CHAPTER IV

SEPARATION OF THE JUDICIARY FROM THE EXECUTIVE

Introduction

Prior to British Rule, all powers were, more or less, concentrated in one Head of a specified area. It happened to be a despotic Ruler and there was no effective means whereby the rights of an individual against the Ruler could be enforced. But after the advent of British Rule in India, the Rulers decided to sweep away the existing system and adopted a new form of Government. They concentrated police and magisterial powers in one and the same individual who was designated as the Collector. He was made the Head of the District Administration. But this system involved the subordination of the judiciary to the Executive. But this system was disapproved from its inception itself. Tracing the history of the controversy of the movement for the separation of the judiciary from the executive, Mr. Joseph Chailley, an eminent British Jurist opines: "The combination of executive and judicial functions in the District Magistrate has been a subject of intense controversy almost co-extensive with the history of Anglo-Indian
administration. Even before Montesquieu, a cardinal of Germany named Nikolaus von Kues (1401-1464) suggested separation of the legislature, executive and judiciary. The doctrine of separation of power was first mooted by the French Political Philosopher and Jurist Montesquieu (1689-1755). Louis XIV the most despotic sovereign was on the French throne during the early part of Montesquieu's life. Hence he was induced to advocate the theory of separation of powers. He observed: "When legislative and executive powers are united in the same person or in the same body of Magistrates, there can be no liberty. Again there is no liberty if the judicial power is not separated from the legislative and executive powers. Were it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined with the executive power, the judge might act with violence and oppression. There would be an end of everything, were the same man or the same body, to exercise those three powers." It means simply that if all the three powers namely legislative, executive and judicial, accumulated in the same hands, a government could act despotsically, pass laws according to its wishes and administer them without regard to the rights of the individual. Thus,
in order to preserve political liberty, the legislature, executive and judiciary should be independent of each other. The influence of the doctrine can be best seen in the Constitution of U.S.A., where there is a real division of powers between the three organs. In its extreme interpretation, the doctrine of separation of powers means, the complete isolation of the three departments. The extreme interpretation is impossible of achievement in practice under modern Constitutions. If one looks to the working of the Constitution of U.S.A., one finds that even U.S.A. is not an exception to this principle.

Arguments for and against Separation

There is a big controversy on the question of separation through all the stages of history. It would be pertinent to examine the arguments for and against the separation.

Arguments for Separation

1) The administration of justice requires the independence and detached mentality. These are affected if there is executive control over the Magistrates. If
the justice is to be unadulterated, the Magistracy must be free from the influence of the executive.

2) When the appointments, postings and promotions of the Magistrates are controlled by the executive bosses, they are tempted to act according to the whims and fancies of their superiors. They are afraid to displeases the District Superintendent of Police and the Deputy Commissioner. Because it is on their recommendations that the appointments, postings, promotions and transfers of the Magistrates take place. They are naturally inclined to gain their good opinion. Mr. K. B. Wassooadew, Ex-Judge, Bombay High Court, once remarked - "The dominant desire of the magistracy is to please the executive on whom the prospects of their promotion entirely depend."(4)

3) The District Magistrates are likely to interfere in the administration of justice. They issue instructions for the guidance of the subordinate Magistrates as they are the Heads of the magistracy and police in the District. Mr. A. R. Shields, Ex-District Magistrate, Dharwar expressed: "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."(5)

4) The Magistrates who are subordinate to the executive are likely to look at every problem from the special angle of the executive needs. In this connection, Mr. B.D. Hirchandani, Ex-District Judge, Kaira once observed: "The Magistrates being executive officers, executive considerations quite often influence judicial decisions, especially when there is a political, social or economic development which comes into conflict with executive authority."(6)

5) A magistracy working under the executive control does not inspire confidence in the public. This kind of suspicion entertained by the people is detrimental to the administration of justice. Mr. S.M. Moore-Gillbert, Ex-District Superintendent of Police, Ratnagiri, remarked: "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."(7)

6) Most of the Magistrates are influenced by the
personal knowledge acquired by them while doing executive work as a result of which, they acquire an executive bent of mind rather than judicial frame of mind. During their tours as revenue officers they get information right or wrong and these impressions will have reflection in deciding the cases. Mr. L.C. Gandhi, Ex-Government Pleader of Surat District, observed: "The Magistrates under the present system are more accessible to the members of the public due to their executive functions, and unscrupulous persons take advantage of that position. This corrupts the Magistrates, if not with money, with improper influence and pressure." (8)

7) The Magistrates devote greater time and energy to their executive duties and responsibilities. They find less time to attend to their judicial functions. They are over-burdened with affairs pertaining to Revenue Code, Food and Civil Supplies, Land Reforms and Local Bodies. Moreover, most of the Executive Magistrates do not possess the necessary legal qualifications and training. Naturally, justice suffers.

These are some of the arguments advanced by the advocates of separation. Hence, they contend that the
present system must be immediately replaced by a system under which the two functions are separated.

**Arguments Against Separation**

1) Many Europeans, who supported the separation theoretically, opposed the introduction of the scheme of separation in India on the ground that it ran counter to the oriental conception of rule. Sir F. Halliday once stated: "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." (9)

2) The separation would involve heavy expenditure to the Government. It is the most formidable argument advanced by the opponents of the reform. Mr. H. S. Lawrence, the then member in charge of finance of the Government of Bombay, participating in the debate on Rao Bahadur Chitale's resolution, in voicing his opposition to separation said: "It 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." (10) The Madras Government also stated: "It is a practical
impossibility to carry out a complete separation of functions without incurring prohibitive expenditure.\(^{11}\)

3) Prestige is one of the oldest of arguments. The prestige of the Deputy Commissioner 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. Prestige was an essential element of imperialism during the British time.

The above contentions are the time-worn arguments of the imperialism of the old regime. There are certain modern arguments against separation.

4) The advent of independence and the fundamental change in the ideas of the functions of the Democratic State have rendered the theory of separation of powers obsolete. The Ministries of the Congress, which pleaded for separation, showed reluctance to introduce separation when they assumed office. Mr. Rajagopalachari, the then Prime Minister of Madras observed: "Now that Congress is in office, we will see that the executive officers will not go wrong and we shall control them."\(^{12}\) The fact is that all Governments like to have power and are unwilling to part with it.
5) If separation is introduced, the executive will not be able to keep subversive forces under control. It would diminish the authority of the Head of the District. If he is to be responsible for law and order, he must be the Head of the police and the magistracy.

6) The purely Judicial Magistrates are unaware of the active conditions of the world. They demand an unduly high standard of proof and are too rigidly wedded to procedure. They fail to play their part to maintain order or to put down crime. The guilty often go unpunished because they have been proved innocent according to the law and procedure.

7) Absolute separation is ideal in normal conditions since it affords great protection to the individual. But its weakness is manifested when Government has to tackle subversive forces. The Government is discredited if the Courts fail to deal firmly with anti-social elements. The Judicial Magistrates are a set of judges who are not in touch with social evils. But the Revenue Magistrates have a wide knowledge of the political, social and economic conditions inside and outside their Districts. They can adequately deal with such anti-social elements.
Thus several arguments are advanced for and against separation. After weighing the arguments very carefully, we can easily find that separation is quite essential. Sir Harvey Adamson expressed: "The experiment may be a costly one, but we think the object is worthy." Though most of the people who opposed the separation frankly admitted that the scheme of separation was a desirable reform in principle. Separation of Judiciary from the Executive is an integral part of our Constitution. The separation, which secures the independence of the judiciary, is the best guarantee of the liberty of the citizens.

Historical Survey of Separation Issue

The history of the separation of the judiciary from the executive in India can be traced back 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 Government of Bombay appointed a Committee, under the Chairmanship of Justice Lokur, in February 1947, to consider the matter of separation and to present a report to the Government. Justice Lokur Committee made a historical survey of the problem and divided the survey into five periods for the convenience
of narration. The following are the five periods according to Justice Lekur Committee:

1) 1780 to 1838.
2) 1838 to 1860.
3) 1860 to 1908.
4) 1908 to 1921.
5) 1921 to 1947.

The details contained in the report have been summarised in the following paragraphs.

First Period - 1780 to 1838

The Battle of Plassey marked the establishment of the East India Company's political supremacy in Bengal. The grant of Diwani to them in 1765 marked their accession to administrative responsibility. "The judicial administration of the company began in 1772 but the separate institution of District Judges did not come into being until 1780. Between 1772 and 1780 the civil judicial administration had been consigned first to the Collectors and then to the Provincial Councils of Revenue. It was in 1780 that separate officers with exclusively judicial functions
were appointed by the Government to preside in the civil courts. This was the origin of District Judgeship. In 1787, the office of District Judge was abolished in all the Districts. Their functions were transferred to the Collectors. Hence from 1780 to 1787 the offices of the Judge and the Collector were held by different persons. But in 1787, it was resolved that the offices of the Judge should be held by the person who had charge of the revenue and until 1793, the several duties of the Collector, the Judge and the Magistrate were discharged by the Collector. Warren Hastings's successor, Marquis of Cornwallis assumed office in 1787 as Governor-General. Finding a combination of executive and judicial functions repugnant to the principle of separation of powers, Cornwallis withdrew the judicial authority of the Collectors in 1793. District Judges were appointed to all the Districts. His efforts led to the passing of the famous Judicial Regulation of 1793. Section 1 of Regulation No. II of 1793 contained the following passage: "All questions between the Government and the landholders respecting the assessment and collection of the public revenue and disputed claims between the latter and their ryots or other persons concerned in the collection of their rents, have hitherto, been cognizable in the revenue courts. The Collectors
of the revenue preside in these courts as judges and an
appeal lies from their decision to the Board of Revenue
and from the decrees of that board to the Governor-General
in Council in the Department of revenue. The proprietors
can never consider the privileges which have been conferred
upon them as secure whilst the revenue officers are vested
with the judicial powers. It is obvious that if the
regulations for assessing and collecting the public revenue
are infringed, the revenue officers themselves must be
the aggressors and that individuals who have been wronged
by them in one capacity can never hope to obtain redress
from them in another. Their financial occupations equally
disqualify them for administering the laws between the
proprietors of land and their tenants. Government must
divest itself of the powers of infringing in its executive
capacity the rights and privileges which, as exercising
the legislative authority, it has conferred on the land­
holders. The revenue officers must be deprived of their
judicial powers. All financial claims of the public, when
disputed under the regulations, must be subjected to the
cognizance of the courts of judicature superintended by
judges who, from their official situation and the nature
of their trusts, shall not only be wholly uninterested in
the result of their decisions but bound to decide
impartially between the public and the proprietors of land and also between the latter and their tenants."(15)
The system of 1793 came to be popularly known as the Regulation system. All the District Magistrates were deprived of all the judicial powers. This system continued upto 1807. Between 1807 and 1821, the judicial powers of Collectors were restored at different intervals. But the Regulation of 1821 gave legal sanction to the re-union of executive and judicial functions in the District Collectors.

Second Period - 1838 to 1860

The combination of executive and judicial functions introduced in 1821 did not last long. The movement for separation was going on. Consequently a Committee was appointed in 1837 with Sir Bird as its Chairman. The Committee submitted its report in 1838. Sir P. Halliday, who was one of the members of Committee attacked the system of combination of functions. The Committee had recommended for the separation of the offices of Magistrates and Collectors. By 1845 they were disunited. But the scheme was again being criticised. It was assailed(16) by Lord Dalhousie in his Minute dated 24th April 1854.
He submitted his own plan for the combination of the two functions. The Secretary of State for India gave sanction to the scheme in 1859.

Third Period - 1860 to 1908

After the Sepoy Mutiny, the Government of India felt the need for improving and reorganising the police machinery and they appointed the Police Commission in 1860. The Commission considered the question of separation and submitted its report in September 1860. The Police Commission in their report expressed: "That as a rule there should be complete severance of executive police from judicial authorities; that the official who collects and traces out the links of evidence - in other words, virtually prosecutes the offender - should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a committal for trial before a higher tribunal."(17) The Commission expressed the view that it was impracticable to relieve the Magistrates of their judicial duties. The proposal of the Commission was accepted by the Government and it was finally decided that the administration of the minor branch of criminal justice combined with executive functions
should remain with the Collectors. With the spread of education, the movement gained momentum. The Indian National Congress, which came into existence in 1885, took up the issue and began to pass resolutions demanding this reform year after year. In 1886, the Congress adopted a resolution recording: "an expression of the Universal conviction that a complete separation of executive and judicial functions had become an urgent necessity and urged the Government of India to effect this separation without further delay."(18) Similar resolutions were passed in 1887, 1888, 1889, 1890, 1891 and 1892 successively. But in 1893, the ominous resolution carried by the Congress ran as follows: "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."(19) "The first Indian who took a leading part in the controversy was Marnohan Ghose who, on the basis of his vast legal experience, was convinced that the Union involved great danger to the life and liberty of the people."(20) Mr. R.C. Datt, published in August 1893, a practical scheme of separation whose chief merit was that it did not involve any extra cost. In fact, these were the two early Congressmen, one a prominent lawyer of Bengal and the other a retired Indian Civil Servant, who made a special study of the problem. In his celebrated scheme, Mr. R.C. Datt remarked: "a separation of judicial and executive functions would make Magistrates' duties less embarrassing and more consistent with our ideas of judicial fairness, that it would improve both judicial and executive work and it would require no material addition to the cost of administration."(21) The similar resolutions were also passed in 1894, 1895 and 1896 by the Indian National Congress. Mr. J.P. Srivatsava, in his thesis on Indian
Civil Service observes: "In fact, at the end of the last quarter of the 19th century, the two most burning problems discussed in India and circles friendly to India in England were the introduction of simultaneous examination in India for the Indian Civil Service and the separation of executive and judicial functions in India. Before this, separation of these functions had been discussed between the authorities among administrative circles and various schemes were put into operation but it had not become the people's problem and politically conscious India had not taken it up." (22) A similar opinion is expressed by Haridwar Rai, in one of his research articles. He remarks: "Upto the eighties of the last century, the controversy was confined to administrative reports and minutes but towards the end of the century, it became an important plank of the policy of the Indian National Congress." (23) On account of the persistent demand made by the Congress, the eminent British men like Lord Hohhouse, Sir Richard Garth, Sir Richard Couch, Sir Charles Sargent, Sir William Markby, Sir John Scott, Sir John Budd Phear, William Wedderburn, Ronald Wilson and Herbert Reynolds, all retired judges and administrators and who had seen the working of the system in India
prepared a historic memorial dated the 1st July 1899 demanding complete separation. The memorial was submitted to the Secretary of State for India. The memorial is popularly known as the Hothouse Memorial. The memorialists had made the most convincing and cogent case against the combination of the executive and judicial functions. But after studying the several opinions expressed, the Government of India did not take any steps in the direction. In their letter written in 1908 they expressed 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." (24) Thus upto 1908, the Government of India opposed every measure of separation. Because the position and prestige of District Magistrate would have been affected.

**Fourth Period - 1908 to 1921**

During this period, there was an astonishing change since there was a welcome softening of the
opposition of the Government of India. Sir Harvey Adamson, the then Home Member, during his budget speech in 1908 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." (25) This pronouncement was made without previous consultation with local Governments. But the Government did not do anything and the Congress was much disappointed. The matter was taken up by a band of public workers like Dr. Rash Behary Ghose, Mr. G. Gokhale,
Mr. M. B. Dadabhay, Mr. B. N. Basu, Sir Surendranath Banerji and Pandit Madan Mohan Malaviya and they pleaded for separation. Mr. P. C. Mitter in his book entitled "The Question of Judicial and Executive separation and the Better Training of Judicial Officers" propounded another scheme in 1913. The first world war broke out in 1914 and it lasted for four years. The question of separation was shelved indefinitely along with other issues during the war period. In the meanwhile, during the year 1916, the report of Public Services Commission in India popularly known as Islington Commission was published. Mr. Abdul Rahim, who was a judge of the Madras High Court and was many years the President of the Central Legislative Assembly appended a long Minute of Dissent and therein he devoted several pages to this question. But the issue of separation came within the scope of powers of the Provincial Governments when the Government of India Act 1919 was passed.

Fifth Period - 1921 to 1947

The new provincial councils established under the above Act of 1919 took keen interest in the problem. In most of the Provincial Councils resolutions were moved by non-official members demanding separation. Most of the
resolutions were carried and the Provincial Governments appointed Committees to report on the problem. In Bihar and Orissa a Committee was appointed in 1921 under the Chairmanship of Justice B.K. Mallick to formulate a scheme for the separation of judicial and executive functions. It submitted an exhaustive report in 1922 in two volumes. The report of the Simon Commission was published in 1930 and it recommended for the separation alongwith certain constitutional changes. The Commission observed: "The abstract proposition that there ought to be no confusion between the function of the prosecutor and the function of the judge is not disputed by anybody and in the same way, the abstract proposition that a man who is trying a criminal should try him in a purely judicial spirit and not be influenced by anxiety as to promotion or prospects, is equally self-evident. But the practical difficulties of meeting all the objections are considerable. It is pointed out that there is a side of magisterial work which must be regarded as preventive rather than punitive and it is of great importance especially in a country where crime is unfortunately so rife and where breaches of peace of the most serious character may arise at the shortest notice that the head of the District administration should be sufficiently
armed to be able to deal effectively with the danger of upheaval and outbreak. The practice is that the District Magistrate, when he anticipates trouble in a particular town or area, calls on a sufficient number of subordinate Magistrates, whom he selects because of his knowledge of their attainments and strength of character, to concentrate at the point of danger not only for the purpose, if need be, of directing an unlawful assembly to disperse, but for the actual business of managing the crowd and limiting the risk of collision. The contention of the authorities is that for this purpose, it is very desirable that the District Magistrate should know his men. No doubt, it is difficult to draw a precise line between what is the preventive justice and what is purely judicial work, but the case is manifestly a much stronger one for change, if a practical solution can be found, when one considers the purely judicial function of trying an accused person upon a charge of crime or of hearing a criminal appeal.\(23\)

However, the Government did not change its attitude. In 1937, Congress Ministries were installed in a majority of the provinces. The people expected that the much-needed reform would be carried out by the Congress Ministries. But strangely enough, their hopes were not fulfilled, and the people were very much disappointed. The Second World
War broke out in 1939 and the Congress Ministries resigned, and returned to office in 1946. Some of the Provincial Governments appointed Committees to frame necessary schemes of separation. The Madras Government by their G.O.M.No.1639, Public (General) dated 25th July 1946 appointed a Committee under the Chairmanship of Shri K.Pajah Iyyar, Advocate General and the Committee submitted its report on 7th November 1946. Similarly, the Bihar Government, by their Resolution No. 5866 A dated 1st December 1947 appointed a Committee presided over by Mr. Justice H.R. Meredith of the Patna High Court to frame a practical scheme for the separation of judicial and executive functions. The Bombay Government, by their resolution of the Home Department dated 1st February 1947, appointed a Committee to examine the question of the separation of the judiciary from the executive. The Committee submitted its report on 11th October 1947. The report is popularly known as Justice Lokur Committee Report. Thus the question of separating the judiciary from the executive had been before the country for nearly a century and half.

Position of the problem after Independence

The separation of judiciary from the executive became a pressing problem after the attainment of
independence. The numerous political parties emerged after the formation of the democratic Government at the Centre and in the States. The people began to feel that the politicians might make attempts, directly or indirectly to influence the judicial discretion of the Magistrates. Even the Magistrates began to feel that they might get into trouble if the politicians were allowed to interfere in the exercise of their powers. Certain external factors were also responsible for the speedy implementation. The workload of the Magistrates had increased to such an extent that they had hardly any time to attend to judicial work. The Centre and the States began to exercise more and more control over the life and property of the citizens on account of planning and developmental activities. The very foundations of liberty and sovereignty of the people were in danger. Hence the people began to urge for the separation of the judiciary from the executive. The public opinion was so strong that the Constituent Assembly could not resist it. There was no provision for it in the Original Draft Constitution but due to the pressure of public opinion, Dr. Ambedkar introduced it on 24th November 1948 in the form of an amendment and thus a new Article 39A was proposed to the Draft Constitution. The Article provided: "That State shall take steps to
secure that, within a period of three years from the commencement of this Constitution, there is separation of the judiciary from the executive in the public services of the State."(29) But at the final stage, an amendment was moved by Dr. Ambedkar on 25th November 1948 and the time limit of three years was omitted. In the final draft, the Articles were renumbered and Article 39A thus became Article 50. In its present form the Article 50 provides: "The State shall take steps to separate the judiciary from the executive in the public services of the State."(30) After much criticism and agitation on the part of opposition, steps were taken by a large number of States after the enactment of the new Constitution in 1950 for the implementation of separation in order to carry out the directive principle in Article 50 of the Constitution. Some States like Assam, Orissa, Rajasthan, West Bengal, Punjab, Madhya Pradesh and Mysore lagged much behind in taking steps in this direction. The proposed separation in the Indian context means the independent functioning of the judiciary freed of all suspicion of executive influence or control, direct or indirect. It ensures that judicial officers will devote their time entirely to judicial duties and this fact leads to efficiency in the administration of
justice. Independent judiciary without any fetters either from the legislature or from the executive is essential for the orderly development of democracy in India.

The Scheme of Separation

Under the Criminal Procedure Code and the various other Statutes, the functions of a Magistrates fall broadly into three categories, namely:

a) Functions which are police in their nature, as for instance, the handling of unlawful assemblies.

b) Functions of an administrative character, as for instance, the issue of licences for fire-arms and etc.

c) Functions which are essentially judicial, as for instance, the trial of criminal cases.

All the judicial functions before separation were performed by the Deputy Commissioners-cum-District Magistrates and by a number of Magistrates subordinate to him and controlled by him. The scheme of separation of judiciary from the executive has been designed within the framework of the Criminal Procedure Code. It is an
arrangement whereby all the functions of a Magistrate are divided between two sets of Magistrates designated as Judicial Magistrates and Executive Magistrates. The essential feature of the scheme is that purely judicial functions coming under category (C) above are transferred from the Deputy Commissioners and subordinate Magistrates, to judicial officers, who will not be under the control of the Deputy Commissioners. Functions under categories (A) and (B) above will continue to be discharged by the Deputy Commissioners and other subordinate Revenue Officers. The said Judicial Officers as well as the Officers of the Revenue department discharging executive functions will all be designated as 'Magistrates' to satisfy the statutory requirements. To indicate the difference between the two, officers in the former category will be called as "Judicial Magistrates" and those under the latter category will be called as "Executive Magistrates."

It would be pertinent at this stage to set out the manner in which the scheme of separation has been implemented. In this connection, the pre-reorganised States of Madras and Bombay set the examples to other States of India. The introduction of separation in
Madras followed the report of a Committee appointed in 1946 under the Chairmanship of Hajah Iyer Advocate General for the purpose of formulating a scheme. The separation was effected in Madras by executive orders and not by Statute. In the initial stages, the scheme was introduced only in a few Districts. It was extended to other Districts year after year. The difficulties in its working were observed and their causes were found out and removed. Thus the scheme was gradually brought into force in Madras State. But in Bombay, the scheme was introduced by passing of the Separation of Judicial and Executive Functions Act (XXIII of 1951). So the Old Bombay and the Old Madras States were the only two States in India which, soon after Independence, effected real separation of the judiciary from the executive. The main points of difference between the Madras and the Bombay schemes are:

1) Whereas in Madras, the head of Magistrates in a District is the District Magistrate (Judicial), in Bombay the head is the Sessions Judge.

2) In Madras, powers under Sections 108 to 110 of the Code of Criminal Procedure are exercisable only by
Judicial Magistrates whereas in Bombay, they are exercisable by Executive Magistrates.

3) In Bombay, the separation was achieved by an enactment known as the Bombay Separation of Judicial and Executive Functions Act 1951. But in Madras this was done by an Executive Order G.O.No.3106 Public (Separation) dated 9th September 1949 which was amended from time to time. A statement showing some of the salient features of the allocation of powers and functions under the Criminal Procedure Code in the schemes of separations in Madras and Bombay is appended in Appendix No.5.

Position of the problem in Karnataka before Unification

The States' Reorganisation Act 1956 brought together units which had been under the administration of five different States namely Old Mysore, Bombay, Hyderabad, Madras and Coorg, to form the new State of Karnataka. Hence, with regard to the matter of separation of judiciary from the executive, five different systems prevailed in five different regions before reorganisation.

1) Government Order No. 1304-18/Cte 18-56-4 dated
29th May 1956 was applicable to the Old Mysore Area including Bellary District.

2) The Government Notifications:

a) G.O.No.3106 Public (Separation) dated 9th September 1949;

b) G.O.No.2074 Public (Separation) dated 7th August 1951; and

c) G.O.No.2304 Public (Separation) dated 24th September 1952 were applicable in the Ex-Madras Karnataka area.

3) The Government Notifications:

a) G.O.No.Jud/Ad/84/50 dated 27-4-1951;

b) G.O.No.G/Jud/Ad/84/ dated 4-9-1952 were applicable in the Ex-Hyderabad Karnataka area.

4) The Separation had not been carried in Ex-Coorg area before Unification but it was introduced in the year 1959 by the issue of Government Order No.HD 10 CLP 58 dated 15th October 1959.

5) The various Acts passed by the Bombay Legislature:
a) The Bombay Separation of Judicial and Executive Functions Act 1951;

b) The Code of Criminal Procedure (Bombay Amendment) Act 1953;

c) The Code of Criminal Procedure (Bombay Amendment) Act 1954;

d) The Bombay Separation of Judicial and Executive Functions (Supplementary) Act 1954;

e) The Code of Criminal Procedure (Bombay Amendment) Act 1955;

f) The Code of Criminal Procedure (Bombay Amendment) Act 1956 were applicable in the Ex-Bombay Karnataka area. It would be quite pertinent to examine the position existing in all these areas briefly.

Old Mysore Area

Bellary District was added to the State of Old Mysore on 1st October 1953. Formerly this District was in Madras. The Government of Old Mysore, Bangalore, by their Order No.3659-69-Cts 369-52 II dated 22nd October 1953 appointed a Committee(37) to examine the question of
redistribution of jurisdiction of Courts in the State because the question of implementation of the separation of judicial and executive functions was closely associated with this. This Committee submitted its report in 1954. As per G.O.No.1438-57-0ts 18-56-4 dated 29-5-1956, the Government of Old Madras introduced the scheme of separation of Judiciary from Executive. According to the above mentioned Order, the police and administrative functions were exercisable by the officers of the Revenue Department, namely, Deputy Commissioners, Assistant Commissioners and Tahasildars. The judicial functions were exercised by the Judicial Magistrates under the control of the High Court. The Revenue Officers were invested with appropriate powers of a Magistrate to enable them to discharge their responsibility. "The powers and functions indicated in the Code of Criminal Procedure of 1898 under Sections 45(3), 107, all Sections in Chapter XIV except 155(2), 196-A(2), 196-B, 326, 337(1) first paragraph were exercisable by the Executive Magistrates, whereas those of Sections 17(1) & (2), 37, 42, 44, 45(1), 60 to 65, all Sections of Chapters VI and VII, 127 to 132, 133 to 144, 153(2), 190(1)(0), 192, 337(1) Second Paragraph, 338, 387, 503, 506, 528(2)(3) & (4), 549(2), 552 and 561(2) fell under the concurrent jurisdiction of the Executive and Judicial Magistrates." (38)
Ex-Hyderabad-Karnataka Area

The separation of the judiciary from the executive was first mooted in the erstwhile Hyderabad State in the year 1922\(^{39}\) and the principles governing this healthy reform were implemented all over the area. The revenue officers, who were earlier exercising also magisterial powers, were divested of them and Munsiffs were appointed for each Diwani Tahsil (taluka)\(^{40}\) and they were invested with first class magisterial powers on the criminal side. The First Talukdar, the Second Talukdar, the Deputy Collector and the Tahsildar were all given certain powers under the Hyderabad Code\(^{41}\) of Criminal Procedure for the express purpose of preventing crimes and for the maintenance of law and order. Under the amended\(^{42}\) Code of Criminal Procedure, in 1955 the revenue officers ceased to exercise also the limited powers conferred earlier. Orders\(^{43}\) were passed appointing Collectors as Ex-Officio Additional District Magistrates, Deputy Collectors in charge of the sub-division as Ex-Officio First Class Magistrates and Tahsildars as Ex-Officio Second Class Magistrates. These officers did not exercise any judicial functions and their powers related mainly to prevention of crimes and efficient maintenance
of law and order. But in 1950, a Committee was appointed by a Royal Firman(44) to go through and report on the working of the separation scheme. The Committee after full deliberation reported in favour of the retention of the scheme. The significant recommendations made by the Committee pertaining to the Suba Court and the District Court administration were accepted by the Hyderabad Government. The notifications - G.O.No.Jud/Ad/84/50 dated 27-4-1951 and G.C.No.G/Jud/Ad/94 dated 4-9-1952 were issued by the Government. Before 1951 the Subedar(45) of Gulbarga was the highest judicial officer in addition to his revenue duties and similarly there was only one District Court for the entire Gulbarga Suba which included the three Districts of Hyderabad Karnataka area - Gulbarga, Raichur and Sidar. But after 1951 April, the Suba Court was abolished and each District was provided with a District and Sessions Judge Court. The Subedar and revenue officers were relieved of the work of a judicial nature.

Ex-Coorg Area

The scheme of separation of the judiciary from the executive, in the Chief Commissioner's Province of Ex-Coorg,
had not been carried out, before its merger with Karnataka. But the Government of reorganised State of Karnataka in their Notification No. 1436-57-Cto 16-56-4 dated 29th May 1956 ordered separation of the judiciary from the executive for the Old Mysore area. But the same notification was extended to Coorg area and it was brought into force with effect from 1st December 1959 and a Judicial District Magistrate was appointed with effect from that date. After the introduction of the scheme, there were two categories of Magistrates in the District-executive and judicial. The following instructions were issued for the guidance of the Judicial and Executive Magistrates and Police Officers in the Coorg District.

1) The Executive Magistrates would be executive officers of the Revenue Department, namely, Deputy Commissioner, Revenue Sub-Division Officers and Tahasildars. They would be responsible for the maintenance of law and order. These officers would continue to be invested with appropriate powers of a Magistrate. The Executive Personal Assistant to the Deputy Commissioner would be ex-officio First Class Magistrates and the Tahasildars Second Class Magistrates. The Executive Magistrate would be under the supervision and control of the Additional District Magistrate on the administrative side.
2) (a) The category of Judicial Magistrates would consist of District Magistrates and First Class Magistrates;

(b) The District Magistrates would be the principal Magisterial Officer in the District and as such would have general administrative superintendence and control over the other Judicial Magistrates in the District;

(c) The Court of the District Magistrate would be inspected annually by the District and Sessions Judge as a nominee of the High Court and the inspection report should be submitted to the High Court. The District and Sessions Judge might also inspect the Court of any Judicial Magistrates in his District.

3) The First Class Magistrates should submit their calendars to the Sessions Judge through the District Magistrates. The District Magistrates should send their calendars to the Sessions Judge.

4) The District Magistrates and the Deputy Commissioner-cum-Additional District Magistrate should act independently of each other.
In Ex-Madras-Karnataka Area

In the District of South Kanara and in the Kollegal Taluka of the present Mysore District which formed part of the Ex-Madras State, the scheme of separation of judiciary from the executive was introduced by the Government of Ex-Madras State in their G.O.No.3106, Public (Separation) dated 9-9-1949. According to this scheme, the officers of the Revenue Department in charge of the executive administration viz., the Collector, the Revenue Divisional Officer, the Tahasildar and the Deputy Tahasildar were designated as Executive Magistrates. The category of Judicial Magistrates would consist of District Magistrates, Sub-Divisional Magistrates, Additional First Class Magistrates, and Second Class Magistrates. The administrative control and supervision of the Judicial Magistrates were vested in the District Judicial Magistrate who was under the control of the High Court. But the administrative control and supervision of the executive Magistrates were vested in the Collector who was under the control of the Government through the Board of Revenue. Matters which were judicial in their nature were strictly within the purview of the Judicial Magistrates, while matters which were purely administrative or executive in
their character were being dealt with by the Executive Magistrates. Matters in respect of which both the types of Magistrates had functions to discharge were shown as concurrent. Judicial Magistrates were empowered to act under Sections 106, 108, 109, 110, 112 to 126-A, 127 to 132, 144, 155 to 163, 164, 165, 166, 167, 190(1)(b)(c) and 190(2), 200 to 265, 337(1) Second paragraph, 406-A(c), 435 to 438, 488, 515, 528(2)(3) & (4), of the Criminal Procedure Code. The Executive Magistrates were empowered to act under Sections 107, 108, 109, 110, 112 to 126-A, 127 to 132, 133 to 143, 144, 145 to 148, 155 to 163, 165 to 166, 167, 169 to 173, 174 to 176, 190(1)(c), 337(1) Second Paragraph, 337(1) first paragraph, 528(2)(3) & (4), of the Criminal Procedure Code.

In Bombay-Karnataka Area

The scheme of separation of the judiciary from the executive was carried out by the Bombay Government by passing of the separation of Judicial and Executive Functions Act, 1951. In Bombay, when the judiciary had been separated from the executive, the entire administrative and supervisory control over the Judicial Magistrates had been vested in the District and Sessions Judge. After the separation scheme was introduced, there
were two categories of Magistrates - Judicial Magistrates and Executive Magistrates. The Collector remained the District Magistrate and the Head of the Police but only for the purpose of maintenance of law and order in his District. He was not to try cases or hear appeals. The Judicial Magistrates were not subordinate to him, but to the Sessions Judge and the High Court. There were Sub-Divisional Officers known as Prant Officers. They were of two categories, those promoted from the lower cadre, who were called Deputy Collectors and Officers of the Indian Administrative Service who were designated as Assistant Collectors. They were called Sub-Divisional Magistrates as they held charge of a sub-division of the District. Besides these, there were the Mamlatdars who were Taluka Magistrates. They were the ex-officio Second Class Magistrates and sometimes first class powers were conferred on them. In the category of part-time Magistrates were found Sub-Registrars who had been invested with third class powers. The Taluka Road Accountant in some places exercised magisterial powers and were commonly known as Sheristedar-Magistrates. Thus the scheme envisaged to relieve the existing Revenue Personnel of their criminal work and one Judicial Magistrate was posted in each of the Talukas in the province. In addition to
these Magistrates, a number of city Magistrates were appointed in big cities. An Act to supplement the provisions of the Bombay Separation of Judicial and Executive Functions was passed in the year 1954. Similarly the Acts to amend the Code of Criminal Procedure, 1898 in its application to the State of Bombay were passed in the years 1953, 1954, 1955 and 1956. The Judicial Magistrates were empowered to act under Sections 106, 127 to 132, 155 to 163, 164, 165, 166 to 173, 190, 200 to 265, 337(1) and 337(2), 435(1), 436(1), 437, 438(7), 488 515, 528 of the Criminal Procedure Code. The Executive Magistrates were empowered to act under Sections 107, 108 109, 110, 112 to 126-A, 127 to 132, 133 to 143, 144, 145 to 148, 155 to 163, 164, 165, 166 to 173, 174 to 176, 337(1) first paragraph, 406 A(c), 435(2)(4), 436(2), 515 of the Criminal Procedure Code.

Position of the Problem in Karnataka after Unification

As discussed above, there was wide divergence in the scheme of separation of the judiciary from the executive in all the five integrated areas of the new State. Because certain Central Acts were in force in some regions and certain other Central Acts were not
in force in other regions, within the same State. For example, the Explosives Act 1884, the Petroleum Act 1934, Police (Incitement to Disaffection) Act 1922, Sarai Act 1867, the Metal Tokens Act 1899 and the Works Defence Act 1903 were not in force in Coorg District, whereas, these Acts were in force in the Old Mysore Area. Further, different State Acts were in force in different regions. Even though Bellary was added to Mysore in 1953, the Madras Acts and Regulations were in force in Bellary District. The Old Bombay State Acts were in force in the Bombay Karnataka region. This had given rise to a lot of problems and the administration had been affected considerably. The Mysore Legislative Assembly discussed and pointed out to the difficulties faced by the Executive Magistrates who were transferred from one region to another region of the same State. So it was found expedient to amend the Code of Criminal Procedure, 1898, in its application to the State of Karnataka to provide for a Uniform Law for the separation of executive and judicial functions. But in the meantime, the Law Commission of India, in their fourteenth report on the reform of judicial administration observed: "The scheme of separation of the judiciary from the executive could more effectively be brought into operation in the States by undertaking...
legislation on the lines of the Bombay scheme. They said "The Bombay Separation of Judicial and Executive Functions Act (XXIII of 1951) would, we think, serve as a model for legislation." (49)

The Introduction of the Scheme of Separation in Karnataka

In the light of the observations made by the Law Commission of India, the State legislature of Karnataka passed the Code of Criminal Procedure (Karnataka Amendment) Act (50) in 1965 and it was brought into force with effect from 1st October 1965. All the enactments and the executive orders which were in force in the different integrated areas were repealed. Besides the High Court, two classes of courts were constituted in the State of Karnataka, namely:

1) Courts of Session;

2) Courts of Magistrates.

Two classes of Magistrates were provided, namely:

I) Judicial Magistrates:

A) Magistrates of the First Class.

B) Magistrates of the Second Class.
C) Magistrates of the Third Class.
D) Special Judicial Magistrates.

II) Executive Magistrates.

A) District Magistrates.
B) Sub-Divisional
C) Taluka Magistrates.
D) Special Executive Magistrates.

The Sessions Judges of the Districts and other Judicial Magistrates were subject to the control of the High Court. All Executive Magistrates were subordinate to the District Magistrate. New Sections for Section 6, 6-A, 7, 12, 13, 14, 17-A, 17-B, 37, 476-C, new Chapter XLII A, 539-C, 539-D, 554-A, 554-B, Schedule IV were substituted under the Code of Criminal Procedure, 1898. Similarly Sections 10, 15, 16, 17, 29 B, 30, 36, 38, 57, 63, 78, 89, 106, 107, 108, 109, 126, 133, 143, 144, 164, 167, 170, 186, 187, 190, 192, 206, 249, 260, 337, 346, 349, 380, 406A, 413, 435, 436, 437, 438, 479, 488, 515, 524, 528, 559, 561, 562, 565, Schedule III of the Criminal Procedure Code were amended. Certain Acts in their application to the State of Karnataka were amended. Section I
of the Press and Registration of Books Act, 1867, Section 14 of the Sarais Act, 1867, Section 7 of the Indian Christian Marriage Act, 1872, Section 7 of the Indian Fisheries Act, 1897, Section 54 of the Indian Electricity Act, 1910, Clause 6 in Section 3 of the Lunacy Act 1912, Section 15 of the Payment of Wages Act 1936, Sub-Section 1 of Section 20 of the Minimum Wages Act, 1948, Sections 6, 9, 10, 11 and 13 of the Madras Coffee Stealing Prevention Act, 1878, Sections 46, 75, Clause (a) of Sub-Section 3 in Section 76, 141 of the Madras Public Health Act 1939, Section 2 of the Madras Compulsory Labour Act, 1858, the Mysore Coffee Stealing Prevention Act, 1878, Clause B of sub-section 1 and sub-section 2 in Section 7 of the Mysore Lepers Act, 1925, Sections 3, 46 and 47 of the Land Acquisition Act, 1894, Section 47, 68 of the Mysore Public Health Act, 1944, Sections 75, 76, Clause A of Sub-Section 3 in Section 77, Section 143 Clause B of the Mysore Public Health Act, 1944, Sections 15, 16, Sub-Section 1 of Section 18, Sub-Section 2 of Section 18, 20 of the Mysore Prohibition of Beggary Act, 1944, Clause A, B and C in Section 18 of the Mysore Lotteries and Prize Competitions Control and Tax Act 1951, Sections 67, 71, 72 and 121 of the Mysore Police Act 1963, Sub-Section 2 of Section 57 of the Mysore Prisons Act, 1963,
Thus the scheme of Separation of the judiciary from the executive was carried out in the year 1965 in Karnataka. It might be recalled here that the Central Government, as back as June 16, 1965, evolved some criteria to Judge whether the executive and the judicial functions have been separated effectively. The following criteria were laid down:

1) Whether a cadre of Judicial Magistrates has been organised;

2) Whether functions of a Judicial nature, namely, those involving recording and sifting of evidence, have been clearly allocated to Judicial Magistrate leaving
the Executive Magistrate with administrative and police functions;

3) Whether administrative control over the Judicial Magistrate has been vested in High Courts; and

4) Whether the power of taking cognizance of offences under Criminal Procedure Code has been vested in the Judicial Magistrates.

The description pertaining to the introduction of the scheme of separation reveals that the above tests have been effectively applied in the separation of Judicial and Executive Functions in Karnataka. Hence it may be said that the scheme implemented in Karnataka is quite satisfactory.

The New Code of Criminal Procedure, 1973

The Old Code of Criminal Procedure 1898 was repealed and on Act(52) to consolidate and amend the law relating to Criminal Procedure was passed by both the Houses of Parliament in 1973. It came into force with effect from 1st April 1974. The New Code provides for a uniform set-up of criminal courts. The hierarchy of Judicial Magistrates
consists of Chief Judicial Magistrates at the District level with Additional Chief Judicial Magistrates, if any, and other Judicial Magistrates. All the Judicial Magistrates are under the control of the High Courts. On the executive side, there is a District Magistrate at the District level with Additional District Magistrates, if any, Sub-Divisional Magistrates and other subordinate Magistrates - all of whom are called Executive Magistrates. There is no classification of these Magistrates - all are Magistrates of First Class. That is so because of the nature of functions assigned to them under the Code. It is to be noted that the Executive Magistrates are appointed by the State Government, unlike the case of the Judicial Magistrates who are appointed by the High Courts. The Code also contemplates declaration of any area comprising a city or town whose population exceeds one million to be a Metropolitan Area for purposes of the Code and establishment of Courts of Metropolitan Magistrates in such areas. One of the Metropolitan Magistrates would be the Chief Metropolitan Magistrate to be appointed by the High Court for such areas.

Constitution of Criminal Courts in Karnataka

Under the circumstances explained above, the Government of Karnataka had to revise the entire set up of Criminal
On consideration of all aspects of the case, sanction was accorded by the Government in Order No. Law 53 UG 74 dated 20th March 1974. (53) Besides the High Court, the following classes of Criminal Courts have been set up in the State of Karnataka.

i) Courts of Sessions;

ii) Courts of Chief Judicial Magistrates-cum-Civil Judges. (54)

iii) Courts of Judicial Magistrates of the First Class at the town and Taluka levels.

iv) Courts of Metropolitan Magistrates at Bangalore.

v) Executive Magistrates.

The City of Bangalore, as defined in the City of Bangalore Municipal Corporation Act, 1949, was declared as Metropolitan Area for purposes of the Code of Criminal Procedure 1973 and a Chief Metropolitan Magistrate for the said area was appointed. The following Magistrates have been appointed in the Metropolitan areas of the City of Bangalore as Metropolitan Magistrates who are of the rank of the Munsiffs:
1) Judicial Magistrate First Class (First Court)
Civil Station, Bangalore.

2) Judicial Magistrate First Class (Second Court)
Civil Station, Bangalore.

3) Judicial Magistrate First Class (Third Court),
Bangalore.

4) Judicial Magistrate First Class (Fourth Court),
Bangalore.

5) Judicial Magistrate First Class (Fifth Court),
Bangalore.

6) Judicial Magistrate First Class (Traffic Court),
Bangalore.

7) Judicial Magistrate First Class (Mobile Traffic
Court), Bangalore.

Jurisdiction of Criminal Courts

The District and Sessions Judges, Chief Judicial
Magistrates-cum-Civil Judges and the Judicial Magistrates
First Class will have territorial jurisdiction which is
co-terminous with Sessions Divisions or Districts, Sub-
Divisions and Talukas respectively. The Metropolitan Magistrates will have jurisdiction over the Metropolitan area of Bangalore. A Sessions Judge may pass any sentence authorised by law. But the sentence of death passed by him is subject to confirmation by the High Court. The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years. The Court of a Magistrate of the First Class may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees or of both. The Court of a Chief Metropolitan Magistrate will have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the First Class.

Thus the scheme of separation of Judiciary from the Executive has been carried out by the Government of Karnataka by effecting local amendments to the Code of Criminal Procedure, the Central and the State Acts. Pending Issues pertaining to this problem have been discussed in the last Chapter.
FOOTNOTES

1) Joseph Chailley, Administrative Problems of
British India, published by Trans William Sayer (Macmillan

2) German News Weekly, Issue dated September 5,

3) William Jones, Masters of Political Thought,
published by George, G.Harrap and Co., Ltd., London,

4) Report of the Committee on the Separation of
the Judiciary from the Executive, published by the
Government of Bombay, and printed at Government Central

5) Ibid., p.27.

6) Ibid., p.27.

7) Ibid., p.28.

8) Ibid., p.28.

9) Ibid., p.29.


13) Ibid., p.31.


34) **Memorandum No. 96335/CT3 VI/74-2 dated 9-8-1974** issued by the Section Officer, Home Department, Government of Tamil Nadu.

35) **File No. AU 24 LAG 62**, Department of Law and Parliamentary Affairs, Government of Karnataka Secretariat, Bangalore, p.5.


40) Ibid., p.517.

41) Ibid., p.517.

42) Ibid., p.517.

43) Ibid., p.517.


45) Ibid., p.331.


51) Ibid., Schedule appended to the Act, pp.115-118.

