CONSTITUTIONAL LAW - SEPARATION OF POWERS - POWER OF THE COURTS AND LEGISLATURE TO REGULATE THE PRACTICE OF LAW AND PROCEDURE

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COMMENTS

CONSTITUTIONAL LAW — SEPARATION OF POWERS — POWER OF THE COURTS AND LEGISLATURE TO REGULATE THE PRACTICE OF LAW AND PROCEDURE — In theory, the doctrine of separation of powers presents a governmental system with spheres of power for each department, separated by clear lines of demarcation. Yet in practice it does not follow that a complete separation of powers could be effected or would be desirable. The concurrent exercise of a power by

1 1 Story, Constitution of the United States, 5th ed., 393 (1905); People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910 (1898); People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006 at 1019 (1929); Saratoga Springs v. Saratoga G., E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693 (1908); State ex rel. Patterson v. Bates, 96 Minn. 110, 104 N. W. 709 (1905); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); Ex parte Creasy, 243 Mo. 679, 148 S. W. 914 (1912); State ex rel. Selleck v. Reynolds, 252 Mo. 369, 158 S. W. 671
two coordinate branches of a government may result in conflicting regulations and also in charges that the exercise of the power by one department is an unconstitutional encroachment on the powers to be exercised by another and coordinate department. This situation is present in the concurrent exercise of the power to regulate the practice of law by the judicial department and the legislative department. The conflicting views resulting are clearly illustrated by two opinions in the recent case of Clark v. Austin. In the principal opinion, the power to regulate the practice of law was stated to be exclusively judicial; in a special concurring opinion, signed by a majority of the court, the practice of law was said to be subject to regulation by both the judicial and the legislative branches of the government, and it was also said that regulation by the legislative branch was not necessarily an unconstitutional encroachment on the inherent power of constitutional courts over this subject.

The inherent power of constitutional courts to regulate the practice of law is well established. Some courts have stated that the inherent power of the courts to regulate the practice of law is exclusive. (1913). See also Green, “Separation of Governmental Powers,” 29 YALE L. J. 369 (1920).

People ex rel. Burby v. Howland, 155 N. Y. 270, 49 N. E. 775 (1898); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); State v. Roy, 40 N. M. 397, 60 P. (2d) 646 (1936). In this case a proceeding was brought to adjudge the respondents guilty of contempt of court for an alleged illegal practice of law. A statute of the state of Missouri forbids any person, unless he is a licensed attorney, to engage in the practice of law and makes the violation of the statute a misdemeanor. The principal opinion adjudged the respondents guilty of contempt but said the statute was an unconstitutional encroachment on the power of the judiciary; the majority opinion held the respondents guilty of contempt and held the statute was a constitutional exercise of the police power.

In re Day, 181 Ill. 73, 54 N. E. 646 (1899); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1930); In re Morse, 98 Vt. 85, 126 A. 550 (1924); People ex rel. Illinois State Bar Assn. v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936); McMurchie v. Superior Court of Yavapai County, 26 Ariz. 52, 221 P. 549 (1923); People ex rel. v. Irwin, 60 Colo. 177, 152 P. 905 (1915); In re Durant, 80 Conn. 140, 67 A. 497 (1907); Chrest v. Commonwealth, 171 Ky. 77, 186 S. W. 919, Ann. Cas. 1918E 122 at 133 (1916); In re Carver, 224 Mass. 169, 112 N. E. 877 (1916); In re Sizer, 300 Mo. 369, 254 S. W. 82 (1923); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); In re Saddler, 35 Okla. 510, 130 P. 906, 44 L. R. A. (N. S.) 1195 (1913); Case of Olmsted, 292 Pa. 96, 140 A. 634 (1928); In re Bruen, 102 Wash. 472, 172 P. 1152 (1918); State ex rel. Wood v. Raynolds, 22 N. M. 1, 158 P. 413 (1916); Brydonjack v. State Bar of California, 208 Cal. 439, 281 P. 1018, 66 A. L. R. 1507 at 1512 (1929).

In re Day, 181 Ill. 73, 54 N. E. 646 (1899); State ex rel. Wright v. Barlow,
Others have recognized legislative regulation as a matter of "comity" to a coordinate branch of the government. But the effect of such recognition is subject to speculation and indefiniteness. A minority of the courts have asserted that the legislature has power to prescribe exclusive qualifications for the admission of attorneys which are binding on the courts. The position taken by the majority of the courts, however, is that the practice of law is subject to regulation by both the judicial and legislative departments. The power exercised by the judicial department is one of the inherent powers of a constitutional court; the legislative regulation is in the exercise of the police power.11

131 Neb. 294 at 301, 268 N. W. 95 (1936); Splane’s Petition, 123 Pa. 527, 16 A. 481 (1889). But in connection with In re Day, supra, see Illinois State Bar Assn. v. People’s Stock Yards State Bank, 344 Ill. 462 at 474, 176 N. E. 901 (1931); and in connection with Splane’s Petition, supra, see Case of Olmsted, 292 Pa. 96, 140 A. 634 (1928).

7 In re Greathouse, 189 Minn. 51, 248 N. W. 735 (1933); Hanson v. Grattan, 84 Kan. 843, 115 P. 646 (1911); State Board of Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A. L. R. 1317 at 1323 (1951).

8 In the Matter of the Application of Harry Cooper, 22 N. Y. 67 (1860); Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62 (1864); In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288 at 289 (1906). The Cooper case has been criticized in 13 HARV. L. REV. 233 at 253 (1899) and inroads made on the principle there asserted by later New York cases. See People ex rel. Karlin v. Culkin, 248 N. Y. 405, 162 N. E. 487 (1928). With Ex parte Yale, supra, compare In re Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935), where a statute provided that on receiving a pardon, the person so pardoned should be restored to rights which were taken away by reason of his conviction for crime. The petitioner, who had been convicted of extortion and later pardoned, sought reinstatement as an attorney at law. The court, however, held the statute to be an unconstitutional encroachment on the power of the courts over attorneys. Annotated in 33 Mich. L. Rev. 1259 (1935) and in 21 Va. L. Rev. 814 (1935). With In re Applicants for License, supra, compare In re Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

9 Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030 at 1040 (1909); In re Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909); In re Bruen, 102 Wash. 472, 172 P. 1152 (1918); Brydonjack v. State Bar of California, 208 Cal. 459, 281 P. 1018, 66 A. L. R. 1507 at 1512 (1929); In re Eaton, 60 N. D. 580, 235 N. W. 587 (1931); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A. L. R. 1059 at 1064 (1932); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); Rhode Island Bar Assn. v. Automobile Service Assn., 55 R. I. 122, 179 A. 139 (1935); In re Myrland, 45 Ariz. 484, 45 P. (2d) 953 (1935).

10 In re Chapelle, 71 Cal. App. 129, 234 P. 906 (1925); Brydonjack v. State Bar of California, 208 Cal. 459, 281 P. 1018, 66 A. L. R. 1507 at 1512 (1929); In re Bruen, 102 Wash. 472, 172 P. 1152 (1918); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); In re Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935).

11 Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030 at 1040 (1909); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re
It has been argued that in England the power to regulate the practice of law was judicial; still, it cannot be denied that regulation was also effected by acts of Parliament, and by the Inns of Court. Nor is there as sharp a separation of powers in England as under our written constitutions.

There is no requirement that a power, if properly applied to a certain subject matter, cannot be exercised because a coordinate branch of the government also exercises a power over the subject matter. A strong analogy can be drawn between the power of the legislature and the court to regulate the practice of law and the power of these two departments in the promulgation of rules and enactments of statutes regulating procedure. A constitutional court has inherent power to make rules regulating its procedure. But it cannot be denied that

Eaton, 60 N. D. 580, 235 N. W. 587 (1931); Brydonjack v. State Bar of California, 208 Cal. 439, 281 P. 1018, 66 A. L. R. 1507 at 1512 (1929); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); Rhode Island Bar Assn. v. Automobile Service Assn., 55 R. I. 122, 179 A. 139 (1935); In re Myrland, 45 Ariz. 484, 45 P. (2d) 953 (1935).

Courts have from early times regulated the practice of law in England, but not exclusively. An early statute passed in 1275 in the reign of Edward I provided that "if any serjeant (counsellor) or others do any manner of deceit or collusion in the kings court ... he shall be imprisoned for a year and a day, and from thenceforth he shall not be heard to plead in that court for any man...." Weeks, ATTORNEYS AT LAW, 2d ed., §§ 14, 19 (1892).

Weeks also lists subsequent examples of legislative regulation such as 15 Edw. II, stat. 1, where it was provided that the barons of the exchequer be restrained from admitting attorneys except in pleas before them, reserving to the chancellor and chief justices the discretion of admitting attorneys; a statute of 33 Hen. VI, c. 7, which provided that there should be only six attorneys in Norfolk and Suffolk and two in Norwich; a statute of 6 & 7 Vict., c. 73, § 27, which provided that attorneys admitted by one of the superior courts might practice in any inferior court in England or Wales upon signing the roll; and the statute of 6 & 7 Vict., c. 73, which provided conditions for admission as an attorney, the oaths to be administered and like regulations. Weeks, ATTORNEYS AT LAW, 2d ed., §§ 44, 91-94 (1892). See also Rex v. Benchers of Gray's Inn, 1 Doug. 353, 99 Eng. Rep. 227 (1780); In re Justices at Antigua, 1 Knapp. 267, 12 Eng. Rep. 321 (1830); In re Day, 181 Ill. 73, 54 N. E. 646 (1899); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932); In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288 at 289 (1906).

See In re Cannon, 206 Wis. 374 at 385, 240 N. W. 441 (1932), where it is said, "The power possessed by Parliament is more analogous to the fully executed power of a constitutional convention ratified by the people. It possessed all the powers of sovereignty over any and all the courts of England."

the legislature has power to pass statutes regulating the practice of the courts.\(^\text{15}\)

In the case of conflicting regulation, properly within the power of each department, however, the problem arises as to whether the regulation of the judiciary or of the legislature should control. Where, as in the majority of jurisdictions, we have regulation of the practice of law by these two coordinate branches of the government, created by the same constitution, it would seem that their power is equal in the matter. However, the necessity for the determination of superiority in the case of regulations of the practice of law has usually been avoided by interpreting court rules or legislative enactments as additional regulations and therefore not in conflict with the power exercised by the other department.\(^\text{16}\) Yet, in the regulation of procedure, statutes of the legislature are held to be superior to rules of the judiciary in case they conflict.\(^\text{17}\) The reason for legislative superiority is not easily ascertained. In England, Parliament could change court rules of procedure, but our legislatures do not have equivalent powers with Parliament.\(^\text{18}\) However, the historical background of the English

\(^{15}\) Justice Thompson, in the case of United States Bank v. Halstead, 10 Wheat. (23 U. S.) 51 at 53 (1825), stated, “It cannot certainly be contended with the least color of plausibility, that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the courts of the United States.” See also Paul, “The Rule-Making Power of the Courts,” 1 Wash. L. Rev. 223 (1926). In fact, legislative regulation is so prevalent today, that statutes which confer on the judiciary power to make all rules regulating procedure in the courts have been attacked (unsuccessfully, however) on the ground that there was an unconstitutional delegation of legislative power. See Ernst v. Lamb, 73 Colo. 132, 213 P. 994 (1923); State ex rel. Wyman-Foster Lumber Co. v. Superior Court for King County, 148 Wash 1, 267 P, 770 (1928); In re Constitutionality of Statute, 204 Wis. 501, 236 N. W. 717 (1931); De Camp v. Central Ariz. L & P Co., (Ariz. 1936) 57 P. (2d) 311; State v. Roy, 40 N. M. 397, 60 P. (2d) 646 (1936).

\(^{16}\) See cases cited supra, note 9. That such regulation is not in conflict, see Butterfield v. Butterfield, 1 Cal. (2d) 227, 34 P. (2d) 145 (1934).


\(^{18}\) See supra, note 13.
judiciary has had a marked effect on the practice in this country.\textsuperscript{19} It has also been argued that the legislature is closer to the people, the source of the power, and it could therefore be argued that they should be superior where there is a conflict resulting from the exercise of a concurrent power.\textsuperscript{20}

There is a limit beyond which legislative regulation may not go. In arriving at the conclusion that the courts have exclusive power to regulate the practice of law, the principal opinion in the case of \textit{Clark v. Austin}\textsuperscript{21} relies heavily on the argument that the power of the legislature if exercised could completely destroy the inherent power of constitutional courts in this matter. But the power to pass regulatory statutes in exercise of the police power can and is subjected to limitations so as not to destroy the inherent powers of constitutional courts. The inherent powers which are a part of a court's constitutional jurisdiction are only those necessary for its proper function.\textsuperscript{22} Regulation by the legislative department, only so far as it tends to impair the powers of the courts necessary to their proper function, is unconstitutional.\textsuperscript{23}

Jurisdiction, broadly defined, embraces the right of the courts to administer justice through the laws.\textsuperscript{24} Any regulation by the legisla-
ture which operates as an encroachment on the powers of a court so that the administration of justice is impaired, either by subjecting clients to unscrupulous or incompetent attorneys, or which destroys the right of the court to protect itself from those not qualified to practice law would likewise be an unconstitutional restriction on their jurisdiction.  

It may be doubted, however, if concurrent regulation of the practice of law and of procedure by the legislature and judicial departments is the most desirable method to achieve the ends sought. It has been suggested that in its stead, a judicial council, modeled after the Rules Committee which today effects procedural reform in England, would be a more effective means of regulation and reform.  

Peter S. Boter  

25 Such legislative regulation would be such as tended to destroy the inherent power of the court as defined in In re Bruen and quoted supra in note 22. See also Shanfeld, "The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar," 19 St. Louis L. Rev. 163 (1934).

26 In England, the Rules Committee consists of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division of the High Court, four other judges of the Supreme Court of Judicature to be appointed by the Lord Chancellor, two practicing barristers, and two practicing solicitors. Supreme Court of Judicature (Consolidation) Act, 15 & 16 Geo. V, c. 49, § 99 (4) (1925). As to its operation, and suggested changes for its adaptation to our governments, see Warner, "The Role of Courts and Judicial Councils in Procedural Reform," 85 Univ. Pa. L. Rev. 441 (1937).