

## The Judiciary and the Executive

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In the early days of the East India Company judicial officers were appointed by, and were under the control of, the Company. This position caused dissatisfaction and distrust in the administration of justice. The judges and Magistrates were suspected- and no doubt with good reason- of trucking to the appointing authority. Eventually the High Courts were set up in the presidency towns of Calcutta, Bombay and Madras, and later in the provinces the High Court Judges were appointed from England.

The early history of the High courts is one of conflict with the Executive. In the early days the Executive strongly objected to the interference of the Courts, and today in the Punjab, since the new Constitution has given the Provincial Legislature greater powers to legislate, the jurisdiction of the High court and the lower courts has been continually reduced. The tribunals which have taken the place of the courts have even more defects than the early courts of the East India Company as they will be under the influence of both the local magnates and the appointing authority : a retrograde and dangerous step. The Central Legislature too has reduced the powers of the High Courts in the important matter of contempt of court, which in India, of all places, are of the utmost importance to preserve. There has, in fact in recent years, since the new Constitution of 1935, been an attack on the Courts and their powers which Indians will live to regret. Unless the present tendency to reduce the power of the Courts is reversed, Government will soon learn the elementary lesson- and that in no pleasant manner- that the strong and sure foundation of all Government, unless it be Fascist or Communist, is the courts, and that the undermining of that foundation is fatal and final.

The last case I heard in Lahore was one where it was necessary for the High Court to protect the rights of the subject against the wrongful use of power by Government. In that case the Government purported to use the powers conferred on it under the Defence of India Act to acquire the business of the Lahore Electric Supply Company, and so attempted to avoid a decision of the courts. The question to be decided was whether they could take possession of the property of the company and terminate its very valuable licence to supply electricity or not. It was doubtful if Government had given the necessary notice under the licence to terminate it. If they had failed in the respect, the Company could enjoy the licence for another twenty years, a right which was worth some half a million pounds to the shareholders. This important matter was actually before the courts for decision when some genius in Government thought of the Defence of India Act and the rules made thereunder.

It was argued for the Company that the action of Government was dishonest ; that it was not justified for any war purpose, and that Government merely wished to avoid the suit pending in the courts. We agreed with the company that the order under the rules of the Defence of India Act was both mala fide and ultra vires and granted an injunction ordering Government to return the property to the company.

It is most important that the powers of the courts should not be whittled away. The Executive in India will certainly continue the process if they can. It is comparatively easy to do this in India as there is no real opposition now to Governments in the Legislatures, and little instructed criticism of proposed legislation on these important matters.

One of the relics of the old days still remains in the control of the magistrates by Government. These magistrates exercise judicial functions in Criminal cases. They are appointed by Government by nomination, whereas the subordinate judges on the Civil side in the Punjab are appointed as the result of an examination held by the High Court. Pay and promotion of the magistrates are entirely controlled by the appointing authority which is Government. The result is just the same as when the East India Company appointed their own judicial officers- distrust by the Public in the decisions of these courts. Appeals, it is true, lie to the sessions judge and to the High Court, but this fact cannot satisfy the public ; every one cannot appeal, and obviously the decision of the trial court which hears and sees the witnesses- especially in a country like India where liars abound in the courts is of great importance.

I do not wish it to be thought that the magistrates are not good men. They are a good type of Indians and drawn from same class as the subordinate judges, but, naturally, if Government is the prosecutor, and those who have to decide the case are paid, promoted, and under the complete control of Government, they would have to be very strong and independent not to be influenced to some degree by their position ; and they are not as strong as that.

It was my habit when inspecting districts to see all the magistrates and we had some very frank and interesting conferences. I have often been told by them that they get into serious trouble if in the opinion of the police or the district magistrate they acquit too many accused persons. And with the police especially, and with some district magistrates, it is almost a crime to acquit any one. Therefore, to avoid the reputation of an "acquitting" magistrate they will convict everyone towards the end of a month if they have already exhausted their safe percentage of acquittals. They rely on the appellate court to put right this injustice.

If there is in a district a good district magistrate, the magistrates can do their duty, but it is scandalous that whether a magistrate does his duty or not should depend on who the district magistrate is. Some do not allow interference with their magistrates by the police or others. Some lecture their magistrates themselves if they show a disposition to acquit. Every magistrate is afraid of the consequences if he acts according to his conscience and all including the public wish they were under the High court and not under Government.

One of the most objectionable results of the present position is that magistrates are subject to complaints made against them by the police. There is always a policeman in court to take notes and report to the

Superintendent of Police, and the magistrates of course know this. The Superintendent sends on the report with his comments to the District Magistrate who nominally is the head of the police. I say "nominally" as in the Punjab now-a-days there is a general complaint that the opinion of the Superintendent of Police is accepted before that of the District Magistrate in many cases. The future of the magistrate is in the hands of the District Magistrate-and really also in the hands of the police. Can it be wondered at if these Indian gentlemen, to avoid trouble and anxiety, do not always pay the attention they ought to pay to the defence? It is difficult for any one who knows India to blame them. I do not. Let the same gentlemen come under the high court for all purposes and they will give as much satisfaction as the subordinate judges.

The separation of the Executive from the Judiciary has been for years, and continues to be, one of the crying needs of India. No government, British, Indian or Congress, wishes to part with the power over the lives and fortunes of those they govern, given them by control of the magistracy. Various reasons are given for not transferring the magistracy to the high court- all of them without substance. The principal objection is said to be on the ground of expense. There is now foundation for this objection. Some magistrates already do little or not judicial work; they can remain under Government. The residue, taking all the judicial work, can be transferred to the high Court with power to Government to call upon their services in an emergency.

But even if the separation did cause increased expenditure, what importance is there in that compared with the administration of justice ? If justice is not given to the people, other and much greater expenditure is bound to be incurred, and the foundation of Government itself may will be undermined.

Before Congress Government took over power in most of the provinces under the new constitution of 1935, no individual or body was louder in their cries for the separation of the Executive from the Judiciary than Congress. They alleged, possibly with some justification, that members of their party had suffered from the ability of government under the existing system to imprison their opponents. I had talked to many of my friends in Congress of this subject, and found them unanimous that this ancient abuse should cease. "Only let Congress govern this country" I was told "and you will see how this iniquitous arrangement will at once come to an end". On this ground I welcomed the advent of Congress as rulers in 1937. I was doomed to disappointment: not one of the Congress Provincial Governments could bear to part with power. The subordinate judiciary, in criminal matters, remained bound to the Executive.

I thought that at last justice would be done by Congress Government at least in the United Provinces. The minister in charge of law and order there was my old friend Dr. Kailas Nath Katju, one of the best advocates I have known in India, and in every way an admirable, conscientious lawyer. Knowing how interested I was in the subject he came to Lahore to discuss the matter with me. We talked for some considerable time, and when he left I felt that we had won the fight in the United Provinces. When I saw the Bill he introduced, I found we were again defeated ; Congress had once more fallen to temptation : the Bill put the High Court in charge of some magistrates for three years, but at the end of that time they returned to their former allegiance. It would have been just as useful, and more honest, to have done nothing at all. When the magistrate knew that he was to return for pay, promotion and honours to Government, he would be just as careful to keep in the good books of Government as ever he was. The tongue in India is ever more powerful than the right arm.

There is one anomalous provision in the Criminal Procedure Code which allows the Executive to avoid the normal right of the High Court ; if a Governor appoints a special magistrate to try a particular case, the High Court may not order a transfer of the case to another magistrate or even to itself. This provision may lead to a miscarriage of justice and should be struck out of the Code. If the Governor has a strong opinion-and he sometimes has-that the accused is guilty or innocent, of the offence charged, that opinion is known and it would take a very strong and independent magistrate to decide the case contrary to the opinion of His Excellency. Under such circumstances the accused would normally at once ask the High Court to transfer the case to another Magistrate. This he cannot do.