

**SEPARATION OF THE EXECUTIVE AND
JUDICIAL FUNCTIONS**

BY

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...acts between lawyers and others,
...ding public men, commercial men, chambers of
commerce and educational and other institutions, with a view to co-ordinate
work in the field of law affecting different walks of life,

(g) to suggest law reform on an all-India basis, and

(h) to establish and maintain international contacts.

The Society is associated with the *Indian Law Review*, a quarterly journal, which has been fortunate in securing the active co-operation of lawyers all over India and some jurists of international repute. The journal, the first of its kind in India, seeks to co-ordinate more closely the practice of law with its academic study and provides a forum for thinkers in the field of law and law-reform. It contains articles on legal and allied subjects, notes and comments on decisions, legislation and legal affairs and useful Appendices.

In the present context of the evolution of Indian life, an institution like the *Indian Law Review Society* and a journal like the *Indian Law Review* will be useful in several ways. The various constitutions in the making, inter-state and international relations, the swelling volume of social and economic legislation and innumerable Orders and amendments to Central and Provincial Acts—all these are contributing to the changing social pattern of India. They require an extensive study, critical judgment and a judicious blending of the instinct of order and the urge for progress.

It is expected that the continued existence of the *Indian Law Review* and the *Indian Law Review Society* will conduce to the well-being and ordered progress of India and will raise her prestige abroad.

We venture to hope that Judges, Lawyers, Lawyers' Associations, Legislators, Legislative Assemblies, educationists, educational institutions, administrators and others interested in law and allied subjects, will cooperate with the sponsors of the Society and the Journal in making their mission a success.

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Lingaraj Panigrahi
Tej Bahadur Sapru

“THE DRAFT CONSTITUTION” AND PERSONAL LIBERTY

By P. R. DAS, BARRISTER-AT-LAW .

“We, the people of India” are about to give ourselves a Constitution; and it is of the utmost importance that we should examine “The Draft Constitution” with a view to ascertaining whether it embodies a guarantee of personal liberty as against the coercive powers of the State. It has been suggested that a guarantee of personal liberty, however important under a monarchical government or a foreign government, is of no moment in a constitution of Government framed by the people for themselves and under which public affairs are to be managed by an Executive chosen by the people. So it was argued by the framers of the American Constitution; and in the Constitution originally framed, there is no guarantee of personal liberty at all. But experience showed that such a guarantee was necessary even though the Executive were chosen by the people themselves. Why? As Pandit Nehru has said somewhere in his *Discovery of India*—“Power corrupteth a man and absolute power corrupteth absolutely;”^{*} The aggressive tendency of power is such that it was deemed necessary by the fathers of the American Constitution to enact this guarantee, and this they did by the celebrated Fourteenth Amendment.

I think I am right in saying that it was originally proposed by the Constituent Assembly that there should be a guarantee of personal liberty in our Constitution and that we should adopt the Fourteenth Amendment of the American Constitution as our model. The framers of the Draft Constitution have however thought fit to take the Japanese Constitution of 1946 as their model; and, in doing so, they say, “The Committee has also substituted the expression ‘except according to procedure established by law’ for the words ‘without due process of law’, as the former is more specific. (cf. Art. XXXI of the Japanese Constitution of 1946).” And there is a remarkable

^{*} “Power tends to corrupt and absolute power corrupts absolutely” was the original saying of Lord Acton. *Historical Essays and Studies*, p. 504—Ed.

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omission. Article XXXI of the Japanese Constitution provides, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." If Article XXXI stood alone, I submit that there would be no protection of life or liberty at all, for a procedure could be invented, without difficulty, which would place the life or liberty of the subject at the mercy of the Executive Government. Article XXXI, however, is followed by Articles which completely protect the subject against the coercive powers of the State. Article XXXII provides that "No person shall be denied the right of access to the Courts." Article XXXIV provides that "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of Counsel; nor shall he be detained without adequate cause and upon demand of any such person such cause must be immediately shown in open Court in his presence and the presence of his Counsel." Article XXXV provides that "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures, shall not be impaired except upon warrant issued only for probable cause, and particularly describing the place to be searched and things to be seized or except as provided by Article XXXIII."

"Each search or seizure shall be made upon separate warrant issued for the purpose by a competent judicial officer."

The provision as to searches is particularly significant in view of the importance attached to the subject by the Common Law of England. The maxim that "Every man's house is his castle" is made a part of the British and American Constitutional Law in the clauses prohibiting unreasonable searches and seizures and has always been looked upon as of high value to the citizen. (See Cooley's *Constitutional Limitations*, 8th Edition, Volume I, Page 611). A reference may be made to the case of *Wilkes* in this connection. I notice that under the recent Security Act in Bengal extensive power has been given to the police to make searches without warrants at all.

I have referred to the remarkable omission in the "Draft Constitution" in that, while proceeding on Article XXXI of the Japanese Constitution of 1946, it has made no reference whatever to Articles XXXII, XXXIV and XXXV. I have searched in vain in the draft constitution for a provision equivalent to Article XXXII of the Japanese Constitution; nor is there

anything analogous to Article XXXIV and Article XXXV of that Constitution. Under the Constitution, as proposed, it would be open to the Executive Government to devise a procedure which will entitle the Executive Government to direct searches without warrant, to detain persons without bringing them before the Courts and to otherwise curtail the liberty of the subject.

The view of the framers of the Draft Constitution that the expression "except according to the procedure established by law" is more specific than the expression "without due process of law," which is the expression used in the Fourteenth Amendment of the American Constitution, needs examination. I admit that Article XXXI of the Japanese Constitution read with Article XXXII, XXXIV and XXXV contain a complete guarantee of personal liberty; but Article XXXI alone, (which is all that we have in the Draft Constitution of India), without Articles XXXII, XXXIV and XXXV will place the individual at the mercy of the Executive Government.

Section 1 of the Fourteenth Amendment of the American Constitution runs as follows:—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."

The question is, is not the expression "without due process of law" sufficiently specific to guarantee personal liberty of the subject?

This expression has a proud ancestry and goes back to the *Magna Carta*. Chapter Thirty-nine of the *Magna Carta* is as follows:—

"No free man shall be arrested, or detained in prison or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." I have taken the translation from McKechnie's *Magna Carta*; page 436. It is not necessary to deal with the controversy regarding this Chapter. Hallam in his *Middle Ages*, Vol. 2, page 48, speaking of Chapters 39 and 40 together, says that they "protect the personal liberty and property of all free men the

by giving security from arbitrary imprisonment and arbitrary spoliation." Modern researches, however, show a more critical appreciation. We are not here concerned with the exact interpretation of Chapter 39; but we are concerned with the interpretation placed upon it in the leading cases of the 20 years following its enactment. In the essay contributed by Professor Powicke to the *Magna Carta Commemoration Essays* we read, "The conclusion is forced upon my mind at least that the thirty-ninth clause was intended to lay stress not so much on any particular form of trial as on the necessity for protection against the arbitrary acts of imprisonment, disseisin, and outlawry in which King John had indulged."

"If we turn to some leading cases of the next twenty years—a period during which the Great Charter was solemnly renewed, fresh in men's minds, and acknowledged as authoritative—this view is confirmed. There is the same insistence upon protection, the same concern for the observance of law, and also the same hesitation or indifference about the actual constitution of the court." (See *Magna Carta Commemoration Essays*, Page 103).

It appears that the words "*Per Legem Terrae*" were abandoned and the words "By due process of law" were substituted. We read in McKechnie's *Magna Carta*, Page 441, that "An important series of these" (that is Statutes) "passed in the reigns of Edward III and Richard II shows how the '*per legem terrae*' of 1215 was read in the fourteenth century as equivalent to the wider expression 'by due process of law', and how the Great Charter was interpreted as prohibiting the trial of men for their lives and limbs before the King's Council on mere informal and irresponsible suggestions, sometimes made loosely or from malicious and interested motives."

Professor McKechnie proceeds to say as follows:—

"Coke, founding apparently on the terms of these fourteenth-century statutes, makes '*Per Legem Terrae*' of the Charter equivalent to 'by due process of law' and that again to 'by indictment or presentment of good and lawful men'"

I think it is well established that the expression "the law of the land" is equivalent to the expression "by due process of law."

51. It is then necessary for us to see whether these expressions are suffi-

ciently specific to afford complete constitutional protection to the subject against the coercive powers of the State.

Viscount Bryce in his preface to the *Commemoration Essays* says at page XVI—"Rather perhaps may we find the chief contribution of England to political progress, *in the doctrine of the supremacy of law over arbitrary power*, in the steady assertion of the principle that every exercise of executive authority may be tested in a court of law to ascertain whether or not it infringes the rights of the subject. Does the 'Law of the Land' warrant and cover the act done of which the subject complains? Though it is now generally held that the famous phrase '*nisi per legale iudicium parium suorum vel per legem terrae*,' does not, as used to be supposed, constitute the basis of what we call 'trial by jury,' still it remains true that these words, and especially the declaration of the supremacy of the '*Lex Terrae*,' are the critical words on which the fabric of British freedom was solidly set before a representative Parliament had come into existence. It was this guarantee of personal civil rights that most excited the admiration of Continental observers in the eighteenth century, and caused the British Constitution to be taken as the pattern which less fortunate countries should try to imitate."

In his essay contributed to the *Commemoration Essays*, Sir P. Vinogradoff says in examining the meaning of the words "*Lex Terrae*," "the struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law.....it was in fact a declaration in favour of legality all round."

In examining the sense in which the phrase "Due process of law" and "the law of the land" are employed, Cooley in his *Constitutional Limitations*, Vol. II, page 736, says that. "Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*: By the 'law of the land' is most clearly intended the general law; *a law which hears before it condemns*; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." Mr. Cooley proceeds to say as follows (Page 736)—"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial'." He points out (Page 737) that—"The words 'by the law of the land,' as used in the ✓

✓ Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" Mr. Cooley says at page 737, "Neither, on the other hand, does 'the law of the land' or 'due process of law' mean anything which the legislature may see fit to declare to be such; for there are certain fundamental rights, which our system of jurisprudence has always recognised, which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty or property.....Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognised and observed in judicial procedures.....The design is 'to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute.'" He quotes Mr. Justice Johnston of the Supreme Court of the United States as saying, "As to the words from *Magna Carta* incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." (Cooley's *Constitutional Limitations*, Volume 2, page 739).

I suggest therefore that the expression "due process of law" is sufficiently specific to import complete constitutional protection to the subject against the arbitrariness of the Executive Government, and that the view of the framers of the Draft Constitution, with all respect, is not correct.

And an analysis of the fundamental rights incorporated in the Draft Constitution is sufficient to establish that little consideration has been shown for personal liberty of the subject. I have already shown that Article XXXI of the Japanese Constitution of 1946 has been incorporated

in Article XV of our Draft Constitution, but by strange oversight Articles XXXII, XXXIV and XXXV are completely ignored. Article 13 (1) (a), (b) and (c) would give constitutional protection to the individual against the coercive powers of the State, if they stood alone; but sub-clauses (2), (3) and (4) of Article 13 would seem to take away everything which Article 13(1) would seem to give. These sub-clauses enact that nothing in sub-clauses (a) (b) and (c) of Article 13(1) shall affect the operation of any "existing law," that is to say, the various "lawless" laws which were enacted for the suppression of human liberty, for example, the Criminal Law Amendment Acts, the Press Acts, and the various Security Acts which have been passed by the provincial governments. The brave words of Article 13(1) (a) (b) and (c) are reduced to nothing when the framers of the Draft Constitution have made it clear that all the rights guaranteed are to be read as "subject to existing laws."

I suggest, therefore, that we should incorporate the Fourteenth Amendment of the American Constitution in our Constitution. The expression "due process of law" has stood the test of time. It was incorporated in the Statutes passed in the reigns of Edward III and Richard II as equivalent to the expression "*per legem terrae*," and numerous decisions of American Courts have established that this expression is apt to import complete constitutional protection to the life, liberty and property of the subject against the coercive powers of the State.

A NOTE ON ARTICLE 15 OF THE DRAFT CONSTITUTION

By SIR B. L. MITTER, BARRISTER-AT-LAW

In the foot note to Article 15 of the Draft constitution, it is claimed that the expression "except according to procedure established by law" is more specific than the expression "without due process of Law." Specificness, however, has been attained at the sacrifice of much substance. The expression "due process of Law" has, through judicial interpretation, acquired a definite connotation. It includes both procedural and substantive due process. In a recent book, the matter has been put as follows:—

"While procedural due process demands that the actual conduct of the trial be in conformity with objective standards of justice, substantive due process demands that the laws under which the trial is conducted be themselves just and fair."

—*Government and Politics in the United States*
By Dr. Harold Zink, (1947).

Article 15 secures procedural due process only. It affords no protection against tyrannical laws.

SEPARATION OF THE EXECUTIVE AND JUDICIAL FUNCTIONS*

By H. E. DR. K. N. KATJU, M.A., LL.D.

Coming to the topic for this evening's talk I should like to make it quite clear that I am here before you not as your Governor, but as a brother lawyer who sometimes still feels the urge for the gown at half past ten in the morning, and who likes to read law reports and see the drift of current legal opinion and judicial decisions, if he gets the time. It is in this spirit that I propose to speak to you. You will take it from me that all the remarks that I am going to make have not the least relevance or reference to any current political controversy in this province or anywhere else in India. They are offered to you in a purely academic spirit. I happen to be a member of the Advisory Board of the Indian Law Review. The Indian Law Review is an enterprise of some young and scholarly members of the Calcutta Bar. They asked me to inaugurate a series of talks on legal topics and I readily consented. They deserve all praise and every encouragement for their enterprise.

As the learned Advocate-General has told you, this topic—the separation of Judicial and Executive functions—has a long history behind it. The other day I was reading a short biography of one of the greatest advocates that the Calcutta Bar has produced—Lal Mohan Ghosh. Mr. Lal Mohan Ghosh put forward a plea for the separation of the executive and judiciary in a great speech he made in 1879. And I very well remember the speech of another great man, great scholar and administrator, Mr. Romesh Chandra Dutt. The first Congress I attended was in 1905 at Benaras. There Mr. Dutt, if my memory is aright, moved a resolution on this topic. He said the matter had been under consideration for 40 years and the literature on the subject had become 6 ft. deep. That was in 1905. I do not know what is its volume now after 43 years. Therefore it is an ever green topic. I thought it might be useful to restate the same old

* Extract by the writer from an address delivered at the hall of the Bengal Chamber of Commerce, Calcutta, on September 12, 1948, under the auspices of the Indian Law Review Society.

truth, may be in a new language, the more so as I think that there is a tendency for all these truths to degenerate into slogans. The slogans always start first with the synthesis of specific ideas, or as a crystal-cut expression of some well-understood and well-defined ideals. Later on I do not know by what process the slogan remains but its contents change and under the cover of that slogan public mind is directed, and criticism is offered, to entirely different conceptions. My object this evening was more to draw your attention to the true contents, as I perceive them, of this particular slogan, and then to examine very briefly the new garments with which it has been clothed now. These latter developments have, in my opinion, no real bearing on the point.

Now, what do we exactly mean when we mention separation of judicial and executive functions ? I think we all recognise that in the political structure, with which you and I are familiar, there are three important elements,—the Legislature, the Executive and the Judiciary. Leaving aside cases of written constitutions, where powers may be defined, even the powers of the Legislature may be defined, and confining ourselves to the political structure of the British parliamentary model, we say that the Legislature wields supreme powers in our constitution. It can do anything. It can make laws, repeal laws, amend laws, suspend laws, nullify judicial judgments, its power is supreme. It exercises power by process of legislation over the judiciary. It exercises power and control over the executive in a variety of ways. The big instrument that it has is of course the budget—the financial whip-hand. It grants funds only for 12 months and the granting of funds from year to year is the most potent instrument for dismissing and appointing ministers. The army in England and in India also would become an illegal organization if funds were refused for the army by the Legislature. When we are talking of the independence of the judiciary we do not suggest that the judiciary is independent of the Legislature. The Legislature may itself have taken very strict means to see to it that there is no interference with the judges while they are discharging their duties by the executive administration or by any political party or by any body. But in the ultimate analysis Parliament is supreme over the Judges. The power of dismissal rests in Parliament itself. Therefore, let there be no mistake about it ; let it not be said that behind this great truth, the separation of judiciary

and executive functions, judiciary is going to be a body or an institution which is responsible to no one. This is not so. It is certainly responsible to the people and the voice of the people is represented in the Legislature.

Then you come to the two other organisations—the executive and the judiciary. The duty of the Executive Government is to administer and to maintain law and order and to do a variety of allied things. The duty of the Judiciary is to see to it that the Executive acts within the law, that every act that they do is in strict accordance with the law and the procedure which the law prescribes. Secondly, you get the other main function, namely, of deciding disputes between citizens and citizens, whether civil or criminal, and disputes between citizens and the state. It is the task of the judiciary to dispense justice between man and man without interruption and without outside control. Now if we look at it this way what exactly do we require in order to achieve our object namely, the separation of judicial and executive functions. The aim is to see to it that judgments are rendered impartially without fear or favour, malice or ill-will; and the first thing that strikes me is that the prosecutor should not be the judge. That is the basic assumption and demand. You will not tolerate the plaintiff being the judge himself in his own cause. This is an elementary truth illustrated in a variety of ways, and in so far as the executive government is concerned we should insist that the prosecutor, whoever it may be, whether it is the police, whether it is the District Magistrate or in the new constitution there may be some other arrangement, some organizational change, but in no way, directly or indirectly, in no shape or form should the prosecutor be the judge.

The second requirement is that the judge or the magistrate should have complete liberty, the fullest opportunity to deal with the case, hear it, determine it, render a judgment upon it without interruption, without interference, without any pressure of any kind by external circumstances or otherwise. He should be blind and deaf to all inducement and coaxing. He should take into consideration nothing but the evidence before him. Public opinion and the legislature should see to it that all such interference should cease.

The third thing necessary is that when a judgment has been pronounced, the executive government should take every possible step to implement that judgment. The judgment of the court must be

obeyed. Of course, there may be statutory bodies for remission and suspension of sentences. Just as the judge has got his statutory power to take cognizance of a criminal act, similarly the Provincial Government have got a statutory right under section 401 of the Code of Criminal Procedure to suspend a judicial order. That stands on a different footing altogether. The executive must go further and must place at the disposal of the officers of the court every assistance to secure and enforce compliance with the judgment. I remember very well a famous dictum of Lord MacNaughton—"the arm of the court is strong enough and long enough to reach every offender whoever he may be or how highsoever he is placed". It doesn't matter whether it is a judgment of the High Court or a junior Magistrate or a junior Munsiff. It is the judgment of a Court, and if you do not take the judgment of the Munsiff on appeal, the judgment of the Munsiff is equal to the judgment of the Federal Court. If you get these three things, then I respectfully suggest you have gained your object.

But when everything is said and done, it really becomes a matter of personality. I have known several judicial officers who were almost trembling in their boots when they were hearing a case of *A. B. Vs. the Secretary of State*. Can anybody help these persons? When a man is obsessed with fear he is past redemption. In the final analysis you will find that it is only the force of public opinion, vigilant public opinion, and let me tell you also, vigilant professional opinion which will keep the Magistrates and Judges on the strait path of judicial rectitude and impartiality. Some people are born weak, some people are made weak and there are some people whom no one can make strong. Even in the olden days you had officers whom no one dared influence. There are classical stories of Deputy Magistrates who would not allow themselves to be put under any pressure of any kind. There is the story of a Deputy Magistrate, a Bengali gentleman, who was very eccentric and would not listen to anybody. The District Magistrates who knew him left him severely alone. Once a new District Magistrate came who was not fully aware of his great qualities. The Superintendent of Police went to the District Magistrate and got a slip written by him—"I understand you are trying such and such an individual. He is a great rogue. Give him six months R.I." The Deputy Magistrate put a seal on this slip of paper, and numbered it

and put it on the file himself. Then he wrote out a long acquitting judgment, but concluding said: "On the evidence I was of the opinion that the offence was not established but inasmuch as the learned District Magistrate per his docket No. so and so has directed me to put him in jail, I have no option but to convict him". There was of course a sensation in the town, the matter was discussed in the club that very evening and the Sessions Judge told the District Magistrate,— "What have you done? You have put your foot into it." They all got nervous. Somehow or other an appeal was immediately filed and the accused was acquitted the next morning and the case was hushed up. The moral of the story is that it is all ultimately a question of personality. What you want is not only rules and regulations on paper but men with guts, men with intelligence and courage. If a Magistrate is subjected to pressure or interference, he should report to the High Court or the Sessions Judge or he might refuse to try the case and send it to the District Magistrate. I put it to you definitely that this question of separation of judiciary and executive functions is, of course, in the first instance a matter for the legislature, but ultimately it is a matter for all the Bar Associations, and for every member of the Bar individually so that a strong and vigilant professional and public opinion may jealously guard such separation. That public opinion should not tolerate any interference of any kind. I do hope that now that we have stepped into our independence, care will be taken in the new constitution to see that as far as law can be effective these two functions are kept separate and distinct and Magistrates and Judges are left alone to do their duty impartially and with independence.

In the new context, however, the slogan "leave the judiciary severely alone" has come to connote a larger meaning and to include the legislative function also. Complaints are some times made that the law is changed and it is then suggested that there is also an interference with the judiciary. Now that is an aspect of the matter which is really not in the old context. I quite appreciate that you may criticise the Legislature itself but so far as the judges are concerned they have got to administer the duly-enacted law whatever the law may be and whoever may have made it. The old notion was that it is Parliament that makes the law and nobody else. In those days, 200 years ago, Parliament had not much to do. The State used to

be in substance a police State for maintaining law and order and nothing more. Government indulged in no nation building activities. It was every man for himself—complete free enterprise. Then it was possible in all countries with self-governing institutions for the supreme legislature to undertake all legislation itself. The volume of legislation was not heavy and the legislature could cope with it itself directly. But as the State began to extend its operations, it became exceedingly difficult for the legislature to discharge its legislative functions directly. It simply could not be done, and the result was that it had to delegate legislative powers on subordinate self-governing institutions like Municipal Corporations and incorporated companies, and these powers were also delegated to different branches of executive administration. This feature at the beginning aroused bitter comments. You all remember the vigorous attacks made upon it by a Lord Chief Justice of England who assailed it as the “New Despotism”. The attack proved a failure for the simple reason that the thing was otherwise quite unmanageable. It is not possible for Parliament in England, or for any legislature in any part of the world, to legislate for the immense variety of topics in all their manifold details which Governmental activities now necessitate. The question whether any particular enactment is within the ambit of the delegated authority is no doubt for the law courts to decide. If it is, then it is as much a good law as if it was passed by Parliament itself. Just as a Judge cannot sit in judgment over the discretion of Parliament in passing a certain statute nor question its propriety or timeliness or wisdom, equally I suggest it is not open for the law courts to sit in judgment over all delegated legislation of any kind. The function of a Judge is to administer the law; he cannot make it nor amend it and whenever any dispute arises, he has to declare it as best as he can. If it is embedded in a lot of law books, precedents and ancient treatises, by patient investigation and research he has to declare what the law is, and if the law is to be found in any written statute then he has—whenever the necessity arises—to interpret it. You know that all rules of interpretation are intended to assist the Judge in discovering and determining the intention of the legislature. For finding that intention of course the Judge is confined to the consideration of the language of the statute and cannot go outside it, though he may take into consideration the surrounding circumstances

for giving proper meaning to the language used. But all along it is the search for the intention of the legislature and sometimes where the language is indefinite and obscure, it may be a pure speculation on that intention. Cases are not unknown where different Judges all engaged in this pursuit—the speculation upon what the legislature intended—have all reached diametrically opposite conclusions, some saying that the legislature intended white, others saying the legislature intended black and yet others ascribing to the legislature all sorts of different hues and colours. I personally do not think that when the legislature finds the Judges in such a predicament that it should not be really a good thing for the Legislature to intervene and say precisely what it did mean. I think if it does that it should be entitled to the gratitude both of the Judges and of the members of the Bar. That reminds me of the story of a testator.

A man disappeared and was not heard of for very many years and under the law he was presumed to be dead. His will proved a very complicated affair. There were lots of legatees and kinsmen and heirs-at-law and they all wrangled over his estate. The will gave rise to a big administration suit. On the day of the hearing the court was crowded with different parties, their counsel and solicitors. There was a protracted hearing, many counsel arguing for different points of view and all possible constructions on the language of the will. Ultimately when every counsel had had his say and the hearing was apparently concluded there arose a meek individual sitting in the well of the court in shabby clothes to address the judge: "My Lord", he began. "This was all of course grossly improper." The judge was greatly annoyed. "Who are you", he demanded sharply and this individual in very humble tones said, "My Lord, I am the testator". I am not surprised that having heard learned counsel putting all sorts of constructions on the language of the will, each saying that that was precisely what the testator had meant, this testator could not resist the temptation of standing up in court and saying that he was the person who could say with authority what the will meant. The Legislature might, I am tempted to say, profitably follow the example of this testator who ventured to intervene before the Judge had actually delivered judgment. You know there is another version of that story, namely, that the testator continued to hold his soul in patience. The Judge started delivering judgment and was very emphatic about

it. After noticing briefly various arguments which had been advanced before him—this judge was noted for his dogmatic nature—he proceeded to observe that he had not the slightest doubt about what the testator had meant and he began to enlarge upon that meaning whereupon the testator, almost involuntarily, shouted from the back of the court, “My Lord, I never had any such intention—never”. Naturally there was tremendous disturbance in the court and much shouting. In the first instance the person who was presumed to be dead should not have had the impertinence to appear in life in the court. It was gross contempt of court, but his impertinence did not stop there ! He had not only had the cheek to remain alive when the court had presumed him dead (had he been a law-abiding citizen, he should have committed hara-ki-ri) but even to appear in court and then to contradict the judge. This latter thing had never been heard of before at all. Speaking seriously, I really suggest that it might lead to saving a good deal of judicial time and patience if the Legislature, like the testator, were to intervene from time to time whenever doubts arose, to declare what it did mean, rather than leave it to legal and judicial ingenuity to speculate upon what was intended. In a country like India with its vast population and with a large number of Supreme Courts in the different provinces, each wielding supreme authority within its own jurisdiction subject to correction by the highest Court of Appeal, it might lead to great confusion and injustice if different interpretations were to prevail of the same All-India legal enactments. I have always advocated the establishment of a Statutory Commission in continuous session. It should be charged with the duty of periodical reviewing all our important legislations and wherever it finds that judicial decisions have given rise to different interpretations on the same legal provision, to remove all such obscurities and doubts by recommending further declaratory or amending legislation for clarifying the intention of the Legislature. In my own experience of 40 years at the Bar, I have known dozens of cases where great confusion has been caused, in the administration of justice in different provinces in India by the seeming indifference of the legislature as to how judge had interpreted a particular legal provision. Take for instance, the case of the interpretation of Articles 132 and 148 of the Indian Limitation Act. You will remember that under Art. 132 you have a period of 12 years for a suit to enforce a charge upon immovable

property; while under Art. 148 the mortgagee is allowed 60 years for a suit for sale or foreclosure. The Calcutta High Court and some other High Courts took the view that a suit for sale on a simple mortgage was covered by Art. 132 of the Limitation Act, and 148 applied only to suits to enforce an English mortgage. The Allahabad High Court and other Courts took a different view and thought that a simple mortgage suit came precisely within the ambit of Art. 148. The result was that while a simple mortgage had 60 years in Allahabad, he had only 12 years in Calcutta, and if a particular simple mortgagee had property included in his mortgage situated in Bengal, Bihar, Orissa and the United Provinces, the mortgagee had his choice to bring the suit anywhere and to take advantage of the period of limitation he thought fit.

The next illustration is of the varying interpretation of the term "attested". Some Court held that an attesting witness must have seen the executant sign, and sign himself as a witness in the presence of the executant of the document. While other courts took a more liberal view. What is your Legislature doing? Why do they not clarify? Such clarification is not interfering with the judiciary. These difficulties really should not arise and instead of the learned Judges being occupied in abstruse questions as to what was meant by the Legislature, let the Legislature itself—whenever real necessity arises and there is confusion all round—say what it means. Please remember one thing, in the absence of any clarification by the Legislature the matter may not reach the Federal Court for years and years; because for the learned Judges of that Court to declare and interpret the law there must be some litigant with funds enough to take the matter to the Federal Court. Why do you throw that enormous burden upon the tax-payer and upon the humble litigant. If there is never an enterprising and solvent litigant to take up the matter to the Federal Court then for years and years the controversy will go on. I am suggesting that the Legislature should take upon itself this duty to save the tax-payer, the litigants and the learned judges themselves a lot of expense and labour, if it were to clarify its intention periodically. If they do that I would not consider it in any way interference with the judiciary. Please remember that if it is a case of clarification of statute then it should be done by the Legislature; if it is an obscurity in a rule or by-law it can be done by the delegated subordinate authority. We are all agreed

that the laws made by the people or persons appointed by the Legislature, acting on behalf of the legislature, should be duly observed and we are all further agreed that the Judges are really custodians of the law and it is for them to see to it that individual citizens, as between themselves, observe the law, that the executive, in its relations or transactions with the citizens, whether it be life, liberty or property, act within their jurisdiction. These are the elementary things that I want to put before you.

I respectfully think that the burden upon the lawyers of to-day is much heavier because now they are not dealing with any foreigners or outside authority. They have got to see the building up of public opinion themselves so that it insists that every authority should keep within the limits of its own sphere.

Expected Contents

Basu, K. K.	... Hindu-Moslem Marriage.
Chakravarti, P.	... Inflation in India and Legislation.
Chakravarti, T.	... Hyderabad—a Constitutional and Historical study.
Das, P. R.	... The Draft Constitution & Personal Liberty.
Katju, K. N.	... Separation of the Judicial and Executive Functions of the State.
Mitter, Sir B. L.	... A note on Article 15 of the Draft Constitution of India.
Mookerjee, Radha Kamal	... Law and Sociological Theory.
Sapru, Tej Bahadur & Ors.	... The Indian Law Review Society.
Schwarzenberger, G.	... Nuremberg Trial.
Sen, S. N.	... India and the Havana Charter.

Appendices to the first Six Issues of the Indian Law Review

Central Acts of 1947 ,
British Cabinet Mission's Proposals ,
Statement of 3rd June, 1947 ,
Reports of the Boundary Commissions ,
The Indian Independence Act ,
Order passed under the Indian Independence Act relating to India and Pakistan.
The Interpretation Act ,
The Statute of Westminster ,
The U. N. O. Charter.
The Statute of the International Court of Justice , and Education in some National Constitutions.

Appendices to vol. II (1948) Nos. 3 & 4 (combined) of the Review

Central Acts of 1948
Havana Charter of International Trade.
Selections from the White Paper on Hyderabad.
Selections from the White Paper on Indian States.

(A Quarterly journal devoted to the scientific study of Law and to Law Reform with an all-India outlook).

Contents of vol 1 (1947) Nos. 1, 2, 3 & 4 and of vol II (1948, Nos. 1 & 2.

Contributor	Subject
Aiyar, Alladi Krishnaswami ...	Federation in Peace and War.
Basu, Anathnath ...	Education & the Draft Constitution.
Barwell, N. ...	Restitution under Contract Act.
Biswas, Sudhis R. ...	Economic Implications of the Cabinet Mission's Proposals.
Cammaide, G. P. ...	The Administrator-General of Bengal.
Chakravarti, Tripurari ...	Lessons from the Constituent Assemblies of the Dominions.
Chatterjee, N. C. ...	Mixed Marriages & Conflict of Laws.
Chatterjee, Suniti Kumar ...	A Pan-Indian Language and Script for Lawyers and Laymen.
FitzGerald, S. ...	Codification of Hindu Law. ✓
Green, L. C. ...	The Indian National Army Trials.
Gupta, Atul Chandra ...	The Calcutta High Court, Law of the Future, Draft Constitution of India.
Gour, H. S. ...	Democracy and Communism, Judicial Harmony.
Gwyer, Maurice ...	Foreword.
Haksar, Kailash Narain ...	Our Laws and the Need for Reform.
Katju, K. N. ...	Sherlock Holmes in Real Life.
Iyenger, A. C. Sampath ...	Non-Resident Traders in India.
Iyer, S. Ramaswamy ...	The U. N. O.
Mitter, Brojendra Lal ...	Kathiawar Constitution, Indian States, Paramountcy.
Mitter, S. C. ...	Bengal Tichborne Case, Functions of Law Journals.
Mitter, S. & Others ...	The Draft Constitution of India.
Mookerji, Radha Kumud ...	Problem of Minorities.
Mookerjee, Bijan Kumar ...	Hindu 'Idol.'
Mukharji, P. B. ...	Charities.
Munshi, K. N. ...	Fundamental Rights.
Muirhead, G. F. ...	Legal Aid for Poor Persons.
Rau, B. N. ...	Regional Arrangements.
Ray, M. N. ...	Constituent Assembly.
Sapru, Tej Bahadur ...	A Message.
Sastry, K. R. R. ...	The Case-Method of Teaching Law.
Schwarzenberger, G. ...	International Law and Organisation in the Atomic Age.
Sen, B. C. ...	How to Stop Black Marketing ?
Sen, Sirdar D. K. ...	The Partition of India and Succession in International Law
Sen Gupta, Naresh Chandra ...	Modern Lawlessness, Constitution of India.
Shavaska, K. S. ...	Registrable Trade Marks.
Shoaib, M. ...	Recent Changes in Factories Act.
Sinha, Ranjit ...	Law in Agriculture.
Somayya, B. ...	The Hindu Judicial System.
Winfield, P. H. ...	Indian and English Lawyers, Equity and Quasi-Contract.