 3). So he submitted his own plan for administering the Revenue and Police business of the districts of the lower Provinces by means of Collector-Magistrates; instead of the then prevailing "system of separate Collectors and Magistrates". Lord Dalhousie's plan was both vehemently supported and severely attached. Among its supporters Sir F. Halliday, who had completely changed his views since he wrote the minute of dissent as a member of the Police Commission of 1837, was the foremost. Mr. Grant ably led the opposition, but the Secretary of State for India, by his letter dated 14th April 1859, gave his sanction to the scheme proposed by Lord Doulhousie and thus gave a temporary respite to a controversy which had gone on for a period of about five years.

Third period.

7. 1860 to 1908.—The third period of the discussion begins with the appointment of the Police, Commission of 1860. After the mutiny, the Government of India keenly felt the urgency of improving and reorganising the police machinery and they appointed the Police Commission to consider the report on the whole question. This Commission submitted its report in September 1860. The Report conceded the theoretical principles of a complete separation of the two functions, but at the same time opined that it was impracticable to relieve the Magistrates of their judicial duties. They recognized that their recommendation was a "departure from the principle" of separation and made Dome suggestions to make their "departure from the principle" less objectionable in practice. "The proposal of the Commission was accepted by Government and a Bill was introduced by Sir Bartle Frere on 29th September 1860 "to facilitate improvement in the Police of India". At the second reading of the Bill the principle of separation came to be hotly discussed. Sir B. Frere, replying to those members who advocated complete separation on the ground of principle, said "It is one thing to lay down a principle and another to act on it at once." He very frankly admitted that his Bill embodying a "compromise was "a half and half measure". The Bill, when passed, became Act V of 1861. This legislation settled for Bengal as similar laws did for other presidencies, "the question of the continuance of the union of judicial and executive police functions in the same officer, which had been discussed with such energy for

nearly forty years. The application of the principle of separation, theoritically perfect, was qualified by an exception demanded by the conditions under which the British Government of India was carried on" (Mr. J. W. Quinton's note of 1884).

8. The first Indian Penal Code (Act XLV) was passed in 1860 and the first code of Criminal Procedure (Act XXV) in the following year; the former code was altered or amended in 1864 while the latter, after being amended in 1862 and 1869 came to be completely overhauled in 1872 as Act X of that year. At that time of each endeavour to amend the Procedure Code the question of separation was repeatedly debated. This discussion came to be summed up by Mr. Fitziames Stephen in his Minute on the Administration of Justice in British India. The Governor General, to whom the Minute was forwarded by the Secretary of State, expressed his inability to decide at once upon the suggestions made in the said Minute and decided "to invite an expression of the opinion of the local Governments and Administrations upon such of the proposals made by Mr. Stephen as concern them more closely" (Resolution Nos. 197-208 dated the 3rd February 1873).

9. On the question of separation of judicial functions from the executive functions, Mr. Stephen expressed his adverse opinion in emphatic terms. He advanced various reasons in support of his views. But the strongest argument that he advanced was that "the position of the District Officers" would be "materially weakened" if the separation of functions be carried out. In this view Mr. Stephen was supported, with unanimity, by the Local Governments whose views were invited. All of them stressed the necessity of keeping with the District Officers the administration of the minor branch of criminal justice combined with executive functions.

10. In 1886 the Indian National Congress adopted a resolution recording an expression of "universal conviction that a complete separation of executive and judicial functions has become an urgent necessity"; and urging the Government of India "to effect this separation without further delay". Similar resolutions were passed in 1887 and 1888 and the demand formed, in 1889, 1890 and 1891, the first section of an "omnibus" resolution affirming the resolutions of the previous Congress. In 1892 the Congress again carried a separate resolution on the question, adding to its original resolution a reference to "the serious mischief arising to the country from the combination of judicial and executive functions". In 1893, the Resolution carried by the Congress ran as under :—

"That this Congress, having now for many successive years vainly appealed to the Government of India to remove one of the greatest stigmas on British rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress,

humbly entreats the Secretary of State for India to order the immediate appointment, in each province of a committee (one half at least of whose members shall be non-official natives of India, qualified by education and experience in the working of the various Courts to deal with the question) to prepare such a scheme for the complete separation of all judicial and executive functions in their own province with as little additional cost to the State as may be practicable, and the submission of such schemes, with the comments of the several Indian Governments thereon, to himself, at some early date which he may be pleased to fix."

11. A similar resolution was passed in 1894, 1895 and 1896.

12. Sir Pherozeshah Mehta gave expression to the Congress demand on the floor of the Bombay Council when in 1893 he moved a resolution in which he demanded the handing over of the magisterial work to the subordinate civil judiciary.

13. The persistent demand by the Congress found formidable and remarkable support in a historic Memorial, dated the 1st July 1999, signed by eminent British men, and demanding complete separation.

14. The Memorial, which was responsible for starting a long and what became on occasions, a venomous controversy, was circulated for official opinion, But after studying the several opinions received, the Government of India decided to take no steps in the direction indicated by the Memorialists. In their letter written in 1908, Government of India opined as under :—

"The consensus of opinion in favour of the existing system, combined with the faulty presentation by the Memorialists of the case for separation, debarred Lord Curzon's Government from deciding finally either to reject their proposals altogether and simply maintain the *status quo*, or to accept the abstract principles laid down by them and to endeavour to apply them tentatively and experimentally in some selected regions."

Fourth period.

15. 1908 to 1921 : This period saw an astonishing change of front on the part of the Government of India. Till 1908 the Government of India had consistently shown their opposition to any measure of separation which, in their calculation, was inevitably to lead to weaken the position and affect the prestige of the District Magistrate But Sir Harvey Adamson, who was then Home Member, in his Budget speech in 1908 gave expression to views, which, though cautious, represented a welcome softening of their erstwhile unbending opposition. He said :—

"The Government of India have decided to advance cautiously and tentatively towards the separation of judicial and executive functions in those parts of India where the local conditions render that change possible and appropriate. The experiment may be a costly one but we think that the

object is worthy. It has been consistently pressed on us by public opinion in India. I have had the pleasure of discussing the question with Indian gentlemen, among others with my colleagues, the Honourable the Maharaja of Darbhanga and the Honourable Mr. Gokhale. Their advice coincides with my own view that the advance should be tentative and that a commencement should be made in Bengal, including Eastern Bengal. It is from Bengal that the cry for separation has come ; and if there is any force in the general principles which I have expounded, it would appear that the need for separation of Police and Magisterial functions is more pressing in the two Bengals than elsewhere."

16. This pronouncement was made without previous consultation with local Governments. This was a significant departure from the usual official practice. Sir Andrew Fraser remarked : "The Government of India, without letting the Local Governments or other authorities throughout the country, know anything about it, have suddenly sprung the matter on the community as settled". After the delivery of Sir Harvey Adamson's speech in the Imperial Council, his scheme was sent to the Government of the two Bengals for report. But before any step could be taken disorders broke our in Bengal and the implementation of the policy outlined by Sir Harvey had to be postponed.

17. The matter was again taken up by public workers. Mr. (Sir) S. N. Banerji, in March 1913, moved a resolution in the Viceroy's Council requesting the Government of India to make grants to Local Governments to enable them to carry out the experiment of separating the two functions. Sir R. Craddock on behalf of Government opposed the motion on the ground that "the question was still under consideration" and on being pressed he conceded that Government accepted the general principle of separation.

18. In the same year the question was raised on another front. The Public Service Commission in 1913 recorded a good deal of evidence on the point, but as their report shows, treated it as a side issue only. They recorded a resume of the arguments on both sides and came to a non-commital conclusion, leaning a little perhaps in the direction of separation.

19. The world war I Broke out immediately thereafter and this question, along with many others of purely domestic interests, was indefinitely shelved.

Fifth period.

20. 1921 to 1946 : The Government of India Act of 1919 brought into existence the new provincial councils which began to show greater and more active interest in this problem. In most of the Provincial Councils resolutions were moved by non-official members demanding separation. We give below some of these resolutions.

(i) Bombay.

21. On the 30th September 1921 Mr. Kanji Dwarkadas asked the following, questions :—

(*a*) Is it a fact that the Local Government are considering the separation of the executive and judicial function in this Presidency also ?

(*b*) If the answer to (*a*) is in the affirmative, when may a definite announcement on the subject to be expected ?

The Honourable Mr. M. H. Hayward replied : "the question is under the consideration of Government."

22. The reply being unsatisfactory to the non-official side of this Council Rao Bahadur G. K. Chitale representing Ahmednagar District moved the following, resolution on the 1st of October 1921.

"This Council recommends that the executive and judicial functions be separated from the 1st of January 1923.

(*a*) by investing subordinate Judges with magisterial powers wherever possible,

(*b*) by the appointment of resident magistrates ;

(*c*) by taking such other steps as may be necessary and desirable for effecting the separation."

23. Government members opposed the resolution, but Mr. Hayward made a conciliatary gesture by promising to make a declaration of Government's policy on this question before the next meeting of the Legislative Council. The mover having refused to withdraw the resolution, it was put to the vote. The counting having disclosed a tie the president gave his casting vote against the resolution an declared it to be lost.

24. Rao Bahadur Chitable renewed his efforts and moved the following resolution in the Legislative Council on the 17th March 1922 ;

"This Council recommends to His Excellency the Governor in Council that immediate steps be taken to vest criminal jurisdiction purely in judicial officers without any executive duties, controlled in all matters, including their postings, salaries and promotion, by the Sessions Court and the High Court.

"This Council further recommends that the change above recommended be effected by strengthening the cadre of subordinate Judges by creating a grade of Rs. 200 per mensem and by appointing full time resident magistrates of the first class out of the cadre of the subordinate judges ; also by investing with first class magisterial powers subordinate judges whose time is not fully occupied with civil work".

25. This resolution was vehemently opposed by Government spokesmen who advanced of repeated arguments against separation. It was voted upon after a prolonged debate and declared carried.

(ii) Madras.

26. On the 18th February 1922 Mr. C. V. Venkataramana Ayyanger moved :—

"That this Council recommends to the Government that steps should at once be taken to separate executive and judicial functions completely in this Presidency and that all judicial officers should be placed directly under the control of the District and Sessions Judge and of the High Court".

The resolution was lost.

27. The "separationists" were not discouraged by this defeat. They again rallied their forces and moved a resolution indicating in detail the points which should be considered in framing a scheme of separation. That resolution was carried in the Legislative Council on the 22nd September 1922 and in pursuance of that resolution the Local Government appointed a Committee under the Chairmanship of Mr. Justice Coleridge I.C.S. The Committee submitted its report on the 21st April 1923. Eventually the Government of Madras apprehending official criticism, discarded it by issuing a lengthy resolution giving in detail the reasons for such rejection.

(iii) Bengal.

28. On the 4th of April 1922, Babu Kishori Mohan Chaudhari moved :—

"This Council recommends to the Government that early steps be taken for the total separation of the judicial from the executive functions in the administration of the Presidency".

Mr. A. C. Dutt moved as an amendment that the following words be added at the end—

"That the said separation be effected in consonance with the following principles :—

(1) Officers appointed to perform executive duties in no case to perform judicial duties and *vice versa.*

(2) Officers appointed to perform judicial duties to be in no way subordinate to executive officers :

(3) The entire control and management of criminal judicial service, including the powers of promotions, transfers and punishment of judicial officers, be vested in the High Court".

The amendment was lost but the original resolution was put to vote and passed.

29. The Local Government, responding to the above resolution appointed by their Government Resolution No. 6287-A, dated the 19th August 1921, a Committee, with the Honourable Mr. Justice W. E. Grieves, as its president "to elaborate a practical working scheme for the separation of executive and judicial functions in the administration of Bengal and to report on the cost thereof." The Committee submitted its report on the 30th January 1922.

(iv) United Province

30. On 6th April 1922 Babu Chhalt Bihari Kapur moved "That the Council recommends to the Government to appoint a Committee to work out a detailed scheme for the separation of judicial and executive functions and to prepare an estimate of the cost of the same".

An amendment to the resolution, requiring that a majority of the committee should be non-official members of the council, was moved, and lost, but the original resolution was put to vote and carried.

(v) Bihar and Orissa

31. On 18th July 1922 Rai Bahadur Dwarka Nath moved "That this Council recommends to the Government that judicial and executive functions should be separated and immediate steps be taken to appoint a Committee of officials and non-officials for settling the whole scheme with instructions to report before the next winter session of the Council".

With some slight modification regarding the time allowed to the committee to submit its report, the resolution was put to the vote and carried unanimously.

32. In consequence of this Resolution, the local Government by their notification dated the 26th November 1921 appointed a Committee which submitted an exhaustive report in two volumes.

(vi) Central Province

33. On 6th August 1922 Mr. M. R. Jayavant moved "This Council begs to bring to the notice of the Government the desirability of an announcement of its policy about the separation of the executive and judicial functions and the necessity of framing a scheme for such separation with an estimate of the probable cost of the same."

The resolution was carried.

(vii) Assam

34. On 19th October 1928 Moulavi Munawwar Ali moved "That this Council recommends to Government (*a*) that the judicial and executive functions be separated, different officers being employed to discharge these functions

separately, and (*b*) that a committee consisting of four non-officials and two officials be appointed to formulate within six months, a scheme to give effect to the recommendation contained in (*a*)".

The resolution slightly amended regarding the time allowed for the committee to submit its report, was carried unanimously.

(*viii*) *The Punjab*

35. The Punjab Legislative Council in the month of October 1921 passed the following resolution.

> "This Council recommends to the Government to appoint an expert committee consisting of officials and non-officials to work out a detailed scheme for the separation of judicial and executive functions and to prepare an estimate of the cost of the same".

36. The Government accordingly by their resolution No. 2368 (Home Department) dated the 24th January 1922 appointed a committee, with the Honourable Mr. Justice Walter Aubinle Rossignol as its Chairman. The Committee submitted its report on the 29th March 1922.

37. When the members on the provincial Legislatures were straining every nerve to secure separation, the members of the Council of State and of the Central Legislative Assembly were also striving to get the principle recognized and adopted as will be seen from the following resolutions :—

(*i*) The Council of State.

38. On 9th March 1922 the Honourable Mr. Bhurgi moved "This Council recommends to the Governor General in Council to make a definite declaration that the time has arrived for the complete severance of judicial from executive function and that early steps will be taken to accomplish the severance almost immediately".

39. The resolution was withdrawn, the Government having assured that they would not object to any Provincial Government giving effect to the separation.

(*ii*) Legislative Assembly.

40. On 20th September 1922, Rai Bahadur T. P. Mukherji moved "This Assembly recommends to the Governor General in Council that judicial and executive functions should be separated and steps should be taken to appoint a committee consisting of officials and non-officials for preparing a scheme for the purpose at an early date".

41. Inspite of Government opposition the motion was put to vote and carried.

In spite of the fact that these resolutions were carried, the Government of India did nothing to respond to the wishes so expressed by the Central Legislatures. In 1931 the subject was raised again in the Central Assembly. The Simon Commission had then just published its report recommending certain constitutional changes and the Government of India using these recommendations as pretext for delay replied that no move could be made till the picture of political reforms then pending had become clearer. In 1935 when the question was again revised, the Government of India repeated their reason given in 1931 with the additional ground that separation had become an "exploded" theory. This bold assertion was sought to be supported by reference to the trend of the legislative practice in England, where the principle of undiluted separation had ruled long, and where it was alleged the trend was to blur the distinction between the executive and the judiciary The trend referred to was probably that of enacting legislation in a form which left a large opening to be filled by rules to be made by the Executive and the addition of clauses to the effect that the validity of rules so made should not be questioned in a court of law. Even conceding that such a trend was evident in England, still one can very well doubt the wisdom of such a tendency.

42. In 1937 Congress Cabinets were installed in a majority of the Provinces In view of the Congress insistence on separation right from 1886, the public expected that the much-needed reform would be one of the most urgent items on their agenda. But strangely enough, these hopes were not fulfilled We have not to go far to seek the explanation for the disappointment caused Mr. C. Rajagopalchari, the then Prime Minister in Madras, is quoted as having said "Now that the Congress is in office, we will see that the executive officer will not go wrong and we shall control them" (*vide* page 166 of "Recollection and Reflections by Sir C. Setalwad). It appears to have further been argued that any scheme of separation involved the placing of the entire criminal judiciary under the control of the High Court and that would create a "*imperium in imperio*" (Rep. of the Committee of the Separation of the Judiciary from the Executive (Madras) 1946 p. 15 para. 47). So this led to criticism that even the Congress Governments were imitating their predecessors and could fish out reasons for withholding the reform which the Congress had advocated for so many years. Rt. Honourable Sir John Beaumont (who was then the Chief Justice of Bombay) criticized this in the following words:—

> "Separation of the judiciary from the executive was one of the main planks in the programme of the Congress party, and when that party took office in Bombay the Ministry started to work out a scheme for such separation. The matter is not free from difficulty, but the difficulties are, I am

certain not insuperable. However, I am afraid the Congress party when in power was as anxious to control the magistrates as its predecessors had been, and would, I think, have extended control to the judges if it had the chance. At any rate, whatever the reason may have been, Congress Government made no real attempt to separate the judiciary from the executive and, from the unanimity with which all the Governments abandoned the project, I think that one may assume that they acted on the orders of the Congress Working Committee. For much of the work of the Congress Governments in Bombay I had sincere admiration and my relations with the Ministers concerned with law and order were most friendly, but I regarded the failure to tackle the problem of the magistracy as a cynical sacrifice of principle to expediency". (Vide 48 Bombay Law Reporter, Journal page 12 at page 17)".

43. Congress Ministries which voluntarily went out of office by the end of 1939, returned to office in 1946. Already some of the Provincial Governments have appointed committees to frame necessary schemes of separation. The Bihar Government, by their Resolution No. 5866A, dated the 1st December 1947, appointed a committee presided over by Mr. Justice H. R. Meredith and the committee has already submitted its report in last January. The Madras Government by their G. O. M. No. 1639, Public (General), dated the 25th July 1946 appointed a committee, under the Chairmanship of Shri K. Rajah Ayyar, Advocate General, and the Committee has submitted its report on the 7th of November 1946. This is the report referred to in the resolution appointing this Committee.

44. We have given the long history of this problem in detail in order that, one, who is less acquainted with the history might be able to realize the importance of the principles at stake and the urgency of the question, even under popular Governments.

CHAPTER II.

The Present System of Courts.

45. The Hierarchy of Courts which today administer criminal justice in the Province, excepting the City of Bombay is built up as follows :—

46. At the base are :—

(1) The Courts of Village Officers.

(2) The Village Benches.

Courts of Village Officers.

47. These Courts function under the Bombay Village Police Act, 1867 (Sections 14, 15 and 16 of Bombay Act VIII of 1867). They are one man Courts presided over by the Police Patel, who besides being primarily and personally responsible for the preservation of law and order, is also the local representative of the civil power in his village. In addition, the Police Patel is within his jurisdiction a criminal Judge in a small way. In some Districts, his office is held hereditarily and in that case he can be dismissed by Government only. In other cases he is liable to be suspended or dismissed by the Collector.

Village Benches.

48. Village Benches are constituted under section 37 of the Bombay Village Panchayats Act, 1933, and function in rural areas. A Village Panchayat elects out of its members five persons for the purpose of constituting a Village Bench. The five persons so elected constitute a village Bench which exercises all or any of the judicial powers which may be conferred upon it by the Panchayats Act, 1933. The Provincial Government may remove any member elected on the village bench after giving him an opportunity of being heard and after such enquiry as the Provincial Government deem necessary, if, in the opinion of the Provincial Government such member has been guilty of misconduct in the discharge if his duties or of any disgraceful conduct or neglects or refuses to perform or has been incapable of performing any of the duties as a member of the village bench. The powers of punishment of a village bench are very limited, the maximum punishment which a bench can impose being a fine of Rs. 20 for certain offences and Rs. 10 for others.

Bench Courts.

49. Village Benches and village officers function in areas which can be described as rural. In urban or quasi-urban areas in which category must be included for the present purpose the headquarters of a taluka, Courts of Honorary Magistrates or Benches of Honorary Magistrates were functioning till very recently. These Courts have now been abolished and it has now been directed that only special Magistrates and Stipendiary Magistrates must dispense criminal justice throughout the Province.

Stipendiary Magistrates.

50. These Courts are divided into three categories, *viz.*, (1) Courts of Magistrates of the First Class ; (2) Courts of Magistrates of the Second Class and (3) Courts of Magistrates of the Third Class.

A Stipendiary Magistrate who is known as Resident Magistrate or a City Magistrate is a full time Magistrate. In the category of part-time Magistrates are to be found Sub-Registrars, who in certain Districts, have been invested with Third Class Powers. The work which they however turn out is not very large. The Taluka Head Accountant in some places exercises magisterial powers and is commonly known as Sheristedar Magistrate. The Taluka Sheristedar is usually busy with his own work and the time he can devote to his magisterial work is seldom large. The most important category of part-time magistrates in the subordinate cadre is that of the Mamlatdar or Mahalkari who is a revenue and executive officer as well. The executive officer in charge of a Taluka is known as a Mamlatdar ; and the one in charge of a Mahal or Peta is known as a Mahalkari.

Resident and City Magistrates.

51. City Magistrates are full time Magistrates and their headquarters are usually the District and the Taluka town. Their present strength is 18. The Resident Magistrates are also full time Magistrates and exercise their jurisdiction over a number of villages either in the same Taluka or in 2 or 3 talukas. Sometimes they are directed to hold their Courts at different places in their jurisdiction. They are usually given areas which can be conveniently covered from their headquarters. These officers devote all their time to the disposal of criminal cases. Their number at present is 101.

Taluka Magistrates.

52. Taluka Magistrates, besides the above, are the Mamlatdars who are usually ex-officio second class Magistrates and sometimes first class powers are conferred on them. Being primarily revenue officers, they are busy with their own work and they hardly find time to hear criminal cases.

Sub-Divisional Officers.

53. Above them there are sub-divisional officers known also as Prant Officers. These are of two categories, those promoted from the lower cadre, who are called Deputy Collectors and officers of Indian Civil Service who are designated as Assistant Collectors. They are also called Sub-Divisional Magistrates as they hold charge of a division of the District and are invested with criminal powers.

District Magistrate.

54. The District Magistrate is at the top of the magisterial cadre in a District. He, however, finds little time for Court work and does not usually do any original criminal work. He sometimes hears criminal appeals. Under the Code of Criminal Procedure, certain types of applications such as petitions to revise orders dismissing a complaint under section 203 or discharging

an accused under section 253 may be presented either to the District Magistrat or to the Sessions Judge, and the parties go to the one or the other offic according to their convenience. The District Magistrate, however, spend very little time on purely judicial work. He usually inspects the Court of all the First Class Magistrates in his district once a year. Occasionall he also inspects the Courts of a few Second and third Class Magistrates. H receives monthly statements showing particulars of the cases received, disposed of and pending in all Courts in his district and issues reviews on thes statements.

55. There are, however, a number of ways in which the personality o a District Magistrate manifest itself. He issues from time to time Circula to the Magistrates under him, which usually furnish useful guidance to them but they may occasionally trench upon matters which are properly in th field of judicial discretion. The subordinate Magistrates usually act on th instructions issued to them by the District Magistrate, although they ma happen to interfere with the judicial discretion vested in them by law. It rarely that a District Magistrate issues any direct instructions to the subordina magistrates, but he offers remarks containing hints which he knows th subordinate magistrates will be careful not to ignore in future, as they are look to the District Magistrate for their promotion and future prospects. At time explanations are called for from the subordinate magistrates. Not infrequent these remarks have a bearing on the judicial aspect of cases and natural influences a Magistrate when he has to dispense justice in subsequent case In this way the District Magistrate exercises an indirect influence on Magistrat subordinate to him. Generally subord nate Mag strates are very sensiti to the remarks made by District Magistrates on their calendars and they a apt to follow them even in preference to High Court decisions.

56. In addition to the controlling of the work of the subordinate magistrac the District Magistrate has to perform a very wide range of duties which a more or less of an administrative character. He issues licences under th Arms Act, the Petroleum Act, the Cinematograph Act, and numerous oth Acts. His sanction is also required before a prosecution is launched und some of these and other Acts. Under the Criminal Tribes Act he perfor certain duties which are purely of an execut ve character. As the princip executive officer in a District, he is responsible to Government for the preserv tion of law and order in his district. The District Police Act expressly stat that the District Superintendent of Police is subordinate to him in such matte and the contact between the two officers is frequently close and oft confidential.

57. When there is too much work for a District Magistrate in a Distr additional District Magistrates are appointed to assist him. There at present several such additional District Magistrates in the Province.

Sessions Judges and the High Court.

58. Above the Court of the District Magistrate is the Sessions Court presided over by a Sessions Judge. But the Sessions Judge exercises no control over the District Magistrate except to the limited extent that appeals lie to him in those rare cases where the District Magistrate holds an original trial himself. The Sessions Judge receives from the District Magistrate reports about the work of all First Class Magistrates in the District and passes them on to the Commissioners. At the apex of the pyramid is the High Court. Both the Sessions Court and the High Court are exclusively judicial institutions and hence do not strictly fall within the purview of our enquiry.

The working of the system.

59. One cardinal feature of the present system is the combination of functions which have been long distinguished as executive and judicial and the definite subordination of the judicial function to the executive. The Collector, the Chief Executive Officer, in the District, is, by virtue of his office as the District Magistrate, in a position to dominate the will and influence the decisions of other Magistrates under him in an indirect way. He may in this way sometimes impose on them his policies, his views and even his fads. If it is found that a particular subordinate Magistrate follows his own bent of mind in deciding cases entrusted to him, it is possible that others will be preferred to him and he may not be recommended for higher offices. Similarly if a subordinate Magistrate, who is only acting, does not follow the line of decision indicated by the District Magistrate, he has the fear that he may be reverted to the clerical grade and may have to pass his whole life as a clerk. As all Magistrates in a District have to depend for their further progress and advancement in office to the recommendation or the good will of the District Magistrate, it is but natural that they are prone to follow the advice given to them by the head of the District and very few having the courage of their convictions will act in a way which may not be to the taste of the head of the District. It is in this way that the present system is defective and it is essential that all subordinate Magistrates should have the freedom to decide cases according to their own good judgment.

Prosecuting Agency.

60. There is a Public Prosecutor for each District with several Assistant Prosecutors, but they ordinarily appear only in Sessions cases and criminal appeals in the Sessions Court. In every District there is also a Police Prosecutor and a number of Sub-Police Prosecutors under him. The Public Prosecutor appears before a Magistrate only if specially instructed to do so and the Police

Prosecutors usually conduct all the cases before Magistrates. The Sub-Poli Prosecutors are part-time Government servants and are not eligible for pensio They get a pay of Rs. 150 per mensem. They are recruited from the Ba and are allowed private practice. The Police Prosecutors are whole tim Government servants and their grade of pay is Rs. 200—10—300 wi a Selection grade of Rs. 320—20—400 with a temporary increase of Rs. 2 per month. The Police Prosecutors also are recruited from the Bar. Th District Magistrate and the District Superintendent of Police have effecti control over the Police and the Sub-Police Prosecutors.

CHAPTER III.

Arguments for and against Separation.

61. It used to be the case that on every occasion when the question o separation of functions of the judiciary and the executive was under discussio even those who were opposed to the change frankly admitted that in principl it was a desirable reform. One of the staunchest opponents of separation Sir Charles Elliot, in his article to which we have referred in the last chapte conceded that "this principle in the abstract is accepted". But it would b a mistake to assume that the same has continuously prevailed till toda There has come into existence a new and popular school of thought that refus to admit even the principles, and points to the necessity of placing more an more functions in the hands of the executive, excluding at the sam time the right of intervention by the Courts. Indeed in 1931 when th question of separation was under consideration, the Government of Indi rejected the very idea as "an exploded theory" and today not a few of th witnesses examined by us spoke of it disparagingly, one of them describin the doctrine of separation, as a "schoolroom cant". But such opinion were sparse and the majority of persons have ever subscribed to th principles of separation, even those who had their doubts about the workin of it in practice. We cannot fail to recognise that great changes have take place in the form and organisation of the modern democratic state, and tha it has now come to be regarded as necessary that a larger measure of stat control over the life and property of its citizens should pass into the hand of the executive than was formerly thought compatible with democrati freedom, but we are definitely and strongly of opinion that every rule or la that prevents an appeal to the open Court is a danger to individual freedom and ultimately to the very foundaitons of liberty and the sovereignty of th people. In our opinion that authority of the Courts is an essential pilla of the democratic state that it cannot be weakened without endangering th whole structures.

62. It should not be thought that we are blindly following an ideal or refusing to see realities. There have always been emergencies when special powers were given to the executive. There have been occasions when even the executive had to stand down and surrender authority when the authority to rule passed into the hands of the military. It is recognised that during such abnormal times the powers of the Courts may have to be abrogated and individual rights of life and property surrendered. But with the return to normal habits of life, emergency measures should cease, and the authority of the Courts be re-established; for no state can remain secure within unless there is respect for the rule of law. Where the executive is allowed freely to circumvent the Courts, there will be a steady decline in the standard of Government that can only end in the deprivation of individual rights and in the ruin of the democratic way of life. We have no doubt that a large majority of those who have studied the question believe in the principle today even as before. Since the quesiton of the separation of the judiciary and the executive was mooted in India more than a century ago, a variety of arguments were advanced against it from time to time, many of which, though plausible then, are no longer tenable in the present times. One of the earliest arguments against separation was that without magisterial powers the Collector could not collect the land revenue. This was regarded to be so at the time the argument was advanced and resulted in the abolition of the first experiment of separation that had been tried at the instance of Lord Cornwallis in Bengal and led to the reunion or the combination of powers once more in the Collector, the executive head of the district. The argument would not be adduced now and need not be considered further. Everyone knows that the administrative machinery of Government has developed greatly since then, and it would make no difference at all to the recovery of the land revenue if the Collectors and the Mamlatdars ceased to be Magistrates.

63. Many Englishmen of weight and authority, who supported separation theoretically, opposed its introduction in India on the ground that it ran counter to the oriental conception of rule. They argued that the system operating in India is an indigenous product devised to suit oriental people. Sir F. Halliday stated "I am very sure that our administration will caeteris paribus be generally efficient, while it is certain to be also acceptable to the people according to the degree in which it conforms to the simple or oriental, in preference to the complex or European, model. The European idea of Provincial Government is by a minute division of functions and offices, and this is the system which we have introduced into our older territories. The oriental idea is to unite all powers into one centre. The European may be able to comprehend and appreciate how and why he should go to one functionary for justice of one kind and to another for justice of another kind. The Asiatic is confused and aggrieved by hearing that this tribunal can only redress a particular sort of injury, but that if his complaint be of another nature,

he must go to another authority; and to a third or fourth kind of judicature, if his case be, in a manner incomprehensive to himself, distinguishable into some other kinds of wrong or injury. He is unable to understand why there should be more than one Hakim, and why the Hakim to whom he goes according to his own expression as to a father for justice, should be incapable of rendering him justice, whatever be the nature of his grievance, or whatever be the position of his adversary. (Minute, dated 30th April 1856 paragraph 53). Sir Charles Elliot, another confirmed opponent of separation remarked. "I would point out that the keynote of our success in Indian Administration has been the adoption of the oriental view that all power should be collected into the hands of a single official, so that the people of the district should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of Government. The English idea of distributing power to a series of officials or bodies ..... is very far from the Indian ideal which more resembles the Continental system than ours, since the District Magistrates correspond more closely to the prefect of a French Department than to any official in England". (Article printed in the Asiatic Quarterly Review, for October 1896).

64. This argument no doubt was accepted as a very powerful exposition of the case of unity of powers at the time but is obviously antiquated now. Such notions of the functions of Government no longer survive, and if it were attempted to use this as an argument in favour of combination of powers now, it would be met with universal derision.

65. That separation would entail heavy expenditure is one of the most frequent and formidable arguments advanced by the opponents of the reform. In 1837 Lord Auckland, the then Governor of Bengal, addressing the Honourable Court of Directors on the subject of separation, observed that "financial considerations" were one of the grounds which made the question "one of great difficulty". Sir F. Halliday in his minute of the 30th April 1856 pointed out: "It is one very serious objection to this scheme, that it will be very expensive" (paragraph 52). Sir Charles Elliot, one of the most vehement opponents of separation, referred, in his Article printed in the Asiatic Quarterly Review for October 1896, to the "financial argument" advanced by many others against the proposal and proceeded to support it by pointing how additional staff would be required to carry out the scheme. The Honourable Mr. H. S. Lawrence, the then member in charge of Finance, participating in the debate on Rao Bahadur Chitale's resolution, in voicing his opposition to separation said. "It (separation) will set up a system of justice which in proportion to the wealth of the country will be far more expensive than that in any other part of the country" (Bombay Legislative Council Debates, Volume V 1922, page 1404). The Madras Government also stated: "It is a practical impossibility to carry out a complete separation of functions

without incurring prohibitive expenditure" (Statement of the Government of Madras on the report of the Committee on the Separation of Judicial and executive functions. Government Order No. 112, 17th March 1924, page 50, paragraph 7).

66. These and similar comments made by the opponents on the count of financial difficulty have not gone unchallenged. It was to meet this ground of objection that Mr. R. C. Dutt, Rev. Commissioner, Bengal, framed his scheme in a manner which would need the least additional expenditure. Mr. Dutt admitted that for separation to be carried out some additional staff would be necessary and this would "increase .....the cost of administration", which increase, ...he thought, to be "necessary for effecting complete separation". He went a step further and stated "even this additional cost may be met by savings in other departments". The authors of the Memorial of 1899, after referring to the remarks of men who based their objections on the financial ground, warmly recommended Mr. Dutt's scheme as "the best answer to this objection" (paragraph 18). Mr. Manmohan Ghose, the First Indian Barrister, in his "Inteviews" printed in "India" for December 1895, after stating that the "reform could be carried out without costing an additional rupee to the state", observed ....."the financial objection is merely put forward in the present embarrased state of Indian finances in order to shelve the question". Mr. C. D. Field, a Judge of the Calcutta High Court, in his article printed in the Asiatic Quarterly Review for January 1897, pungently attacked this "financial argument" in these terms :—"In 1860 the financial difficulty was the strongest argument advanced against complete separation and ever since, as other means of defence have been weakened by time and progress, this big old gun has been brought out as an irresistible piece of artillery. But time has affected this also, and it can no longer do .....If the change would cost a little, would not this little be spared from the tax on justice, that justice may be done? Very little (if anything) would be required if the reform were carried out by some one having the knowledge of the existing system and some faculty of organisation. Bearing in mind this economy that results from division of labour and large existing establishments ready for rearranging, it is by no means impossible that an actual saving could be effected."

67. Prestige is one of the oldest of arguments, which if advanced in these days, would be regarded as ridiculous. There was a time when it was urged with a show of great plausibility that the prestige of the Collector would be seriously weakened by withdrawing all his magisterial authority and the authority of Government to maintain law and order in districts would suffer thereby. All Governments are careful of their prestige. It is most important to the health of every Government that it should command respect. But the idea

of prestige as an instrument of Government in India was bound up with the fostering of the creed of the superiority of the ruling classes and the divine mission of imperialism. Prestige came to be in fact an essential element of Imperialism and was the prop of a rule, however beneficient at times, that ultimately rested on force. It was the showy side of power, the part that appealed to the eye and the sense of wonder, covering beneath its attractive exterior a core of military force. Every state, we know, must rely on force, but the army of the democratic state is the people and it is the sanction of their will which is the foundation of the security of the state and not military power as such. There is a place too for dignity and ceremony in the conduct of the affairs of a democratic state, but pomp and splendour can never be used to conceal force. Henceforth the prestige of the state must rest on its reputation for good and enlightened Government and the pride its citizens take in keeping it secure, strong and free. The argument of prestige has been blunted for ever and with its passing we move out of the past and on to the new order of the future.

68. Here we should observe that there appears to have been a tendency on the part of the supporters of separation to dwell overmuch on the arguments advanced in the past and to rest content with demolishing them for proving the need for this reform, neglectful of the views of modern times. It is now easy for them to gain a verdict against the time-worn arguments of the imperialism of the old regime, but unless it can be shown that the evil of the combination of powers is as objectionable today as it ever was, and that the new arguments in favour of continuing it are equally fallacious, we fear that the support for the reform will be so weakened by the antipathy to imperialism that has not become historical, and the case for the executive so strengthened by the wave of popularity which is supporting the new Governments, that people may fail to realize how important and vital this reform still continues to be.

69. The two set arguments which are now-a-days advanced by the executive to oppose the separation is that all the claims for this reform are unnecessary now, since independence has been won, and that fundamental changes in the ideas of the functions of the democratic state have rendered the theory of separation of powers obsolete. One witness before us remarked; "The question was near acute when we were under foreign rule, but matters will be changed now that independence has come". Another said: "Frankly, I think this idea of separation has no basis whatsoever. It seems to me that a lot of these complaints were really due to the fact that you had a foreign Government of which you were naturally suspicious. You will see that there is nothing much, no substance in your argument". (E. W. Perry, C.S.I., C.I.E., I.C.S., Commissioner of Excise). This view was reflected in the apparent reluctance of the Congress Ministries to introduce the separation

when they first took office. Mr. Rajagopalachari, the then Prime Minister of Madras (now H. E. the Governor of West Bengal) observed : "Now that Congress is in office, we will see that the executive officers will not go wrong, and we shall control them". But this assurance did not go unchallenged, and the trenchant remarks made by the Right Honourable Sir John Beaumont, Ex-Chief Justice of Bombay, have already been quoted. Mr. Wassoodew (Ex-Judge of the Bombay High Court) stated before us : "An independent judiciary is the only *safeguard* against encroachment by the executive on the liberties of the people". Right Honourable Dr. Jayakar gave it as his opinion that the "the need will be more when a popular Government comes in, as there are more chances of the executive interfering with the Judiciary". "My strong point", he continued, "is that the judiciary even at the highest *should* be kept free. We are apt to concentrate attention on the lower aspect of the judiciary but I would maintain the same principles even as regards the highest aspects of the judiciary. For instance, I have heard a complaint very recently from high authorities that the High Court makes certain recommendations to the executive. Government specify the *preference* of candidates in order, say A,B,C,D, and the executive Government selects the last candidate D. The convention should grow strongly that the High Court's recommendations in the matter of posting must be followed". Rao Bahadur Manilal Desai, supporting this point of view said : "If I am to speak very frankly in the name of democracy, *power is being abused*. From my own experience, I can say that during the last few years, after the introduction of democracy, executive agencies of local workers have been trying to control and guide the judicial decisions of the magistrates to such an extent that in certain instances, it has become a scandal. We do not want any change in the name of *democracy which will* be harmful to the judicial administration of this country".

70. These are grave indictments coming from men of eminence and experience that must serve as a warning against too much apathy towards *or implicit trust* in any form of Government, popular or otherwise. The fact is that all Governments like to have power and are slow to shed it.

71. Another argument used is the apprehension that the executive will not be able to keep subversive forces under control, *if any reform* is introduced in the system of Government that would diminish the authority of the head of the district. It is pointed out that if the District Magistrate is to be responsible for law and order, he must be the head of the police and the magistracy. Mr. Perry, in giving his evidence, said : "I do think that in the present circumstances and stage of *development you* do want to have a District Magistrate with powers of punishment to maintain law and order". He had experience of a system of separation working in practice in Kolhapur State and declared it to be a failure, for "when put to the strain it broke down, because the District Magistrate in charge of the Magistrates was a judicial

officer who carried absolutely no weight". The fault may have been in the selection of the particular officer, and need not be necessarily attributed to the system.

72. Mr. Justice Weston thought it was not possible to carry the idea of separation to logical extremes. There must be somebody, he said, responsible for law and order, and he must be the District Magistrate having ministerial powers which he possesses under Chapter XII. In answer to the question: "Should Mamlatdars be invested with magisterial powers" he said: "It is difficult to justify the theory, but the great advantage of it is that the Mamlatdar knows about the active conditions of the world, and a great deal of justification for a magistracy is his ability to understand world conditions and to deal with cases which come before him. That is the general weakness of what I might call purely judicial branch. We are apt to get men who are not very experienced in world conditions". He went on: "I am not one of those who condemn the present system. Personally, I may say keep the system of Taluka Magistrates in purely rural districts or endeavour to have some system whereby all magistrates are as little subordinate to District Magistrates as possible in the matter of advancement. That is the best that could be done.

73. The executive too has felt that at times the higher courts that are free of its control, that is to say, the Sessions Courts and above, have not been abreast of the situation and have failed to play their part in adequately resisting Government to maintain order or to put down crime, and the guilty often go unpunished by courts that demand an unduly high standard of proof or are too rigidly wedded to procedure which, in the words of the Chief Justice Sir Leonard Stone, "tends to disguise absolute veracity. We acquit or convict people not because they are innocent or guilty, but because they have been proved according to the law and procedure innocent or guilty".

74. It is agreed that the system of absolute separation is ideal in normal conditions and affords great protection to the individual, but its opponents condemn it by reason of its weakness which is manifested when Government has to tackle underground subversive forces. It is said that if the Courts fail to deal adequately with anti-social criminals like black-marketeers, Government comes into disrepute, and absolute separation would in practice mean a set of judges who are not in touch with the scope of social evils that Government is answerable for, such as black-marketing or traffic in opium and who would not sufficiently appreciate the necessity of inflicting heavy sentences in the way that revenue magistrates, who are men of affairs, would do. It is further argued that the power exercised by the District Magistrate is the power of a man in high position under the control of Government, who is in touch with the needs of the people and has a wide knowledge of the political, social and economic conditions inside and outside his own district. It is also pointed out that if at all, the District Magistrate may occasionally use his influence in the matter of sentences only and not the findings, and it would be

wrong because some subordinate executive officers were weak-minded enough to pass judgments that they thought would please their superior to condemn all executive magistrates as a class of such moral cowardice or to blame the District Magistrate. It is also urged that whatever be the system of courts, it is necessary to have supervision and in the districts the District Magistrates can exercise more effective supervision than the Sessions Judges. This last argument finds support in the evidence of Mr. Lad, District Judge, Poona, who said : "speaking for myself, for the last one year I could not inspect even one court on account of being occupied all the time in Court".

55. One witness, who is evidently opposed to separation frankly admitted that in political cases at least the Magistrate in the mofussil showed a tendency to be influenced to a great extent by the District Magistrate, but added that this will not happen hereafter in the altered political situation in the country. He, therefore, thought it was no longer necessary to seperate the judiciary and the executive.

76. Replies to these arguments are to be found in the evidence written and oral, given before us by the many witnesses, who by reason of their eminent position and their long experience are best qualified to speak with authority on subject. The substance of these replies is that unless the judiciary is independent it is difficult to expect a fair trial and that it is not impossible to provide a system of independent judiciary without seriously weakening the position of Government. There would still be enough power in the hands of the Head of the District to deal with any emergency. To explain this, we will quote from the evidence of some of these witnesses.

77. Under the present system, "the independence and detached mentality which is a necessary condition for the administration of justice is much affected by the existence of the executive control". (Prof. J. R. Gharpure, Principal, Law College, Poona). "Independent status and character of the magistracy is not always maintained under the executive. Justice should be supreme and unadulterated. It is, therefore, desirable that the magistracy should be removed from the influence of the executive, which is not free from the inherent likes and dislikes as well as other prejudices" (Mr. Bakhtiyar, the District Magistrate of Surat). "Magistrate must be independent of any executive interferences and even a suspicion of control by the executive in judicial matters is undesirable. In the present system a magistrate is usually anxious to convict in police cases as he is afraid that the District Superintendent of Police might take to the District Magistrate, if he acquits too many police cases". (Mr. Chinmulgund, District Magistrate, Panch Mahals). "Magistrates are not at present independent of the police in their outlook. Some

first class magistrates have confessed to me that sometimes they dare not displease a Police Sub-Inspector and second class and third class Magistrates can ill afford to displease a Police Jamadar". (Mr. V. B. Raju, ICS., District Judge, Surat). "It is essential that in dispensing criminal justice, the magistrates should be independent and impartial. To secure such a position, it is necessary that the magistrates should not be under the executive", (Mr. B. K. Dalvi, District Judge, Dharwar). "Magistrates working under the control of the executive have too little judicial independence and whether they are, or are not, influenced in their decisions by what they think, the Government desires, the accused will be very liable to think that this is the case. This was certainly so in respect of "political" cases conducted under the former regime against its opponents. It applies equally under a system of representative Government in which groups opposed to the party in power are bound to have less confidence in the impartiality of a court which is directly under the executive than in an independent court" (Mr. J. G. Simms, I.C.S Secretary to the Government of Bombay, Revenue Department).

78. The Executive appoints the present Magistrates and controls their future career. Not only removal but even posting and promotion rest with the executive bosses. This sole dependence of the lower magistracy tend to make them servile with the result that they are tempted or constrained to do what is demanded, not by justice, but by the whims on their superiors. "They are afraid to displease the District Superintendent of Police or the District Magistrate. The District Magistrate is head of the Police and promotion of the magistrates depends on the view that the District Magistrate takes of their work." (Mr. Mirchandani, I.C.S., District Judge, Nadiad). "The Collector-cum-District Magistrate is the head of the Police Department. It is on his recommedations that the appointments, postings, promotions and transfers of the executive officers take place, The subordinate Magistrates are too often easily inclined to convict to gain good opinion of the police and the District Magistrate" (Mr. C. S. Deodhar, District Judge, Kanara). The Magistrates, who are Revenue Officers, work under a system in which they are subordinate to the District Magistrates who represent the prosecution. The District Magistrate is the head of the Police in the District at whose instance many of the prosecutions are launched. The District Magistrate in his capacity as the Collector is the person who can make or mar the prospects of the revenue officers as magistrates. This usually creates a feeling that in order to be loyal and faithful to the superior officer, the District Magistrate, the magistrates are bound to convict persons against whom prosecutions are launched at his instance" (Mr. R. D. Shinde, District Judge, Thana)". "The dominant desire of the magistracy is to please the executive on whom the prospects of their promotion entirely depend." (Mr. K. B. Wassoodew, Rertied Judge, Bombay High Court).

79. The District Magistrates consciously or unconsciously interfere in the administration of justice. "At present the District Magistrate is the head of the magistracy and police in the district and he issues instructions for the guidance of the subordinate magistrates. It is found in practice that there is interference on his part in the judicial matters. The Magistrates are not independent and free to exercise their individual judicial discretion" (Mr. M. I. Kadri, retired District and Sessions Judge, Ahmedabad). "Magistrates have often to decide disputes in which the executive itself is directly or indirectly involved, and they will be unable to remain really impartial, both because of their own interest as part of the executive and because their superior officers in the executive may bring pressure to bear on them" (Mr. A. E. Shields, I.C.S., District Magistrate, Dharwar). "The Executive Officers having control over the officers exercising magisterial authority, sometimes get opportunities to interfere with the judicial exercise of authority by the magistrates in important cases in which officials in the executive Department have interest direct or indirect" (Mr. M. S. Patil, District Judge, Ahmednagar). "Cases have occurred, and probably are occurring today, in which District Magistrates take Magistrates to task for passing certain orders which were not quite to the liking of the police or the executive. Instructions are also sometimes issued to magistrates as regards the nature and duration of sentences they should pass in certain cases or class of cases. To avoid publicity or adverse criticism, the instructions are marked confidential" (Mr. H. K. Chainani, I.C.S., District Judge, Ahmedabad).

80. The Magistrate subordinate to the executive is accustomed to consider every problem from the special angle of the executive need. "The Revenue Officers (Aval Karkuns, Mamlatdars, Prant Officers etc.), as executive officers, necessarily acquire, by reason of their duty they do a typically executive mind with rough and ready methods, whereas the magisterial work requires a balanced and detached frame of mind." (Mr. C.S. Deodhar, District Judge Kanara). "The Magistrates being executive officers, executive considerations quite often influence judicil decisions, especially when there is a political, social or economic movement which comes into conflict with executive authority" (Mr. B. D. Mirchandani, I.C.S., District Judge, Kaira).

81. The executive is given a power under many an enactment to make rules, the breach of which is made punishable. The present magistracy is a part of the executive. Thus when they try cases of breaches of these rules, they are virtually judges in their own cases and thus the prosecutor and the judge are combined into one.

82. A magitracy working under the executive does not inspire confidence in the public, as being uninfluenced by the executive. The real question is not whether they are actually influenced ; It is whether the public believe that

they are influenced. It is this suspicion which is very detrimental to proper administration of justice and the present system helps to breed such distru e "The present system leads the public to believe that in some cases, they are not getting fair play, as purely departmental considerations are likely to weigh with the magistrates" (Mr. S. M. Moore-Gillbert, Indian Police. District Superintendent of Police, Ratnagiri). "In the administration of justice, it is not merely enough that justice should be actually done to the parties, but it is of the essence of that administration that public must feel that, at all stages of the litigation, justice shall be done to them. If the magisterial functions are concentrated in the executive hands this most salutary principle is set at naught. This is of paramount importance specially in those period when conflicts arise between the subjects and the state regarding the fundamental rights of citizens such as liberty of thought and expression etc." (Mr. N. M.Mabhoy .District Judge, Broach).

83. The magistrates in deciding cases are not infrequently influenced by their personal knowledge acquired when doing executive work. "The present magistrates attach greater importance to their executive work and naturally acquire an executive bent as opposed to a judicial frame of mind. They are influenced by rumours and reports which reach them frequently. They make many friends and acquaintances in the course of their executive work and have to rely on many persons who attend to their needs while on tour and who assist them in their executive work" (Mr. V. B. Raju, I.C.S., District Judge Surat). "The Magistrates under the present system are more accessile to the members of the public due to their other executive functions and unscrupulous persons take advantage of that position. This corrupts the magistrates; if not with money, with improper influence and pressure" (Mr. L. C. Gandhi, District Government Pleader, Surat). "As revenue officers they move and are expected to move about in their areas coming in close contact with the villagers, village officers and leaders of the public etc. In the course of their duty they get certain information, right or wrong, and they carry the impression which they bear in deciding the cases." (Mr. C.S. Deodhar, District Judge, Kanara).

Most of the officers who belong to the Revenue Department, have to go about touring within the area under them and hence the exercise of criminal powers by these officers causes delay in disposal and great inconvenience to the parties. "They (such officers) are unable to hear cases day by day, consequently, in any one fixed place. Magisterial courts are also frequently fixed at Magistrate's camps sometimes in out-of-the-way places, difficult to get at. This means considerable harassment, expenses and inconvenience to all concerned, non appearance of witnesses interference with evidence and failure of true cases. All this causes a feeling of frustration and impatience with Government methods ..... People attending such courts get stranded in out-of-

the-way places with no accommodation transport or means of obtaining food" (Mr. P. B. Wilkins, Deputy Inspector General of Police, Southern Range). "Revenue Officers, who are magistrates have often to tour and hold courts on tour. This involves delay in the disposal of cases and expenses and inconvenience to the parties, witnesses and pleaders" (Mr. N. K. Dravid, I.C.S., District Judge, East Khandesh). "Some of the touring magistrates also hear cases at considerable distances from their headquarters. This causes inconvenience and hardship to all the parties" (Mr. H. K. Chainani, I.C.S., District Judge, Ahmedabad).

85. The Magistrates devote greater time and energy to their executive duties, rather than to their judicial functions with many baneful results. "Since generally they (magistrates) do magisterial duties along with various other kinds of duties, justice is delayed and parties and witneses are inconvenienced, litigation becomes costly" (Dewan Bahadur N. M. Jhaveri, Advocate, O.S.). Mr. P. B. Wilkins, Deputy Inspector General of Police, Southern Range, observes—"Magistrates are at present overwhelmed with work under the revenue code, Tenancy Act, Food Control, Municipal and Local Board affairs, etc., which leads to whole-sale and unavoidable delay in disposal of cases". After quoting statistics of pending cases in his range, Mr. Wilkins proceeds, "It will thus be seen that things are getting worse and worse. This seems an undesirable state of affairs which should be remedied by separation of the judiciary from the executive." Mr. A. E. Shields, District Magistrate, Dharwar, remarks, "In the complex system of administration today, executive officers have no time to hear cases and much delay detrimental to the interest of justice always occurs". "The officers working now as Magistrates under the executive are chiefy Revenue Officers who consider that magisterial work..... is not their legitimate work. Their promotion and prospects do not depend upon the quality or quantity of magisterial work they do, but it depends upon the revenue work and their executive capacity" (Mr. M. B. Honavar, District Judge, Belgaum). The revenue officers have other multifarious duties connected with village uplift, collection of land revenue etc. The trial of a case is regarded by these officers as of secondary importance. Majority of cases take inordinate time for their disposal. As the hearing of cases is interrupted by other duties they are usually spread over several months. The Magistrates are unable to give to the cases that attention which is necessary for appreciating the evidence in arriving at a decision" (Mr. R. D. Shinde, District Judge, Thana). "Except resident magistrates most of the other magistrates do not do magisterial work for the whole day; owing to their other work, they can devote only part of their time to this work. The trials are, therefore, very protected" (Mr. H. K. Chainani, I.C.S., District Judge, Ahmedabad). The present system "leads to long delays in the disposal of criminal cases as the revenue magistrates cannot find much time for judicial work. Consequence, hard-

ship and unnecessary expense to parties due to too frequent adjournments" (Mr. B. D. Mirchandani, I.C.S., District Judge, Kaira).

86. Magistrates do not possess the necessary legal training and therefore Justice suffers. "Few Revenue Magistrates possess legal qualifications, especially in the I.C.S., and are often unable to decide legal issues without postponement either for references, or for deferred decisions,thereby incurring delay in disposal" (Mr. P. B. Wilkins, Deputy Inspector General of Police, Southern Range). "The executive, as it is constituted, lacks legal training and is devoid of judicial temperament" (Mr. P. V. Deshpande, Secretary, Hungund Bar Association). "There is a further objection of the want of legal knowledge and acumen in the Magistrates. Ordinary clerks in course of time become first class magistrates. None of the Magistrates possesses any knowledge and study of law books. I am firmly of the opinion that persons imparting criminal justice must have a throrough knowledge and legal acumen in criminal jurisprudence", (Mr. G. R. Kanade, District Govenment Pleader, Jalgaon. "Very few of them have any legal training and most of them are promoted, from the position of clerks" (Mr. M. B. Honavar, District Judge, Belgum). "Many of the subordinate revenue magistrates, having risen from clerkship and having no higher education or legal training, their judicial work is not of a higher order" (Mr. B. D. Mirchandani, I.C.S. District Judge, Kaira.)

87. These are some of the disadvantages of the present system. Advancing these or similar other grounds, the advocates of separation contend that the present system must be immediately replaced by a system under which the two functions are seperated.

88. We have taken into consideration all the arguments that have been advanced on both sides and have given our anxious consideration to the argument now put forward of the danger to public safety which, all would agree, transcends every other consideration. We have taken great care to see that the proposals we have to make will in no way weaken the authority of the head of the district or make it more difficult for Government to maintain law and order or easier for wrongdoers to evade the law. We have recommended that the preventive powers under Chapter VIII to XII of the Criminal Procedure Code should be partially retained by the District Magistrates. We are convinced that these powers will enable that officer to maintain tranquillity and order. We feel that both, sides in their enthusiasm have tended towards exaggeration. To say, as the Madras Government stated in 1922, that it is practically impossible to carry out a separation without prohibitive expenditure is as futile as to say, as Mr. Manmohan Ghose stated, that the reform could be carried out without costing an additional rupee to the State.

he authors of the various schemes, put forward during the last century and ore, have attempted to work out an estimate of the recurring and non-curring cost that their schemes would entail. We have also made an effort calculate the probable cost of our scheme. We very candidly concede at our scheme will surely necessitate additional expenditure. But we dorse what the Government of Punjab said when they appointed the committee 1922. "though increased expenditure is inevitably entailed, it appears to is Excellency that some set off to this increase might be secured by effecting me necessary changes in the present system" (Paragraph 30). We further el that if our scheme is put into operation, there will be substantial saving to e litigant public. This saving and also the appreciable impovement in the ality of justice dispensed take of the edge of the argument of financial difficulty e conclude the discussion on this topic by expressing our conviction the words of Sir Harvey Adamson : "the experiment may be a costly e, but we think the object is worthy."

89. After having followed very closely the controversy on the question of paration through all its past stages and after very carefully weighing the guments advanced for and against retention of the present system we have ached the unanimous conclusion that separation should be immediately d completely introduced. Almost all the official and non-official witnesses. ho have tendered written or oral evidence before us, speak with one voice support of the reform. Great constitutional changes have taken place d we are sanguine that the future constitution of free India will be emocratic one of the type of the British or American Constitution. Separa-on of functions is an integral and important part of such constitutions. he present system owes its origin to the patriarchal system of Government tablished in this country in the latter half of the eighteenth century by the itish rulers. That form of Government having come to an end, the present stem of administration of justice must also disappear with it. The new onstitution will assuredly detail the "Fundamental Rights" of every citizen this country. But mere enumeration of these rights is not enough. They ust be effectively guranteed and separation, which secures the independence f the judiciary, is the best guarantee of the liberties of the citizens.

CHAPTER IV

Our Scheme

90. In proposing our scheme we have kept in view not only the complete paration of the judiciary from the executive, but also the keeping down f the extra expenditure involved as low as possible. We have had the dvantage of the considered opinions contained in the recent reports of similar ommittees in Madras and Bihar. We have studied carefully the various

schemes proposed in the past in different provinces, which have be summarised in Chapter V and the different suggestions and views consider in Chapter VI of the report of the Madras Committee. We have also consider the systems prevailing in Baroda and Aundh States, which were explain to us fully and in detail by Messrs. Sudhalkar, Naib Dowan, Baroda, a Appasaheb Pant, Aundh State respectively, in their evidence before us. We not think that it will serve any useful purpose to describe or discuss in det every one of the schemes considered by us, but we will refer at some leng to a scheme preferred by Sir Leonard Stone, Chief Justice of Bombay.

91. After referring to the systems of judicial administration prevaili in Egypt and other countries the Chief Justice put forward a scheme for t Province, in which he recommended a separation not only between the judicia and the executive, but also between the civil judiciary and the crimi judiciary, and in which the Police head of a District should be responsi for the maintenance of law and order in the District and not the Distr Magistrate. According to his scheme, there would be four different cad in each District as follows :—

(*A*) Revenue Collection and other cognate duties—Awal Karku Mamlatdar, Prant Officer and Collector—none of these having any magister powers—subordinate to the Revenue Commissioner and the Government.

(*B*) Police Officers headed by the District Superintendent of Poli subordinate to the Deputy Inspector General of Police, the Inspector Gene of Police and Government.

(*C*) Magistrates, Assistant and Additional Sessions Judges and Sessi Judges, subordinate to the High Court.

(*D*) Civil Judges, Junior Division and Senior Division, Assistant Judg and District Judges, subordinate to the High Court.

Magistrates should be recruited from pleaders having a good practice criminal courts and Civil Judges from those having good practice in civil cour The pay and prospects of both will be similar, the former rising to the post a Sessions Judge and the latter to that of a District Judge. This will gi an opportunity to them to become specialized in their respective spheres.

92. Some of the witnesses, whom we examined, welcomed this idea, a he supported the separation of the civil judiciary from the criminal. T Chief Justice went a step further, and in order to give a chance to both t Sessions Judges and the District Judges to be promoted to the High Cou he suggested that there should be a similar bifurcation in the High Court al some of the Judges being always assigned criminal work. Most of the witnes were not in favour of this idea ; and thought that this would be carryi the separation too far. In our opinion such specialization is not necess

at any stage. A sound lawyer having a good grounding in the basic principles of law, can be a successful Judge both on the criminal as well as on the Civil Side. Our past experience shows that Civil Judges who were invested with Magisterial powers were found to dispose of criminal cases satisfactorily and efficiently.

93. But the principle drawback in the scheme is the enormous increase in the expenditure which it involves. For every district there will have to be two judicial heads, one District Judge and one Sessions Judge instead of one District and Sessions Judge. It is possible that some of the Assistant Judges might then be dispensed with, but the saving caused thereby will not be substantial. We have discussed this scheme separately because it may be useful in appreciating our proposals.

94. We will refer to another matter that the Chief Justice also raised, viz., the question of the appointment of High Court Judges. The Chief Justice stated that the separation of the judicial from the executive practically consisted in transferring the control over the subordinate courts from the Executive to the High Court, but if the High Court itself were not kept independent of the influence of the Executive the proposed separation would be futile.

95. It is not finally settled what the future constitution of the High Court will be under the new constitution. But if the Provincial Government is to appoint Judges of the High Court and can take disciplinary action against them, then such Judges cannot be said to be independent of Government, and the separation at the bottom would be only a sham, without a similar separation at the top. The question of the future status of the High Court being outside the province of the terms of reference, we will content ourselves with merely expressing our opinion that any scheme of separation would be merely academical unless the judiciary at the top is free from all control by Executive.

And now to come back to our scheme :

The Appointment, Qualifications, Control and Career of Magistrates

96. There is general agreement that the Magistrates should be recruited from practising lawyers and should possess the same legal qualifications as Civil Judges. If so, they should have the same prospects of rising to the post of a District and Sessions Judge as the Civil Judges. Otherwise a candidate would always prefer to be a Civil Judge, and only those who are found not up to the standard and have failed to get a Civil Judgeship would seek the post of a Magistrate. In order to avoid this, there should be a single cadre, and

a candidate, who is selected, should be a Civil Judge-*cum*-Magistrate ; so th having gained the experience of both civil and criminal work, he will be eligibl if selected, for the post of an Assistant Judge and Assistant Sessions Judg and thereafter of District and Sessions Judge.

97. The question that next arises is whether such an officer should be bot a Civil Judge and a Magistrate at the same time, so that he might try both civ cases and criminal cases according to his convenience. That, we are tol is the system in Baroda State. But looking to the very large number of civ and criminal cases that come up for trial before every court, we are not i favour of what the Madras Committee calls the "Simultaneous Method" In rejecting it in paragraph 118 of their report they say :—

"If an Officer is a Magistrate and a Munsiff at the same time, he will find extremely difficult to adjust his work in a manner that will not cau inconvenience to the public. It would seldom be possible for a Munsi Magistrate to know, long enough in advance to enable him to post his oth cases, how many witnesses will appear before him on a given day or wh time their examination will actually take. Summonses may not have be served, or the witnesses may not be able to come, or they may be deliberate kept back by an interested party. These things usually happen and cann be wholly eliminated. Obviously, if a judicial officer cannot estimate eve roughly how much time a particular case will occupy on a given day, it wi not be possible for him to make any judicial posting. The result would that he either overposts his work which necessitates adjournments wi inconvenience all round ; or underposts, the consequence of which is del in disposal. It might be asked how a full time stationery Sub-Magistra manages. The answer is that in a criminal court, postings do not usual run beyond a month and a competent Magistrate can know from day to d exactly where he stands in relation to his work. This would not be possib in relation to civil cases where the postings run months ahead. Perso who advocate this method point to the fact that a District Judge is al to hear Session Cases from day to day and ask why a Magistrate-*cum*-Muns should not do likewise. The answer to this is that the analogy of a Sessio court does not apply to a Magistrate's Court. In Sessions cases, the witnes would have been bound over in advance. They have to appear on t appointed day or forfeit their bonds unless they show good cause to t contrary and they know this. Besides, from the length of the depositio in the lower Court and the estimate which the Judge has formed of t calibre of the committing Magistrate, he can *forecast with reasonable precisi* the time that a particular Sessions case would take. Should his estima turn out to be materially wrong, he can always adjust his work by movi his civil and criminal appeal either forward or backward. These facilit

a Munsiff-Magistrate will not have. The moving of civil appeals does not involve any inconvenience to parties, because their presence is seldom necessary and the Vakils would be in any case coming to court. It must also be admitted that even in a District Court, Sessions cases do frequently run into civil proceedings which are as a result adjourned more frequently than they need otherwise be. There are persistent complaints that civil litigation lasts longer than it should and the argument frequently urged against giving criminal judicial powers to the civil judicial officer is that, in such an event, criminal cases would tend to take the same time as civil cases to get disposed of. If with a view to avoid delays in disposal, a Munsiff-Magistrate were to allot certain other days to criminal work, the result would be that a criminal case which is not finished on schedule will have to wait for the next allotted day. And this will be hard on accused persons, especially when they are on remand."

98. We entirely agree and would, therefore, not recommend the adoption of this method. We prefer what the Madras Committee styles "The alternating" or "turn and turn" method. Under this method, an officer will work for a term as a civil Judge and for another work as a Magistrate, and back again, the postings depending upon the exigencies of administrative convenience. This will facilitate the selection of a suitable officer for promotion to Assistant Judgeship and eventually to District and Sessions Judge-ship, and when he is so promoted, he will have a full knowledge of both civil and criminal work. Of course, exceptions will have to be made in the case of those who are found unfit either for one kind of work or the other, and such officers may be continued in the line suited to them. It follows that they are marked out as unfit for the post of a District and Sessions Judge; and no useful purpose will be served by giving them training in both civil and criminal work, when they are fit for only one.

99. Some of the Revenue Officers who have been doing Magisterial work already may be found sufficiently qualified and suitable to be continued as Magistrates under our scheme and if they so desire, they may be taken out of the revenue line, but they would be confined to criminal work only.

100. The prospects of such Magistrates would correspond to those of Civil Judges who are or have become ineligible for Assistant Judgeship. Such Civil Judges can still rise to be a Civil Judge, Senior Division, and corresponding to the latter, these Magistrates should become Magistrates, Senior Division, whose periodical increments should be the same as Civil Judges, Senior Division. Such Magistrates, Senior Division, should ordinarily be posted as City Magistrates at important places, and be invested with power to hear appeals from Second Class Magistrates.

101. We propose to abolish the 3rd Class Magistracy altogether. Under Government Resolution, Home Department, No. 2310/3-III, dated 10th June 1939, the Civil Judges are 1st Class Magistrates *ex-officio*, but they are not to be entrusted with the trial of first class cases until they have completed 5 years of their service. We suggest that this should be modified. All Civil Judges should be *ex-officio* Second Class Magistrates, and should be invested with the powers of a first class Magistrate only after they have worked as second Class Magistrates for at least one year. Appeals from such Second Class Magistrates will lie to the Magistrates of the Senior Division specially empowered.

102. Although we have disapproved of the system of civil Judges working simultaneously as Magistrates, it may be found suitable in certain exceptional talukas where the civil work is so little that the Civil Judge has to be sent on deputation for substantial part of the year. Civil Judges of such courts can easily cope with both the civil and criminal work of the Talukas. So too, we think that it is high time that the linking of civil courts should be discontinued. It has never been popular either with the Judges or the bar or the litigants, and causes a good deal of inconvenience to all. If each of such linked courts is given a separate Judge, he will be able to cope with all the criminal and civil cases in his jurisdiction.

103. In view of the higher legal qualifications of the new Magistrates, we suggest that the power to try summarily should be more freely conferred upon them after they have gained reasonable experience. This will save a good deal of their time and enable them to dispose of a much larger number of cases.

104. The method of recruiting such Civil Judge-*cum*-Magistrates will, we expect be laid down by the new Constitution Act. We are not opposed to entrusting the work of recruitment to the Public Service Commission, but we would urge that the High Court should have a voice in their selection. Once their appointment is made, they should be entirely subordinate to the District and Sessions Judge and the High Court, and have nothing to do with the District Magistrate. Their promotion and their transfer as well as disciplinary action against them should be left exclusively to the High Court. Sub-section (*f*) of section 17 of the Criminal Procedure Code will have to be amended and the words "Sessions Judge" substituted for the words "District Magistrate".

105. Some of the District and Sessions Judges pointed out that they were already over-worked and would hardly be able to devote any time to supervise the work of the Magistrates in the District. We do realize that unless they are relieved of some of their present duties, they will not be able to do full justice to the additional duty proposed to be thrown on them as the heads of the

Magistracy in the District, and we suggest that Government should consider the advisability of transferring the official guardianship of the properties of minors from the Deputy Nazir of the District Court to the Collector or some other agency. This arrangement might conduce to a more efficient administration of minors' estates, and give time to the Sessions Judge to supervise and control the work of the Magistrates. The Deputy Nazir will then be free to take charge of the Magisterial file, and do the work that is now being done by the Deputy Chitnis under the District Magistrate. The clerks employed by the Deputy Nazirs are temporary and are paid out of the minors' estates. They may be transferred to the Collector's office to do the same work under the Deputy Chitnis, if found suitable; otherwise they may be discharged. This reform is really overdue and is independent of the separation of the judicial and executive functions, and we urge that the time for effecting it, is now eminently opportune. This will not require any amendment in the Guardians and Wards Act, 1890, and in fact sections 23 and 32 do contemplate the appointment of Collectors as guardians of minors' estates.

Location of Courts

106. Under our scheme nearly every Taluka will have a First Class Magistrate. Second Class Magistrates will be posted only at District Head Quarters for initial training and to help the First Class Magistrates. We recommend that in every important city there should be at least one Senior First Class Magistrate. We expect that he will have sufficient work to occupy him full time. In the same way, the Mamlatdar of the Taluka, though relieved of his criminal work, will have other sufficient work to attend to. If neither of them has full time work, it should be considered whether the area of his jurisdiction should be extended. There will be no Third Class Magistrates, and appeals from the Second Class Magistrates will be heard by Senior Magistrates specially empowered. Hence no Sub-Divisional Magistrate is required. At present the Deputy Collector or the Prant Officer, as he is commonly called, is also the Sub-Divisional Magistrate. The powers of a Sub-Divisional Magistrate enumerated in Schedule III of the Criminal Procedure Code, may be exercised by specially empowered First Class Magistrates. The Prant Officer is concerned more with revenue work and the absence of a Sub-Divisional Magistrate is not likely to affect the administration of criminal justice under the supervision of the Sessions Judge.

The District Magistrate

107. Before dealing with the powers of Magistrates under the different section of the Criminal Procedure Code, we have first to consider the question of maintenance of law and order. The suggestion made by Chief Justice that the maintenance of law and order should be left entirely to the police,

without any interference by the District Magistrate, is strongly supported by two experienced Police Officers examined by us, one a Deputy Inspector General of Police and the other a Deputy Commissioner of Police, both of whom have a wide experience of the affairs in the mofussil. They say that the District Magistrate is hardly in direct touch with the happenings in villages and generally acts on the recommendations made by the District Superintendent of Police, who can avoid responsibility by taking shelter behind the District Magistrate, but if he is charged exclusively with the maintenance of law and order, he will feel a greater responsibility, and will fulfil it more efficiently. We do not doubt the force of this reasoning, but unfortunately the Police do not command the same confidence from the public as the District Magistrate. It is expected that with the change of Government, the Police may be able to inspire more confidence, but most of the witnesses examined by us were opposed to the idea of giving such wide powers to the Police, uncontrolled by the District Magistrate. We think the time has not yet come when the District Magistrates can be relieved of their responsibility for the maintenance of law and order, and the District Superintendent of Police and the Police Force in the District must continue to be under his "command and control" as provided in Section 13 of the Bombay District Police Act, 1890.

108. As doubt was raised whether the District Magistrate will be able to maintain peace and order in the District without any magistrate under him. He is himself a magistrate and we propose that all the Mamlatdars and Prant Officers under him will be *ex-officio* magistrates, but they will not exercise their magisterial powers judicially. To borrow the expressions used in the report of the Madras Committee, they will be "Executive Magistrates" while the magistrates subordinate to the Sessions Judge will be "Judicial Magistrates". The former will exercise their Magisterial powers only so far as they are required for the maintenance of law and order. They will take all the necessary preventive measures but when the stage of judicial inquiry and decision is reached, they will transfer the proceedings to the judicial magistrate having jurisdiction. We will illustrate this by referring to various sections of the Criminal Procedure Code, indicating what powers an Executive Revenue Magistrate should exercise and how far.

(1) Under Section 64, he may arrest or direct the arrest of, and commit to custody, any person committing an offence *in* his presence but he shall not try that person. For the purpose he must transfer the proceedings to the appropriate Judicial Magistrate.

(2) Similarly, under section 100, if he is a First Class Magistrate, he can issue a search warrant for discovery of a person wrongfully confined, but after the person is so discovered, the proceedings should be transferred to the appropriate Judicial Magistrate for further action.

(3) He may also similarly exercise the power of search of a house suspected to contain stolen property, forged documents, etc., under section 98 and if any suspected article be found, he should forward the proceedings to the Judicial Magistrate.

(4) The power to hold inquests under sub-section (5) of section 174 may be exercised by the Executive Magistrates.

(5) Dying declarations may be recorded by an Executive Magistrate but not confessions of the accused persons, or statements of witnesses under section 164 of the Code.

(6) The same principle is to be applied to the exercise of the powers under Chapter VIII to XII of the Code. We had included *a special question* regarding those powers in the questionnaire issued by us. and almost all the witnesses are agreed on this point. We will deal with these powers at some length, as the same rule cannot be applied to all the preventive measures contained in different sections in these chapters.

109. Part IV of the Criminal Procedure Code which is headed " Prevention of offences " contains provisions aimed at the prevention of those acts which are likely to disturb public peace or to affect public safety or confort, by persons who are a danger to the public. It contains six chapters, VIII to XIII, of which Chapter XIII deals with preventive actions by the Police, with which we are not concerned.

110. Chapter VIII deals with—

Security Proceedings—

(1) for keeping peace—

(*a*) on conviction or	Section	106
(*b*) on likelihood of breach of peace and		107

(2) for good behaviour from—

(*a*) persons disseminating seditious matter, etc. ..	108
(*b*) Vagrants and suspects and	109
(*c*) habitual offenders	110

111. No Executive Magistrate can exercise the power under section 106 since security under that section can be demanded only after conviction. and such Magistrates will no longer try and convict any person.

112. Proceedings for taking security for keeping peace under Section 107 or for good behaviour under Sections 108, 109 and 110 are usually started at the instance of the Police, and sometimes on private complaints. As these proceedings are aimed at the maintenance of law and order, the initiation of the

proceedings should be left to Executive Magistrates. If a complainant or the Police were to move a Judicial Magistrate for action under any of these sections they should be referred to the appropriate Executive Magistrate. If, on the materials placed before him, the latter decides to take action, he should issue a notice under section 112, calling upon the person concerned to show cause why he should not be required to furnish security. In cases of emergency, he can, under section 117 (3), require him to furnish interim security pending the inquiry, and on his failure to do so, he can detain him in custody. There he should stay his hand, and thereafter if he thinks that inquiry is necessary under section 117 he should transfer the proceedings to the Judicial Magistrate having jurisdiction. The inquiry and all subsequent orders, which ordinarily require judicial decisions will be within the purview of the Judicial Magistrate. We do not think that this will in any way impair the emergency powers of the Executive Magistrates, since they will retain their power to arrest in case of emergency under section 3 of section 107 and also the power to make interlocutory orders under sub section (3) of section 117 but they should not hold the subsequent judicial inquiry, condemn the suspect and pass a final order requiring him to furnish security. That should be the function of the Judicial Magistrate.

113. We are further of opinion that once the Judicial Magistrate has passed his order requiring or not requiring security, orders under sections 124 and 125 should be passed in his discretion by the District Magistrate. Orders under sections 123, 126 and 126A should, however, be passed by the Judicial Magistrate, who had decided the case judicially.

114. We may also add that under section 151 any Police Officer, knowing of a design to commit any cognizable offence, may arrest without orders from a Magistrate and without a warrant, the person so designing if it appears to such officer that the Commission of the offence cannot be otherwise prevented. Under Sections 149 and 152, he can also of his own authority interpose to prevent the commission of a cognizable offence or any inquiry to public property, etc.

115. These powers of the Police and the powers retained with the Executive Magistrates to institute security proceedings and to pass emergent orders, together with certain other powers under Chapter VIII to XII which we propose to leave with them to a large extent, will be sufficient for the maintenance of law and order, if they are properly and effectively exercised.

116. We would apply the same principle to proceedings under Chapters X and XII. Chapter X deals with the removal of unlawful obstructions and nuisances of various kinds. The conditional order under section 133 should be made by the Executive Magistrates, and if that order is obeyed without

objection, the proceedings will automatically terminate. But if the party concerned wants to show cause or claims a jury, and a judicial inquiry is called for, then the proceedings should be sent to the appropriate Judicial Magistrate for disposal.

117. Chapter XII deals with disputes regarding immoveable property and if a breach of the peace is apprehended, the initial order under section 145(*1*) should be passed by the Executive Magistrate, who may attach the property, if necessary under the second provision to sub-section (*4*) or pass any suitable order under sub-section (*8*) but for judicial inquiry and final order the proceedings should be transferred to the Judicial Magistrate having jurisdiction.

118. Chapter XI contains only one section—the familiar section 144, and as it is to be invoked only in urgent cases of nuisance or apprehended danger, and as the order passed under this section is to remain in force only for two months, unless extended by the Provincial Government, there is no scope for a Judicial inquiry by a Judicial Magistrate. We recommend that the powers under that section should be exercised exclusively by executive Magistrates and if any party or Police Officer approaches a Judicial Magistrate for an order under that section, he should be referred to the appropriate Executive Magistrates. Government may, however, authorise any Judicial Magistrate, especially the City Magistrates in District Towns, to pass orders under section 144 themselves. But this should be rare, since the District Magistrate himself can issue such an order. A Judicial Magistrate may, in very exceptional cases, pass such an order if the Executive Magistrate is not present on the spot, and the issue of the order cannot await his arrival. In such a case, the latter may, after his arrival, continue or rescind the order passed by the former.

119. We must acknowledge with respect that these recommendations are similar to those made by the Madras Committee and have been approved by all those whom we consulted in the course of this inquiry.

120. It follows that cognizance of offences under section 190 of the Code will have to be taken by Judicial Magistrates and the final report of the Police under section 173 also will have to be sent to them. What is known as A, B or C summary will be issued by such Magistrates.

121. As regards inquiry into cases of suicides or accidental deaths, the report of the Police under section 174 may be received by Executive Magistrates and they should exercise the powers under section 176, since it is no judicial inquiry, but only an administrative action.

122. We have next to consider certain other powers conferred by the Court upon the District Magistrate and the Sub-Divisional Magistrate. The power to direct a warrant to any landholder farmer or a manager of land for the arrest of any escaped convict, proclaimed offender or a person who has been accused of non-bailable offence, and who was eluded pursuit, under section 78(*1*) may be exercised by the District Magistrate as it does not involve any judicial proceedings.

123. In an inquiry into disputes relating to immoveable property under Chapter XII, section 148(*1*) empowers the District Magistrates and the Sub-Divisional Magistrates to depute any subordinate Magistrate to make the inquiry. As we are now requiring the judicial Magistrates to hold the inquiries, this section need not be availed of.

124. The power to grant a warrant to search for a document, parcel or other thing in the custody of the Postal and Telegraph authorities is conferred only on the District Magistrate and the Chief Presidency Magistrate by section 96(*2*). It is not necessary to alter that procedure and whenever any Court requires a warrant it may obtain it from the District Magistrate or the Chief Presidency Magistrate as the case may be.

125. The power to initiate certain criminal proceedings under section 196(*a*) (2) and to order criminal inquiry under section 196(*b*) should remain with the District Magistrate, as it is more or less in the nature of an administrative or executive order.

126. The power to tender pardon to an accomplice under section 337 should not be exercised by the District Magistrate or the Sub-Divisional Magistrate, but by the judicial 1st Class Magistrate, making the inquiry or holding the trial, and where the offence is still under investigation, by the Magistrate having jurisdiction to try the case.

127. Under proviso (*b*) to section 350, the power to set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held is conferred upon the High Court and the District Magistrate. But as it involves a judicial decision even though there may not be any appeal, we think that the power should be exercised by the High Court or the Sessions Judge and not by the District Magistrate. This section will, therefore, have to be amended accordingly.

128. There are three sections 192, 349 and 528 (*2*) in the Code which deal with the transfer of cases by the District Magistrate or the Sub-Divisional Magistrate. Section 192 (*1*) will not be applicable since no District Magistrate or Sub-Divisional Magistrate will hereafter take cognizance under section 190.

Section 349 lays down the procedure when a second or third Class Magistrate cannot pass sentence sufficiently severe. In such a case he is to submit the proceedings to the District Magistrate or the Sub-Divisional Magistrate, to whom he is subordinate. We recommend that he should submit the proceedings to the Court to which appeals from his decisions ordinarily lie. The section will, therefore, have to be amended accordingly. The most important section that is usually resorted to by the parties to obtain transfer of cases is section 528(2) which gives concurrent power to the District and the Sub-Divisional Magistrate to order such a transfer. We think that that power should be vested in the appellate authority so that where the case is pending before a Second Class Magistrate its transfer may be ordered by the Senior First Class Magistrate to whom the appeals lie, and if the case is pending before a First Class Magistrate then it can be transferred only by the Sessions Judge. This will necessitate an amendment of section 528(2) to that effect.

129. The District or the Sub-Divisional Magistrate will have hereafter no appellate powers and no District Magistrate shall be empowered to hear appeals from order under section 118. If follows that even appeals from orders under section 514 should not be heard by the District Magistrate and section 515 should be amended by substituting the words "Sessions Judges" for the words, "District Magistrates". In the same way, the powers of the District Magistrate and the Sessions Judge under sections 435 to 438 being concurrent the District Magistrate should not exercise them. There is, however, no objection to the executive Magistrates, acting under sections 523 and 524 regarding the disposal of property seized by the Police. So also the power to compel restoration of abducted females under section 352 may be exercised by the District Magistrates. But if any subsequent judicial inquiry is necessitated, the proceedings should be transferred to the appropriate judicial Magistrate.

130. The Juvenile Courts should be subordinate to the Sessions Judge.

131. Thus, in short, wherever a judicial inquiry or a judicial decision is required, the matter should be dealt with by the judicial Magistrates. But where executive or administrative orders are to be passed, the executive Magistrates should be at liberty to do so. This principle should be extended to the powers conferred by other acts also. By way of illustration we have appended a schedule showing the allocation of the powers and functions between the two kinds of magistrates. It is not exhaustive and it may have to be enlarged, and in each case we recommend that the same principles should be applied.

Village Courts

132. Government have now decided to abolish the system of honorar Magistrates and Branches of Magistrates. So we need not consider the questi beyond expressing our approval of the decision taken by Government. W are unanimously of the opinion that the Village Police Patil should not b invested with the powers to try even petty cases. It is our experience th in most of the villages there are factions and the Police Patil is inclined to si with one of the parties. Some of the witnesses seem to be of the opinion th it would be a great hardship to require villagers to go before the Talu Magistrate for petty matters and it would be very convenient if a local offic is allowed to deal with them. We appreciate the force of this reasonin but it is necessary that the person to deal even with petty cases should b independent and should have no bias. We, therefore, recommend that su cases may be dealt with by the village Panchayat Courts, of which some migh be constituted as in Aundh State as an experimental measure. In Aund State both civil and criminal cases are mostly disposed of by elected Villa Panchayats, assisted by a Sub-Judge appointed by the State. In this w justice is brought to the doors of the villagers, it is speedy and extreme inexpensive, and the result is said to be almost invariably satisfactory. Ma of the cases are compromised, and the fact that although appeals are provid for, there are very few appeals shows that the litigants are satisfied with t decisions given by the Panchayats. Some of our members are very mu in favour of the system of Village Panchayat Courts and have contribut a separate minute on it ; but however great our admiration of the Aund State system, we do not think the time is yet ripe for introducing it in th Province.

133. We have not dealt with the Presidency Towns, because there is alrea a practical separation of the judicial and executive functions. The Collector Bombay has nothing to do with the trial of criminal cases and the Ch Presidency Magistrate is responsible for the disposal of all criminal cas all other Presidency Magistrates being subordinate to him. The Poli Commissioner is responsible for the maintenance of law and order, and ho the powers of a Presidency Magistrate, though he never uses them for judici work. Appeals from the Judgments of the Presidency Magistrate lie to t High Court. The work of the Presidency Magistrates is supervised a controlled by the High Court, but their appointment rests with the Governm who after consulting the Chief Presidency Magistrate usually consult t High Court also about any recommendation made by the Chief Presiden Magistrate. We think that the appointment of the Presidency Magistra should be made by the High Court in consultation with the Chief Presiden Magistrate or at least their appointments should be made in the same w as that of Civil Judges-*cum*-Magistrates in the Mofussil.

134. It is necessary that every Judicial Magistrate should have a Police Prosecutor attached to his Court, so that the work in his Court may be continuously carried on smoothly. The present system of appointing Police Prosecutors is regarded as far from satisfactory. We suggest that they should be appointed by the Provincial Government in the same way as Public Prosecutors. The posts should be permanent and pensionable and they should work under the orders of the District Magistrate whom they really represent in all the prosecutions. They should be recruited from practising lawyers of sufficient standing and their salary should be Rs. 200 rising to Rs. 400. They should not be allowed to have private practice.

135. We may make one other recommendation which, though not directly within the terms of the reference made to us, is closely allied to it. At present the Government Finger Print Expert and the Government Hand-writing Expert are attached to the Criminal Investigation Department, and are subordinate to the Deputy Inspector General of Police, C. I. D., Poona. They have often to give opinion in criminal cases, but are looked upon as Police Officers inclined to support the Police case. This is undesirable from the point of view of the administration of justice, and the principle that the judiciary should be independent of the executive would, indirectly at any rate, be involved in the question whether these officers should be subordinate to the Police or not. Whenever such an expert appears in the Court to give evidence, the defence attacks him in the cross-examination by suggesting that he is a subordinate of the Deputy Inspector General of Police, and wants to support the prosecution. The evidence of the expert is very often an important piece of evidence in a case and its credibility or otherwise makes all the difference in deciding the guilt or innocence of the accused. In the Central Provinces, he is an independent officer and in the Central Government, he is attached to the Home Department. We, therefore, recommend that in this Province also these experts should be under the Home Department, and not form part of the Police Department.

CHAPTER V.

Summary of our Recommendations.

136. Our recommendations may be summarised as follows :—

(1) Complete separation of the judiciary and the executive should be effected.

(2) The Collector will remain the District Magistrate and the head of the Police as at present but only for the purpose of maintenance of law and order in his district. He will not try cases or hear appeals, and the Magistrates who do court work (styled for the sake of convenience "Judicial Magistrates" as opposed to "Executive Magistrates") will not be subordinate to him, but to the Sessions Judge and the High Court.

(3) The Deputy Collector will continue to be sub-Divisional Magistrate and the Mamlatdars and Aval Karkuns will continue to possess magisterial powers as at present, but they will exercise these powers only for the purpose of maintaining peace and order.

(4) Even as regards preventive measures, they can only initiate proceedings, but if and when those proceedings come to the stage of a judicial trial, they should be transferred to the appropriate judicial Magistrate.

(5) The Judicial Magistrate, who will be subordinate to the Sessions Judge and the High Court, should be recruited as Civil Judges, but selected officers from the Revenue Department, who are already doing magisterial work may be retained and will be subordinate to the Session Judge and the High Court.

(6) Third Class Magistrates should be abolished, and the newly recruited Civil Judges will act first as Second Class Magistrate for at least one year and may then be invested with the powers of a First Class Magistrate.

(7) There should be one cadre of Civil Judges and Magistrates, and they will work for some years as Magistrates and some years as Civil Judges by turn, but not simultaneously, except when required by the exigencies of local conditions, such as insufficiency of work in a particular Taluka.

(8) Appeals from a Second Class Magistrate will be heard by a selected First Class Magistrate specially empowered.

(9) Village Police Patels should not be empowered to try even petty criminal cases, but powers to try such cases may, by way of experiment be conferred on selected Panchayats.

(10) Powers of an administrative character vested in the District Magistrates or the Sub-Divisional Magistrates under the Criminal Procedure Code and other Acts should continue to be exercised by them.

(11) The power to transfer cases should be conferred upon the Court to which appeals from the Court from which the transfer is sought ordinarily lie.

(12) As the Scheme proposed is likely to increase the burden of the work of the District and the Sessions Judges, it is suggested that they might be relieved of the work of supervising the management of minor's estates of which the Nazir or the Deputy Nazir is appointed as official guardian, and instead of the latter, the Collector should be appointed as the guardian under the Guardians and Wards Act, 1890 (The Committee was not unanimous on the transfer of this work from the Sessions Judge).

(13) A Police Prosecutor should be attached to every Magisterial Court. He should be appointed by the Provincial Government and be subordinate to the District Magistrate. He should be recruited from practising lawyers and should not be allowed to have private practice.

(14) Juvenile Courts should be subordinate to the Sessions Judge.

(15) Generaly speaking, wherever a judicial inquiry or a judicial decision is required the matter should be dealt with by Judicial Magistrates and Executive Magistrates should pass executive or administrative orders only.

(16) Government should undertake the necessary legislation and issue executive instructions to implement our proposals, particularly those in respect of allocation of functions between executive and judicial Magistrates wherever necessary.

(17) These changes should not be introduced by stages but at once without avoidable delay.

CHAPTER VI.

FINANCE.

137. As already mentioned in the preceding chapter, the scheme envisages to relieve the existing Revenue personnel of their criminal work and to post one Judicial Magistrate in almost each of the 191 talukas in the Province. In addition to these Magistrates, it will be necessary to have a number of City Magistrates in big cities like Ahmedabad, Poona, Sholapur, etc. The existing strength of City Magistrates is 18 and that of the Resident Magistrates is 101. The total number of Magistrates necessary to work this scheme on the above basis would therefore be 217 (191 Resident Magistrates and 26 City Magistrates).

138. At present the City Magistrates and Resident Magistrates are mostly from the Revenue Department and there is also no leave reserve for these Magistrates. When the separation scheme comes into being there will be a separate cadre of Magistrates, and a leave reserve will therefore be necessary. We are of opinion that a leave reserve of 10 per cent. would be adequate. This will bring the total strength of the cadre to 239 Magistrates. The total number of magistrates to be appointed will thus be 120.

139. We have carefully considered the question of location of the courts with a view to serve the interest of the public being in mind at the same time to keep the cost of the scheme as low as possible. In the case of certain talukas we did not consider it necessary to have whole-time Judicial Magistrates on account of their small size, the population and shortage of work. In these cases we have proposed the courts of circuit or itinerary Magistrates to serve two or more than one of such talukas. As, however, the High Court will have the control of these Magistrates it will be free to appoint such Magistrates as Sessions-cum-Criminal Judges in charge of these talukas by re-ordering the distribution of civil jurisdiction. We have been able, by the arrangement of itinerary Magistrates suggested above, to reduce the strength of the total cadre from Magistrates suggested above, to reduce the strength of the total cadre from 239 to 216 and the number of Magistrates to be appointed from 120 to 97. We append a statement at Schedule "B" showing the location of the new courts, district by district and taluka by taluka.

140. The annual cost of putting the scheme into effect by appointing 97 Magistrates will be roughly Rs. 9 lakhs. This cost includes non-recurring items of expenditure such as the purchase of books, furniture, etc. A statement showing the details of the cost involved is attached at Schedule "C". It is only a provisional estimate, and after the work of the Debt Adjustment Boards is finished, it may be possible to materially reduce the number of additional Magistrates, since some of the Civil Judges may then be free to take over some of the magisterial work.

141. In Schedule "D" we have suggested what amendments are required to be made in the Criminal Procedure Code and other Acts in order to give effect to our recommendations. The list is only indicative but not exhaustive.

142. The Committee desires to place on record its acknowledgement of the very valuable help it has received from the report of the Madras Committee and from the witnesses who sent their replies to the questionnaire, particularly those who gave evidence before the Committee, as well as the two Secretaries Messrs. Gallagher and Bam. The Committee regrets that Mr. Drewe, who was a member, and rendered a good deal of help in drawing up the report, could not be present to sign the report, as he went on leave preparatory to retirement. The Committee also records its appreciation of the help rendered and the hard work put in by Mr. R. P. Umarji, a Junior Assistant in the Home Department.

(Signed) N. S. LOKUR,
Chairman.

11th October 1947.

Members—
(Signed) R. A. JAHAGIRDAR.
(Signed) B. N. DATAR.
(Signed) HIMATLAL P. SHUKLA.
(Signed) C. M. GANDHI.
(Signed) Y. B. CHAVAN.
(Signed) S. S. MORE.
(Signed) C. K. DAPHTARY.
(Signed) S. D. PATIL.
(Signed) A. A. KHAN.
Secretary—(Signed) A. S. BAM.

SCHEDULE "A".

(*Vide* paragraph 131).

Central Acts applying exclusively to Bombay.

Serial Number and title of the Act.	Judicial Magistrate Section.	Executive Magistrates.	Concurrent Jurisdiction.
The Bombay District Police Act, 1890.		15, 16, 17 and 21.	
	Bombay Acts and Regulations.		
1. The Bombay Abkari Act, 1878	38D, 41, 41C, 45, 45A, 49A, 55, 56.	38A, 42, 50	38B, 40
2. The Bombay Prevention of Gambling Act, 1887.	8, 10 and 11.	..	6(*ii*), 7
3. The Bombay Prevention of Prostitution Act, 1923.	12.	9(6).	
4. The Bombay Children Act, 1924.	5, 6(*1*), (*2*), Proviso to Sections 7(*1*) and (6), 24A, 47A. 51.		6(*1*), (*2*), 17.
5. The Bombay Prevention of Adulteration Act, 1925.	12.		
6. The Bombay Borstal Schools Act, 1929.	8 and 21.		
7. The Bombay Motor Vehicles Tax Act, 1935.	13.		
8. The Bombay Probation of Offenders Act, 1936.	3(*1*) (*3*).		

SCHEDULE "B".

(*Vide* paragraph 139).

Statement showing the location of courts, giving details of existing Magistrates, total number necessary for each district and the additional number required.

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4-3).
1	2	3	4	5
Ahmedabad ...	Ahmedabad ...	7	7	.....
	Sanand }	.....	1	1
	Dholka }	1	1	.....
	Dhanduka ...	1	1	.....
	Viramgaon ...	.....	1	1
	Gogha ...	1	1	.....
	Daskroi ...	.....	1	1
	Prantij } Modasa }			
		10	13	3

SCHEDULE B—*contd.*

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4–3).
1	2	3	4	5
Kaira	Matar	.....	1	1
	Mohmedabad	.....	1	1
	Nadiad	2	2	.....
	Kapadvanj	.....	1	1
	Anand	2	2	.....
	Boread	1	1	.....
	Thasra	.....	1	1
		5	9	4
Panch Mahals	Godhra	2	2	.....
	Dohad	2	1	.....
	Jhalod			
	Kalol	1	2	0
	Halol	.....	.....	.....
		5	5	0
Broach	Broach	2	2	.....
	Ankleshwar	.....	1	
	Jambusar	1	1	.....
	Vagra	.....	1	1
		3	5	2
Surat	Mandvi	.....	1	1
	Olpad	.....	1	1
	Bardoli	1	1	.....
	Valod	.....		
	Chikhli	.....	1	1
	Pardi	.....	1	1
	Jalalpore	.....	1	1
	Surat	3	3	.....
	Bulsar	1	1	.....
		5	10	5

SCHEDULE B—*contd.*

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District	Additional Number required (4–3).
1	2	3	4	5
Thana ...	Dahanu ...	1	1	.....
	Umbergaon ...	1	1	.....
	Mokhada ...	.....	1	1
	Bassein ...	.....	1	1
	Palghar ...	1	1	.....
	Vada ...	.....	1	1
	Bhivandi ...	1	1	.....
	Kalyan ...	.....	1	.....
	Shahapur ...	1	1	.....
	Murbad ...	.....	1	1
	Thana ...	1	2	.....
	Bocivli ...	.....	.....	.....
		5	12	4
Ahmednagar ...	Akola ...	.....	1	1
	Sangamner ...	1	1	.....
	Kopergaon ...	.....	1	1
	Belapur ...	1	1	.....
	Rahuri ...	.....	1	1
	Newasa ...	.....	1	1
	Shivgaon ...	.....	1	1
	Pathardi ...	.....	1	1
	Parner ...	.....	1	1
	Shrigonda ...	.....	1	1
	Karjat ...	.....	1	1
	Ahmednagar ...	2	2	.....
	Jamkhed ...	.....	.....	.....
		4	13	9
East Khandesh ...	Yawal ...	1	1	.....
	Raver ...	.....	1	1
	Bhusaval ...	1	2	1
	Edlabad ...	.....	1	1
	Chopda ...	1	1	.....
	Amalner ...	.....	1	1
	Erandol ...	1	2	1
	Jalgaon ...	1	1	.....
	Chalisgaon ...	.....	1	1
	Parola ...	.....	1	1
	Shadgaon ...	.....	1	1
	Jamner ...	1	1	.....
	Pachora ...	.....	.....	.....
		6	13	7

SCHEDULE B—*contd.*

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4—3)
1	2	3	4	5
West Khandesh ...	Taloda	.....	1	1
	Shahada	1	1	.....
	Shirpur	.....	1	1
	Nandurbar	1	1	.....
	Navapur	.....	1	1
	Sabri	.....		
	Sindkheda	1	1	.....
	Dhulia	2	2	.....
	Akrani (Mewas)	.....		
		5	8	3
Nasik ...	Nasik	3	3	.....
	Peint	.....		
	Dindori	.....	1	1
	Igatpuri	.....	1	1
	Malegaon	1	2	1
	Baglan	Pimpalgaon 1	1	.....
	Kalwan	Manmad 1	1	.....
	Nandgaon	.....	1	1
	Niphad	.....	1	1
	Sinnar	.....	1	1
	Yeola	.....	1	1
	Chandor	.....	1	1
		6	14	8
Poona ...	Haveli	.....	1	1
	Purandar	.....	1	1
	Mawal	.....	1	1
	Mulshi	.....		
	Junnar	.....	1	1
	Ambegaon	.....	1	1
	Khed	1	1	.....
	Sirur	Baramati 1	1	.....
	Poona City	5	5	.....
	Bhimthadi Saswad	Saswad 1	1	.....
	Indapur	Vadgaon 1	1	.....
	Dhond	.....	1	1
		9	15	6

SCHEDULE B—*contd.*

District	Taluka	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4 – 3)
1	2	3	4	5
Satara	Javli *	..	1	1
	Wai	1	1	..
	Satara	2	2	..
	Koregaon	..	1	1
	Mahableshwar†	..	..	..
	Patan	..	1	1
	Malva	..	1	1
	Karad	1	1	..
	Shirala ‡	Vita 1	1	..
	Khatau	..	1	1
	Man	..	1	1
	Shahapur	..	1	1
	Tasgaon	..	1	1
		5	13	8
Sholapur	Sholapur N.	1	1	..
	Sholapur S.	1	3	3
	Barsi	1	1	..
	Pandharpur	..	2	1
	Sangola	..	1	1
	Malsiras	..	1	1
	Madha	..	1	1
	Karmala	..	1	1
	Mohol	..	..	..
		3	12	9
Belgaum	Belgaum	3	3	..
	Khanapur	..	1	1
	Sampgaon	..	1	1
	Para-gad	..	..	..
	Changad §	..	1	..
	Athm	1	1	..
	Chikodi	1	1	..
	Gokak	..	1	..
	Rukeri	Bail Hongal 1		
		7	10	3

* Part-time at Wai.
† Part-time with Wai.
‡ Part-time at Walva.
§ Part-time with Belgaum.

SCHEDULE B—*contd.*

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4–3).
1	2	3	4	5
Bijapur	Indi	1	1	...
	Sindgi	...	1	1
	Bijapur	2	2	...
	Bagewadi	...	1	1
	Muddebihal	1	1	...
	Badami	...	1	1
	Bagalkot	1	1	...
	Hungund	1	1	...
	Bilgi*	...	1	1
		6	10	4
Dharwar	Dharwar	2	2	...
	Kalghatgi†	...	...	...
	Hubli	2	2	...
	Bankapur	...	1	1
	Kod	...	1	1
	Karjagi	...	1	1
	Ranebinnur	1	1	...
	Hangal	...	1	1
	Gadgag	2	2	...
	Navalgund	...	...	...
	Ron	Haveri 1	1	...
	Mundergi	...	1	1
	Nargund	...	...	...
		8	13	5
Kanara	Karwar	1	1	...
	Ankola	...		
	Honavar	...		
	Kumta	...	1	...
	Bhatkal	...		
	Mundgod	...		
	Sirsi	...	2	1
	Siddapur	...		
	Haliyal	...		
	Yellapur	1	1	...
	Supa	...		
		2	5	2

* This Magistrate should work part-time at Bagalkot.
† Part-time with Dharwar.

SCHEDULE B—*concld.*

District.	Taluka.	No. of existing Magistrates.	Total No. required for the District.	Additional Number required (4—3).
1	2	3	4	5
Ratnagiri ...	Chiplun ...	1	1	...
	Dapoli ...	...	1	1
	Khed ...	...		
	Mundangad ...	...	1	1
	Rajapur ...	...	1	1
	Devgad ...	1	1	...
	Kankavli ...	...		
	Malwan ...	1	1	...
	Vengurla ...	...		
	Ratnagiri ...	1	1	...
	Lanza* ...	...	...	...
	Sangameshwar ...	...	1	1
	Guhagar ...	...	1	1
		4	9	5
Kolaba ...	Panwel ...	1	1	...
	Uran ...	...		
	Pen ...	1	1	...
	Roha ...	...		
	Karjat ...	1	1	...
	Khalapur ...	...		
	Mangaon ...	...	1	...
	Mahad ...	1	1	1
	Alibag ...	...		
		4	6	2
	Total ...	105	195	90

* With Ratnagiri.

4 Leave Reserve of 10 per cent. (20) ... 216

Total number to be appointed ... 97

SCHEDULE "C".

(*Vide* paragraph 140.)

COST OF THE SCHEME.

I.—*Recurring Annual Expenditure.*

	Rs
(1) *Pay of Officers*—	
97 Magistrates in the grade of Rs. 250 (for two years)-275—15—380.	
Average cost Rs. 335-7-0. (97×335-7-0×12) .	3,90,149
(2) *Allowances, Honoraria, etc.*—	
(*a*) Travelling Allowance	3,000
(*b*) Cost of Living Allowance (70×97×12) .. .	81,480
(3) *Pay of Establishment*—	
(*a*) *Superior Establishment*-	
97 Clerks in the grade of Rs. 60—5/2-75.	
Average cost 71 (97×12×71) and	82,644
97 Clerks in the grade of Rs. 25—5/2—55.	
Average cost 40 (40×12×97)	46,560
(*b*) *Inferior establishment*-	
194 persons on Rs. 14 per mensem (194×14×12) ..	2,592
(4) *Allowances, Honoraria, etc.*—	
(*a*) Travelling Allowance	1,000
(*b*) Dearness Allowance (97×35×12)+(291×25×12)	1,28,040
(5) *Contingencies*—	
(*a*) *Contract Contingencies*—	
At the rate of Rs. 100 for each court . ..	9,700
Non-contract contingencies-	
(*b*) Rents, Rates and Taxes	2,000
(*c*) Service, Postage and Telegrams .. .	5,000
(*d*) *Other Supplies and Services*—	
Road and Diet money to witnesses at the rate of Rs. 500 per court per annum (97×500)	48,500

I.—SCHEDULE "C"—*contd.*

Recurring Annual Expenditure—contd.

		Rs.
(*e*) *Pay of Inferior Establishment*—		
97 Hamals at the rate of Rs. 10 per mensem each (97×10×12)		11,640

II.—*Non-Recurring Expenditure.*

6) (*a*) *Purchase of Furniture*—		
At the rate of Rs. 500 for each Court (97×500) .		48,500
(*b*) *Purchase of Books*—		
At the rate of Rs. 100 for each Court 97×100 .		9,700
Total ..	Recurrent ..	8,42,605
	Non-recurrent	58,200
	GRAND TOTAL ..	9,00,805
		9,00,000
		(in round figures).

N. B.—The pay scales mentioned in the above statement are subject to revision along with the general revision of pay scales recommended by the Central Pay Commission and in that event the cost of the scheme will be slightly higher.

SCHEDULE "D".

List of amendments to be made in the Criminal Procedure Code and other Acts

Criminal Procedure Code.

Section 17 (*1*) ..	by substitution of the words "Sessions Judge" for "District Magistrate".
Section 17 (*5*) .	Delete and substitute :— "The District Magistrate shall not be subordinate to the Sessions Judge except to the extent and in the manner hereinafter provided".
Section 29 (*b*) ..	Omission of "District Magistrate"

SCHEDULE "D"—*contd.*

Criminal Procedure Code—contd.

Section 36, Sub. (*iii*)	.. Amendment so as to exclude judicial power. Reference to Sub-Divisional Magistrates in all sections need not be omitted as there will be no sub-divisional magistrates.
Section 190	.. Omit reference to District Magistrate and sub-Divisional Magistrate. And corresponding change in 192.
Section 349	.. The words "District Magistrate" wherever occurring to be substituted by the words "the Court to which an *appeal lies* from his decision".
Section 350 (*1*) (*b*)	.. Delete the words "or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate", and insert "or the Sessions Judge". Substitute "Sessions Judge" for "District Magistrate".
Section 406 (A) Section 407 Section 408	.. } .. } Appeals to District Magistrate to be omitted. .. }
Section 407 (*1*)	.. "Magistrate empowered in that behalf" in place of "District Magistrate".
Section 407 (*2*)	.. "The Magistrate to whom an appeal lies" for "District Magistrate".
Sections 435 to 438	.. The words "District Magistrate" to be omitted, or preferably the District Magistrate may be given a directive not to exercise the powers.
Section 492	.. Omit.
Section 506	.. Substitute "Magistrate to whom an appeal lies".
Section 515	.. "Shall be appealable to Sessions Judge" instead of "shall be appealable to District Magistrate".
Section 528	.. The power of transfer to be vested in the authority competent to hear appeals from any magistrate.
Section 559 (*2*)	.. Substitute "Sessions Judge" for "District Magistrate".

Other Acts.

The following Bombay Acts will require amendments :—

(1) The Bombay Village Police Act, 1867, Bombay Act VIII of 1867.

(2) The Bombay Village Panchayats Act, 1933, Bombay Act of 1933, (S. 77, 87A, 87B).

(3) The Abkari Act, 1873.

(4) Bombay Children's Act, 1924.

(5) District Police Act, 1867.

(6) Mamlatdar's Courts Act, 1905.

(7) Bombay Markets and Fairs Act, 1862.

(8) Police (Duties and Powers of Magistrates) Regulation Bombay Regulation XII of 1827.

(9) Bombay Prevention of Prostitution Act, 1923.

(10) The Bombay Probation of Offenders Act, 1938.

(11) The State Prisoners Regulation, 1827.

(12) The Bombay Village Sanitation Act, 1889, S. 15.

(13) The Prevention of Cruelty to Animals Act (Bombay Amendment), 1922.

(14) The Bombay District Vaccination Act, 1892.

(15) The Bombay Home Guards Act, 1947, Bombay Act III of 1947.

(16) Bombay Public Security Measures Act, 1947, Bombay Act VI of 1947

(17) Bombay Ferries (Amendment) Act, 1942.

(18) Bombay Ferries Act, 1868.

APPENDIX "A".

Questionnaire.

1. Are you in favour of the separation of the Judiciary from the Executive?

2. Do you approve of the present system of magistrates working under the Executive? If not, why not?

3. Should all magisterial powers be taken away from all officers of the Executive in the District?

4. If you think that magisterial powers should not be wholly taken away from all officers of the Executive to what exent and for what purpose should they be exercised by them?

5. If the Executive be responsible for the maintenance of law and order, should it have powers under Chapters VIII to XII, Criminal Procedure Code? Should those powers be limited in any way and, if so, to what extent?

6. Under Section 17 (*1*), Criminal Procedure Code, all Magistrates are subordinate to the District Magistrate and under Section 13 (*1*) of the District Police Act, the Superintendent of Police and the Police Force of the District shall be under the command and control of the Magistrate of the District. Are you in favour of the separation of these officers? Which, if either, should remain with the Collector and which should be transferred to the District Judge or another appropriate authority?

7. Who should be ultimate authority responsible for the maintenance of law and order in the District?

8. Describe the system of criminal courts which in your opinion should take the place of the present system. What are its advantages and disadvantages on comparison with the present system? Would you be in favour of a special system for large cities like Ahmedabad and Poona? If so, what?

9. Is it necessary to have sub-divisional magistrates for judicial criminal work if a whole time judicial authority is appointed to control the judicial criminal work of the District?

10. Are you in favour of continuing (*a*) Honorary Magistrates Courts (Single or bench Magistrates), (*b*) 2nd and 3rd Class Magistrates and trying cases?

11. Who should hear appeals from the decisions of second and third class magistrates ?

12. Are you in favour of all Civil Judges exercising both civil and magisterial powers ? If not should there be one cadre for magistrates and civil judges so that they may be interchangeable ? Or alternatively, are you in favour of full-time stipendiary magistrates doing criminal work only ?

13. If full-time stipendiary magistrates are appointed, and the volume of work in some taluka is insufficient will there be any objection to the Court having jurisdiction over more than one taluka ?

14. Should the criminal courts be itinerary, if so, to what extent ?

15. Are you in favour of granting vacations to full-time Criminal Courts ? If so, what machinery do you suggest for disposing of urgent criminal work during vacation ?

16. What should be the qualifications of the magistrates and how are they to be recruited ?

17. What scale of remuneration do you suggest ?

18. Who should appoint the magistrates and who should deal with their transfer and promotion ?

19. Are you in favour of investing the Village Patils and Village Panchayats with judicial powers to try petty cases in villages. If so, what ?

20. Do you suggest any change in the present system of appointing officers for prosecution on behalf of the Crown in magisterial Courts ? What qualifications and what remuneration do you suggest ? To whom should such officers be subordinate ?

21. Should the proposed separation be made gradually and by stages or at once ?

22. Have you had any experience in working a scheme of separation of powers ? If so, what are your general views on the success of it ?

APPENDIX "B"

List of witnesses examined by the Committee

Sir Leonard Stone, Chief Justice, High Court, Bombay.

Mr. W. G. Hulland, I.C.S., Director of Civil Supplies, Bombay.

Mr. J. Booth, O.B.E., I.C.S., Secretary to Government Civil Supplies Department.

Mr. E. W. Perry, C.S.I., C.I.E., I.C.S., Commissioner of Excise.

Mr. J. G. Simms, O.B.E., I.C.S., Secretary, Revenue Department.

Mr. B. D., Mirchandani, I.C.S., District Judge, Kaira.

Mr. V. N. Sardesai, I.C.S., District Judge, Satara.

Mr. K. B. Wassoodev, Retired High Court Judge, Bombay.

Mr. N. K. Dravid, I.C.S., District Judge, East Khandesh.

Mr. P. M. Lad, I.C.S., District Judge, Poona.

Mr. Justice Weston, Judge High Court, Bombay.

Mr. Oscar Brown, O.B.E., Bar-at-Law, Chief Presidency Magistrate, Bombay.

Mr. M. B. Honavar, LL.B., District Judge, Belgaum.

Mr. V. G. Kanetkar, I.P., Deputy Commissioner of Police, Bombay.

Mr. P. B. Wilkins, M.C., O.B.E., I.P., Deputy Inspector General of Police, Southern Range Belgaum.

The Right Honourable Dr. M. R. Jayakar, P.C.

Mr. Apa Pant, Minister, Aundh State.

Rao Bahadur V. A. Gadkari, Advocate, Original Side, Poona.

Divan Bahadur N. R. Gundil, Retired District Judge, Bombay.

Mr. D. G. Vasvada, LL.B., Honorary Secretary, Bar Association, Ahmedabad.

Mr. S. S. Kazi, Government Pleader, Kolaba at Thana.

Sir Chimanlal Setalvad.

Mr. G. P. Murdeshwar, LL.B., Advocate, Bombay.

Rao Bahadur Manilal Desai, Broach.

Mr. S. A. Sudhalkar, Education Member, Baroda.

Mr. K. F. Nariman, B.A., LL.B., Bombay.

APPENDIX "C"

Note by Shri Himatlal Shukla on the question of a special system of courts for the cities of Ahmedabad and Poona

Let me make it clear at the outset that this is not a minute of dissent but an attempt to submit a concrete scheme for the two cities in the light of the principle accepted by the Committee.

We have said in our report that every city will have a City Magistrate. The application of this abstract principle has great significance. Hitherto, the City Magistrates in Ahmedabad have been recruited from the cadre of Deputy Collectors. Speaking from personal experience, I remember that as far back as 1930, there was only one City Magistrate in Ahmedabad assisted by one or two Honorary Magistrates, doing judicial work of lesser importance and sitting only for a few hours every week. Since then the City Area has been extended and the population has more than doubled. The increase in crime, however, much to our shame, is out of all proportion. At present there are "six City Magistrates, one newly recruited Resident Magistrate, one Magistrate—of the Mamlatdar's cadre—trying offences under the Abkari Laws, one Magistrate of the same cadre trying offences against Municipal Laws. Even then, the delay in the disposal of cases is abnormal and prosecutions filed by private individuals are given a step-motherly treatment. The number of Appeals and Revision Applications is also very high. I regret to observe without meaning any disrespect to any individual, that throughout my experience at the Bar a very large number of City Magistrates were not up to the mark either for want of learning and experience or because they were lacking in moral courage to rise above the executive influence. Conditions are not better to-day, more so, because, really competent Revenue Officers, who would make good Magistrates have been absorbed in the Civil Supplies and allied Departments. This, indeed is a very sad state and must be remedied at once.

I am confident that the Committee's recommendation for providing the cities with City Magistrates would be accepted very soon. Having regard to the nature and bulk of the judicial work before the Ahmedabad Magistrates and also the highly contested—at the bar—character thereof, the time for replacing Deputy Collectors by more deserving Judicial Officers has come. The appointment of fresh Resident Magistrates would be a poor substitute and the newly recruited Resident Magistrate would grow to be a City Magistrate after some years.

It is, therefore, that I suggest that the Government should, at an early date, adopt the system which would be more or less similar to that of the recruitment of Presidency Magistrates for the City of Bombay. It may be, that we may not be able to find such a large number of deserving persons from the local Bar. But then, I would suggest that the new cadre of Ahmedabad

and Poona Magistrates should be made open to the lawyers practising at Bombay, Poona and Ahmedabad only. I am not averse to retaining Deputy Collectors of outstanding merit for the time being for some of them have really made their mark. I am also aware that certain Civil Judges selected by the High Court to work as Magistrates have really distinguished themselves in their new work. They could also be absorbed in this new cadre.

If this system were put into effect, a very important question of scale of pay will arise. I would not go to the length of suggesting the same scale as obtaining in the City of Bombay. However, I must emphasise that the living index in Ahmedabad is very high and the duties, these magistrates will be called upon to discharge are bound to be of an onerous character. The men must have sterling worth. Lawyers of over ten years' standing or Senior Deputy Collectors could not be asked to serve on unattractive salaries. I would, therefore, suggest the scale to be Rs. 500—25—750 ; Selection Grade, one Post each at Ahmedabad and Poona Rs. 750—50—1,000.

The picture I am presenting would not be complete if I ignored the Prosecutors. For some years past, the Government have adopted the policy of recruiting prosecutors on a fixed remuneration without the service being either permanent or pensionable. They are, further, entitled to have private practice under certain limitations. This system has been a complete failure and we have in our report advised the Government to revert to the old system in the cadre of Rs. 200—400. Left to myself, I feel this cadre is not sufficiently attractive but I have chosen to acquiesce in the recommendation because I did not mean to strike a discordant note.

However, in the cities like Ahmedabad and Poona, I most strongly emphasize that the task of these Prosecutors is very heavy. Not only have they to handle very serious and complicated cases but the same are very keenly contested at the Bar. I would therefore, suggest the creation of a special cadre, the entry to which will be restricted to the members of the Ahmedabad and Poona Bar having not less than 5 years' practice. The scale of pay should be Rs. 250—10—450 selection grade, one post each at Poona and Ahmedabad Rs. 450—15—600.

Some of my colleagues on the Committee suggested to me that I should class Sholapur and Hubli with Ahmedabad and Poona. I am at present not armed with sufficient material to do so. However, if in the discretion of the Government these two cities deserve the same considerations, I shall feel very happy.

In conclusion, I am glad to observe that I have discussed the features of this note with prominent members of the Local Bar and with one voice, they have agreed with me.

Swastik Society, Ellis Bridge,
Ahmedabad, 12th July 1947.

(Signed) HIMATLAL P. SHUKLA.

APPENDIX "E"

Minute of Dissent by Shri S. S. More

I am writing this note of Dissent because I disagree with the majority of my colleagues on the question of whole-sale adoption of a system under which the Panchayats shall dispense civil and criminal Justice in villages. The majority have stated "we do not think that the time is yet ripe for introducing it in this Province." They have hardly given their reasons for arriving at such a decision. I hold diametrically opposite view on this important subject. I strongly feel that the reform is long overdue. I am writing this Note in order to explain, in some details, my reasons for coming to this opposite conclusion.

2. When we proceed to consider this problem two important questions arise demanding satisfactory answers—

(1) Should the Village Panchayats be invested with Judicial powers to try petty cases in villages?

(2) Should this experiment be tried in some few selected villages in first instance before it is extended to cover almost all the villages?

3. We shall first apply our mind to the first question posed. We cannot deal with this question satisfactorily unless we notice some of the important land marks in the past history which is both long and fascinating.

4. Village Panchayats existed in India from very ancient times and were entrusted with various functions-including judicial functions—touching every minute detail of the life of the villagers. These institutions possessed remarkable tenacity and withstood all political and other storms. Sir Charles Metcalfe has remarked "The Village Communities are like Republics, having nearly everything they can want within themselves and almost independent of any foreign relations. They seem to last where nothing else lasts. Dynasty after dynasty tumbles down, revolution succeeds to revolution..... but the village community remains the same. This union of the village communities, each one forming a separate little State in itself, has, I conceive, contributed more than any other cause to the preservation of the people of India, through all the revolutions and changes through which they have suffered, and is in a high degree conducive to their happiness, and to the enjoyment of a great portion of freedom and independence" (Rep. Select Com. of House of Commons, 1832, Vol. III, App. 84, p. 331).

5. These Panchayats, as Village Courts "took cognisance of both Civil and Criminal Cases." (Local Government in Ancient India, by Dr. Mookerji, 1920, p. 140). Dr. Mookerji, on the authority of ancient scriptures and documents proceeds to State. "The principle underlying these lower and local

Courts has been admirably put by the "Sukranit". In cases of dispute the best of the locality concerned can alone be the proper Judges. The application of the principle, thus laid down, is shown in the following passages. "Forests are to be tried with the help of Foresters, merchants by merchants, soldiers by soldiers, and in the village by persons who live with both parties." (*ibid*, p. 135).

6. These Panchayats functioned uninterruptedly till the advent of the British Rule. Mr. Elphinstone, reviewing the administrative system prevailing under the Peshwas remarked "These (village) Communities contain in miniature all the materials of a State within themselves, and are almost sufficient to protect their members, if all other Governments are withdrawn" (Elphinstone's Report, dated October 25, 1819.)

7. British administrators designedly uprooted these Village Panchayats and introduced a system of administration which was devised to perpetuate their rule in this Country. But there were many Englishmen who lamented the death of these ancient institutions and even recommended their rejuvenation. Captain Wingate, in 1852, suggested the advisibility of reviving the Panchayat institution to try Summary Suits valued at less than thirty rupees. Mr. James Caird, who was deputed to India by the Secretary to State and asked to report on "The condition of India," in his Report, dated the 31st October 1879, described how the legal system introduced by the British Rulers was disliked by the people and opined that "Costliness and delay" were the manifest evils of the system and that "the debtor is being improverished by it." He also recommended that "The Native Panchayat Courts should be recognised."

8. Indians also have persistently agitated for the revival of Village Panchayats and for giving them judicial powers. The late Mr. Justice Ranade, after taking an exhaustive review of "Local Government in England and "India" said "The necessity and importance of localising Police and Magisterial functions cannot be exaggerated in a bureaucratic Country like India. The old Village Community, with its Panchayats of elders .....fulfilled the same purpose..... It will no doubt be said that these local representatives are more likely to abuse their powers than even the worst officials. We think Honorary Magistrates associated together and sitting as a Bench once a month or more may safely be trusted never to go wrong, and they will certainly relieve the hands of over-burdened officials. There functions may also be duly subordinated to the superior authority of the higher civil and criminal courts" (Esseys on Indian Economics (1920) pp. 230-231).

9. The late Mr. R. C. Dutt, who is repeatedly mentioned in the body of the report as the framer of a scheme for the separation of judicial from the executive functions, presided over the Lucknow Congress of 1899. In his Presidential address he lamented the decay and disappearance of the Village Panchayats

and spiritedly advocated their revival and recommended "send over to them (Panchayats) all petty Civil and Criminal Cases, not for judicial disposal, but for amicable settlement". He pointed out the advantage of such a measure: "A great deal of expensive litigation and bad feeling into villages can thus be stopped, and what is more than natural leaders of the village population will thus come in touch with the sub-divisional and district administrators, and will form the agents of village administration in so far as they are fit to take that position. An unsympathetic system of rule through the Police will be replaced by a rule with the co-operation of the people themselves" (Congress Presidential Address. First Series, 1885–1910 (1935) p. 415).

10. The late Mr. G. K. Gokhale also persistently pleaded for the establishment of Village Panchayats and the grant of judicial powers to these units of Local Self-Government. In his Note submitted to the Decentralisation Commission of 1907 he gave in detail his scheme of Village Panchayat endowed with judicial powers (*vide* speeches of Mr. Gokhale, Appendices p. 192). He also made a similar plea in his Note submitted to Viscount Morley, in September 1908).

11. Yielding to the force of public agitation, the Decentralisation Commission recommended the constitution and development of Village Panchayats possessed with certain administrative powers including jurisdiction in petty Civil and Criminal Cases (*vide* Chapter XVIII of the Report).

12. The Government of India in their Resolution on the Local Self-Government Policy (Nos. 55-77, dated the 28th April 1915) referred to the above recommendation of the Decentralisation Commission and after pointing out to the efforts of the various Provincial Governments to foster Panchayat entrusted with Judicial Powers, proceeded to remark: "throughout the greater part of India the word 'Panchayat" is familiar. The lower castes commonly have voluntarily constituted Panchayats to whom they allow quasi judicial authority in social matters.....Village Tribunals for the disposal of petty Civil suits have got beyond the experimental stage in some places and are in the experimental stage in others" (Paragraph 38). Finally the Resolution left the question of Panchayat 'in the hands of Local Government and Administration". But the Resolution also enumerated "the general principles" on the lines of which advance" was "most likely to be successful." Regarding the grant of judicial powers the following general principles were laid down:—

"(3) In areas where it is considered desirable to confer judicial as well as administrative functions upon Panchayats the same body should exercise both functions.

"(5) The jurisdiction of Panchayat in judicial cases should ordinarily be permissive, but in order to provide inducement to litigants reasonable facilities might be allowed to persons wishing to have their cases decided

by Panchayats. For instance, Court Fees, if levied, should be small, technicalities in procedure should be avoided and possibly a speedier execution of decrees permitted." (Paragraph 39).

13. Bombay Act No. IX of 1920 was passed by the Bombay Legislative Council which came into existence under the Government of India Act of 1919. In spite of repeated demands that judicial powers be given to Panchayats the Act did not confer any judicial power on the Panchayats (*vide* Sections 18-20). This Act came to be replaced by the Bombay Village Panchayats Act (Bombay Act No. VI of 1933). It demonstrates a changed outlook. In its very preamble "The administration of civil and criminal justice" are specifically mentioned and Chapter VI deals with the "Constitution and Powers of Village Benches". This Act came to be materially amended by the Bombay Act No. XVIII of 1939. This amending Act denotes a further stage in the history of Panchayats. The Act of 1933 did not make the establishment of Panchayats or investment of judicial powers obligatory. But the amending legislation laid down that every Village having a population of not less than 2,000 shall have a Panchayat and also every Panchayat shall have judicial powers which shall be exercised by the Village Benches [See 3(2), (13), (17), Section 37(*i*), (2)].

14. In the light of this discussion it will be clear that the question of granting judicial powers to Panchayats is no longer open for discussion. Question No. 19 in the questionnaire of the Committee, so far as it relates to Panchayats, is, I fear, beyond the terms of our reference. The Village Panchayat Act of 1933 as amended in 1939 has finally solved the question by compulsorily conferring judicial powers on all the Panchayats and it is not within the province of this Committee to reopen and re-agitate that question.

15. To the second question formulated above the majority of the members of the Committee, reply in the affirmative. They have stated "that some Village Panchayat courts" might be constituted as in Aundh State as an experimental measure. They have not given their reasons for making this cautious recommendation, though the majority of the members have refrained from giving their reasons for opposing the grant of any judicial powers to any of the Panchayats. The legal position robs these grounds of much force, but they can be validly utilised for supporting the cautious proposal made by the majority. It is necessary, therefore, to take notice of these arguments before we proceed further. The most important of these grounds are summarised hereunder :—

(1) *Illiteracy.*—"The Villagers are still illiterate and have not learnt to realise a proper sense of such responsibility. Until the Villagers become well educated it is dangerous to establish Village Panchayat Courts" is one of the main grounds on which this reform is opposed by many of witnesses. This

view point finds support in the evidence of both officials and non-officials. "The villagers are illiterate and ignorant persons.....it would be wholly dangerous to invest. Village Panchayats with judicial powers to try petty cases" (Shri R. R. Karnik, District Judge, Ratnagiri) "I am not in favour of investing the .....Village Panchayats with any judicial powers even to try petty cases, as there is not enough standard of literacy". (Shri S. M. Shukla, Journalist, Godhra). Rao Bahadur Manilal Desai, a senior Lawyer from Ahmedabad, has also urged in his oral examination that "time is not yet ripe" for granting such powers to Village Panchayats, who are not "in a position to command the respects of the whole village". "Spread of education is an essential factor", which will create the necessary measure of confidence. The Panchayats should be given powers only when such confidence is created.

(2) *Factions in Villages.*—"Almost every Village is cleft with factions and even the election of the Panchayat is apt to be a fruitful source of litigation" is the second ground of attack. Officials as well as non-officials have advanced this argument. Some of the official as well as non-official adduce the same ground for opposing the grant of judicial powers to Panchayat "Generally in several villages there are party-factions and I am afraid that the Village Panchayats cannot impart ally exercise judicial powers". (Shri P. H. Gunjal, District Judge, Bijapur). "The Villages are rent up with factions and the Villagers are self centred. They have the desire to boss and show off. They have not got that broad-based policy of doing justice" (Shri S. A. Ghatge, District Magistrate, East Khandesh) "Village Panchayats should not be invested with judicial powers. There are village politics and there are factions in the villages.....and so, if they are invested with judicial powers they are bound to abuse them by creating more trouble and mischief in the Villages at the cost of other parties. And instead of doing justice great injustice and hardsh p will be caused to the public at large". (Shri S. S. Kazi, District Government Pleader and Public Prosecutor, Kolaba and Thana) "I am opposed to the investing of village.....Panchayats with judicial powers. They often abuse such powers by importing party and personal prejudices in the disposal judicial work". (Shri K. B. Wassodew, Retired Judge, Bombay High Court).

(3) *The experiment has failed.*—The present Act gives Panchayats some powers to try petty cases. There are some witnesses who woefully state that the use of these powers by the existing Panchayats is far from happy. The District Magistrate, Panch Mahal, after stating that Panchayats should not be invested with judicial powers any longer, emphatically asserts "The experiment has proved a failure". Another Officer states "The experiment of the working of the Village Courts has not been very happy. In many villages although

village Benches have been established and given judicial powers the villages have not approached them." (Shri P. H. Gunjal, District Judge, Bijapur) "At present some Panchayats are invested with some judicial powers but they are misused and the litigant public have no faith in such bodies and their action". (Shri K. V. Kaujalgi, President, District Local Board, Belgaum).

16. In spite of these objections vehemently urged by many men of weight and authority I persist in pleading that the system should be extended on a very wide scale. The system has its own positive advantages. I cannot do better than quote what the majority of the members have themselves stated when they expressed their warm appreciation of the Aundh Panchayat system. "In this way justice is brought to the doors of the Villagers, it is speedy and extremely inexpensive and the result is said to be almost invariably satisfactory. Most of the case are compromised and the fact that although appeals are provided for, there are very few appeals, shows that the litigants are satisfied with the decisions given by the Panchayats".

17. In view of these substantial advantages so ably enumerated by the majority I find it rather difficult to go with them when they say that the system should be tried in a few villages "as an experimental measure". Aundh Villagers are educationally and socially on the same level on which we find other villagers in the Province. If we make necessary provision for the proper supervision of the work of the Panchayats administering justice we shall be entitled to expect this system to work as successfully as it has functioned in the Aundh State. I whole-heartedly endorse what the District Magistrate, Kolaba, has stated in reply to our question. "It is necessary the sense of responsibility of the citizens of the country should be raised by associating them as much as possible with the administration of civil life. Past errors cannot come in the way of future progress. In ancient India Panchayats exercised powers which extended to capital punishment and there is no reason to believe that the power was deliberately misused".

18. I am not prepared to accept the opinion of those who contend that the experiment has failed. These critics are unconsciously magnifying individual instances of abuse into a general proposition to condemn the whole system. Shri C. D. Berfiwalla, the Director of Local Self Government Institute, Bombay, sounds a different and more cheerful note: "As regards the judicial powers there has been so far very little experience gained to enable us to appraise the value of the progress made. What little experience we have has failed to substantiate more misgivings which some people entertained regarding the wisdom of conferring these powers on Village Panchayats. Experiment in Punjab should encourage us to rely upon the proper exercise of these powers by the Panchayat". (The Bombay Village Panchayat Manual, 1945, Page V).

19. When I recommend large scale adoption of the Panchayat system in this Province I am not oblivious of the evils which such adoptions is likely to give rise to. The remedy is not the non-adoption of the system but the provision of effective safe-guards which will minimise, if not, eradicate these apprehended evils. I, therefore, make the following detailed suggestions in order to ensure that the system shall work with the least possible friction.

20. The Act of 1933 as amended in 1939 provides that every Village having a population of not less than 2,000 shall have a Panchayat; while in the case of any other local area having a population of less than 2,000 the Provincial Government may after holding necessary local enquiry, declare such Area to be a Village and then establish a Panchayat there [sections 4(1), 5].

21. In spite of the mandatory provision that every Panchayat shall be invested with judicial powers the number of Panchayats enjoying such powers is increasing at a very slow pace as will be seen from the following table :—

Year.	Number of Panchayats having judicial powers.	Year.	Number of Panchayats having judicial powers.
1931–32	238	1936–37	371
1932–33	228	1937–38	426
1933–34	241	1938–39	436
1934–35	259	1939–40	454
1935–36	....	1940–41	604

I feel that the progress is not very encouraging one. Government must boldly go ahead and establish Panchayats in as large a number of villages as possible. In this respect I have rather to repeat what the late Shri G. K. Gokhale stated before the Decentralisation Commission.

"I think in all villages with a population of 500 or over, a Panchayat should be constituted by Statute; .....and that the villages below 500 should either be joined to larger adjoining villages or grouped into unions."

If this proposal is adopted the increase in the number of Panchayats will be immense.

22. All these Panchayats should have necessarily judicial powers. The question of what powers should be given to these bodies will be very important. The District Magistrate, Thana, has stated that some of these Panchayats "Should be given full III powers in order to lighten the work of Resident Magistrate". Shri V. N. Sardesai, District and Sessions Judge, Satara, has recommended that Panchayats "may be empowered" to try "Criminal cases disposable by Third Class Magistrate"; I agree with the suggestion.

23. There will be many persons who may contend that these Panchayat Courts should not be empowered to inflict punishment of imprisonment and that they should pass a sentence of fines only." Shri B. D. Mirchandani, District and Sessions Judge, Kaira, for instance, has suggested such restriction on their powers. I am of the opinion, that when Third Class powers are given to Panchayats, such a restriction will be difficult to operate. The gravity of the offence in a particular case tried by a Panchayat may necessitate the punishment of imprisonment. But the restriction will prevent the imposition of necessary punishment. The result will be that some offenders deserving imprisonment, will escape lightly with a fine or the case will have to be transferred to some other Magistrate who can pass a sentence of imprisonment. This will protract and duplicate proceedings. I suggest that the Panchayats be allowed to inflict a sentence of imprisonment permissible to a Third Class Magistrate, but the sentence shall not come into operation unless the case papers are perused by the Resident Magistrate at the Taluka Head Quarter. He shall have power to alter the sentence, if he thinks it necessary. If the punishment given by the Panchayat is certified to be proper by this authority it shall be g ven effect to. The convict should have also the right to go in appeal, even when his sentence is certified by the Resident Magistrate.

24. The next question of importance is how we can give competent legal aid to these Panchayat Members in order to improve the quality of their justice. In order to secure this objective I advance the following three suggestions :—

(a) In Aundh State Panchayats are guided by touring Sub-Judges and supervised by the District Judge. The majority of the members of the Committee state "to introduce that system in British India several Sub-Judges will be required for each Taluka and a special supervising will be necessary. "This would necessarily swell the expenditure enormously. I think that we must give some legal guidance to these Panchayats and I also feel that we cannot afford to employ the necessary number of Sub-Judges to furnish this legal guidance. I, therefore, suggest that all Law Graduates should be compulsorily employed for giving this guidance. The responsible authorities should lay down a rule that no Law Graduate shall be allowed to practise unless he does this work for a period of two years. Panchayats numbering not more than thirty, or other convenient number, should be grouped into a unit and one Law Graduate should be attached

to each of these units. He should be given an honorarium of Rs. 50 per month and his travelling expenses. This experience will give our Law Graduates useful practical experience which will stand them in good stead when they embark on their professional career. This arrangement will keep down the costs too. These Graduates should be under the District and Sessions Judge, who should hold periodical conferences and give them necessary instructions.

(*b*) No person should be allowed to be a member of a Panchayat unless he possesses some literacy and that such members should be periodically brought together and given some instructions regarding board legal principles.

(*c*) The Secretary of a Panchayat should be better qualified and, some grounding in law should be necessary part of his training.

These are only broad suggestions and they will have to be worked out in fuller details.

25. In conclusion, I need hardly say much. Free India will have a democratic Government. This Government, to be effective and efficient, must seriously try to make people self-reliant. We cannot achieve this object unless we entrust them with responsibility to discharge various functions essential for richer collective life. This is the only way to approach the ideal of "Government of the people and by the people". Members of the bureaucracy may discharge their duties conscientiously and competently but that is not enough for an enduring democracy. People must earn to administer their affairs themselves and this they will not learn unless we trust them with the requisite powers. In learning the difficult art of self-rule, they may make mistakes; some may even abuse their power and authority. But it is inevitable and unavoidable. Democracy can only progress by the only path of trial and error. India is a land of villages. Our democratic Government must have its root deep in the soil of the several hundred thousand villages. Therefore the villagers must be shaped and developed into vigilant citizens. We can do this only if we trust them and teach them. As an essential and important part of this policy given them judicial powers and teach them how to use them. Justice must be both cheap and prompt. It is only village Panchayat which can administer such justice. Ends of justice as well as durable democracy demand this measure.

11th October 1947. (Signed) S. S. MORE.

I entirely agree with the fundamental principle of the note of dissent of Mr. More as it is explained in its concluding paragraph No. 25.

11th October 1947. (Signed) Y. B. CHAVAN.

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