Tuesday, 7th June, 1949

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CONSTITUENT ASSEMBLY DEBATES

OFFICIAL REPORT

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THE CONSTITUENT ASSEMBLY OF INDIA

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SUBEDAR MAJOR HARBANS LAL JAIDKA.

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VOLUME VIII—16th May to 16th June 1949

CONSTITUENT ASSEMBLY OF INDIA

Tuesday, the 7th June, 1949

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Eight of the Clock, Mr. President (The Honourable Dr. Rajendra Prasad) in the Chair.

DRAFT CONSTITUTION—(*Contd.*)

Article 193—(*Contd.*)

Mr. President : We were dealing with article 193 yesterday. We shall now resume consideration of that article. One amendment was moved but there are several other amendments. We shall take them up now. Amendment Nos. 2586, 2587, 2588 and 2589 are of a similar nature. The only difference is with regard to the age of retirement of the Judges in these amendments. There is another amendment No. 2592 which is in the name of Dr. Ambedkar which, I think, will cover all these amendments except about the question of age. So I think that if Dr. Ambedkar moves his amendment first, probably it may not be necessary to take up these other amendments with regard to matters other than the age. With regard to the age, we may take up that question separately.

The Honourable Dr. B.R. Ambedkar (Bombay: General): I am not moving that amendment.

Mr. President : Then we shall have to take up the other amendments. Mr. K.C. Sharma, amendment No. 2586.

Shri Krishna Chandra Sharma (United Provinces: General): Sir, I moved :

"That for clause (1) of article 193, the following be substituted :

'(1) Every Judge of a High Court shall be appointed by the President by a warrant under his hand and seal after consultation with the Chief Justice of India, and in the case of appointment of a judge other than a Chief Justice, the Chief Justice of the High Court of the State, and shall hold office until he attains the age of sixty years.' "

Sir, in that article there is the additional precaution of consultation with the Governor. I respectfully submit that in the case of the other Judges of a High Court in a State, consultation with the Chief Justice is quite sufficient. The Governor in no way comes in and consultation with him would be undesirable. Sir, I move.

(Amendment Nos. 2587, 2588 and 2589 were not moved.)

Prof. Shibban Lal Saksena (United Provinces: General): Sir, with your permission, I would like to move the amendment to this amendment No. 2590, of which I have given notice. Sir, I moved:

"That for amendment No. 2590 of the List of Amendments, the following be substituted:—

(i) 'that in clause (1) of article 193, for the words occurring after the words 'Chief Justice of India's to the end of the clause, the following be substituted:—

'and such of the judges of the Supreme Court and of the High Court of the State concerned as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty years:

Provided that in the case of appointment of a judge, other than the Chief Justice, the Chief Justice of the High Court of the State shall always be consulted.'

(ii) that after sub-clause (b) of clause (2) of article 193, the following new sub-clause be added:—

'(e) is a distinguished jurist.' "

[Prof. Shibban Lal Saksena]

Sir, I have tried to put this clause in line with the clause we have already passed for the Supreme Court. I have used the same language which has been used there. The only thing is that I have omitted reference to the Governor of the State. I feel that in the case of appointment of a Judge of a High Court, consultation with the Chief Justice of the High Court is enough. Consultation with the Governor of the State will, I think, not be proper. I also feel that the Judges of the Supreme Court should be consulted. I do not see why the language should be different here from the language used in article 103 for the Supreme Court.

I have also made provision for the appointment of a distinguished jurist. When we have made this provision in the case of the Supreme Court, I do not see why we should not provide that a distinguished jurist should be appointed as a Judge of the High Court also. I think, Sir that in view of the fact that the principle has already been accepted, this amendment will prove acceptable to the House.

(Amendment Nos. 2591, 2593, 2594 and 2595 were not moved.)

Prof. K. T. Shah (Bihar: General): Amendment No. 2596. This matter has been already discussed. It was rejected then. May I move it now?

Mr. President : I do not think any useful purpose will be served by repeating the same arguments once again.

(Amendment Nos. 2597, 2598, 86, 2599, 2600, 2601 and 2602 were not moved.)

Shri T. T. Krishnamachari (Madras: General): Sir, I formally move amendment No. 2603 and I move amendment No. 194 of List II, which reads as follows:—

"That with reference to amendment No. 2603 of the List of Amendments, In clause (1) of article 193 the words 'or such higher age not exceeding sixty-five years as may be fixed in this behalf by law of the Legislature of the State' be omitted."

Sir, the two amendments are more or less the same in substance except that the amendment which I have moved expressly states the words that are to be eliminated. By the elimination of these words, what will happen is that every judge of a High Court shall hold office only until the age of sixty and the object of this amendment is merely to crystallise the *status quo*. Sir, I do not think it is necessary for me to adduce any arguments, particularly when the amendment is one that seeks to confirm the existing practice. But there are undoubtedly many and weighty arguments against the provision which my amendment has sought to delete, namely, " or such higher age not exceeding sixty-five years as may be fixed by law of the Legislature of the State"; and whether it is the Legislature of the State or Parliament that has to make a law varying the age of retirement of judges, it is an unwholesome and unhealthy provision in a Constitution. Many Members of this House will undoubtedly agree with me that it is best to fix a particular age, no matter what it is and not leave it to canvassing by interested parties, so that either a private member will introduce a Bill or pressure will be brought to bear on the Government of the day, asking them to make a change in the retiring age of the judges, because the people who are interested in raising the age limit have some influence in the quarters, who might perhaps conceivably make the Government move in that direction. The advantage, therefore, lies in the direction of fixing a particular age and not allowing any room for any private canvassing or private endeavour, so that people will know definitely that this cannot

be changed except by an amendment of the Constitution. Sir, on the merits of the problem, I think there is much to be said in favour of the age of sixty. It is undoubtedly true that in this country the age of expectation has risen considerably during the last twenty years. We do find in public life and amongst lawyers people who have passed the age of superannuation, fixed by this provision that I am moving, in full possession of their faculties, able to control the destinies of the country and very adequately at that; but Sir, these people are only exceptions to the rule and the rule happens to be in a country like ours probably in about 30 percent of the cases perhaps, people who attain the age of sixty become unfit for active work. It is in my view safer to provide against even a fraction of the Judges of the High Court being incapable of doing their work rather than depend upon what happens outside the court and in public life where people who are well past the age of sixty are functioning very well and serving the country extraordinarily well. Sir, I feel that no further arguments are necessary in order to make the proposition which crystallises the *status quo* acceptable to the House; and if ten or fifteen years hence conditions of living in this country vary and medical science improves considerably so that senility can be avoided more or less in the generality of cases of people above the age of sixty, well probably that will be time enough for the Constitution to raise the age. I think for the time being the age of sixty is adequate and safe. For the same reasons I hope the House will accept my amendment.

(Amendment Nos. 2604 and 2605 were not moved.)

Prof. Shibban Lal Saksena : Mr. President, Sir, in clause (1) (a) it is said that "a judge may, by writing under his hand addressed to the Governor, resign his office". I want that he may resign his office only by addressing to the President or to the Chief Justice of India. I therefore move:

"That in sub-clause (a) of the proviso to clause (1) of article 193, for the word 'Governor' the words 'Chief Justice of Bharat' be substituted."

It is the President who appoints the judges of the High Court and they can be dismissed only by two-thirds of the majority of both Houses of Parliament. Therefore, Sir, if he wants to resign his office, he must address either to the President who appointed him or to the Chief Justice of India who is the highest judicial authority in the land and there is no sense in his addressing his resignation to the Governor, and I do not know how the Governor can come in this matter. It should be either the President or the Chief Justice of India and I hope, Sir, that it will be corrected. Besides, if the word 'Governor' is put in here. I think it will not only be improper but will also be derogatory to the independence of the judiciary.

(Amendment No. 2607 was not moved.)

Shri H. V. Kamath (C.P. & Berar: General): Mr. President, Sir, I move :

"That in clause (b) of the proviso to clause (1) of article 193 after the words 'Supreme Court' the words 'the State Legislature being substituted for Parliament in that article' be inserted."

Though this amendment I seek that the State Legislature might play an important role in the removal of a Judge of the High Court of that State. This clause as it stands provides that a Judge of a State High Court may be removed by the President in the same manner as is provided for the removal of a Judge of the Supreme Court. That is to say, the President after an address presented to him by both Houses of Parliament, supported by not less than two-thirds of the members present and voting in Parliament may remove the Judge concerned. If the sub-clause were passed as it stands here I feel that the legislature of the State will have no voice at all in such removal.

[Shri H. V. Kamath]

The crux of the matter is this. Should Parliament be the sole authority in the removal of the Judge or should we give power to the State legislature in this matter? It may be argued against this procedure suggested by me that Parliament is a superior authority and therefore more competent. Is that really so? To my mind, both Parliament and the State legislature are elected, the Lower House being entirely elected and the Upper House partly nominated, but the Lower House in either case is elected on the basis of adult suffrage. If we put trust in Parliament, can we not put trust in the State Legislature as well? Ultimately, it is a question of putting trust in the people. Shall we trust the people and their elected representatives or not, whether in the Centre or in the State? Moreover, where a Judge of the High Court is concerned, it is quite likely that Parliament being far removed from the scene may not be quite able to seize itself of the various matters pertinent to or germane to the issue, and the State Legislature being on the spot may be better able to deal with the matter. At this time of day when we have plumped for adult franchise, we should trust the State Legislatures as much as we trust our Parliament at the Centre. After all, if the House reads article 193, clause (1), it will see that so far as the appointment of a Judge of a High Court is concerned, it is not merely the authorities in the Centre that come into the picture, but also some authorities in the State as well, the authorities concerned being those referred to in clause (1) of article 193. The Governor of the State—he is a provincial authority—is consulted; Secondly, the Chief Justice of the particular State is consulted—he is a provincial authority. Therefore, if for the appointment of a Judge not merely the authorities in the Centre but also the authorities in the provinces are concerned, the question arises so far as removal is concerned, why should we not trust, or rather entrust the State legislature with conducting the investigation or impeachment or enquiry? If Parliament at the Centre is competent to present an address to the President for the removal of a Judge of the Supreme Court, to my mind it is quite logical and obvious that so far as a Judge of the High Court of a State is concerned, the legislature of the State ought to be competent, ought to be given powers to present an address in this regard to the President for the removal of a Judge of the High Court. It may be that the amendment of mine may have to be recast. I only seek here the acceptance of the principle that I am trying to embody in this amendment of mine. The amendment that I have suggested seeks to substitute the State legislature for Parliament in article 193. Once this principle is accepted that so far as the removal of a Judge of a High Court is concerned, the State legislature must deal with the matter and present an address to the President, then I am willing or amenable to the recasting of the amendment in any form that the Drafting Committee may please. I move.

Mr. President : Amendment No. 2609: that does not arise.

Shri T. T. Krishnamachari: Sir, I would like formally to move amendment No. 2610 in order to enable Dr. Ambedkar to move amendment No. 195.

Sir, I move:

"That in para (c) of the proviso to clause (1) of article 193, after the words 'Supreme Court of' the words 'the Chief Justice' be inserted."

The Honourable Dr. B.R. Ambedkar: Mr. President, Sir, I move:

"That with reference to amendment No. 2610 of the List of Amendments in clause (c) of the Proviso to clause (1) of article 193, after the words 'High Court' the words 'in any State for the time being specified in the First Schedule' be inserted."

Sir, the object of this amendment is to remove all distinctions between provinces and Indian States so that there may be complete interchangeability between the incumbents of the different High Courts.

Sir, I formally move amendment No. 2614 in the List of Amendments.

"That in sub-clause (a) of clause (2) of article 193 for the word 'State' the words 'State for the time being specified in the First Schedule' be substituted."

Sir, I move:

"That with reference to amendment No. 2614 of the List of Amendments, in sub-clause (a) of clause (2) of article 193, for the words 'in any State in or for which there is a High Court' the words 'in the territory of India' be substituted."

"That with reference to amendment No. 2614 of the List of Amendments, in sub-clause (b) of clause (2) of article 193, after the words 'High Court' the words 'in any State for the time being specified in the First Schedule' be inserted."

"That with reference to amendment No. 2614 of the List of Amendments, in sub-clause (b) of Explanation I to clause (2) of article 193, for the words 'in a State for the time being specified in Part I or Part II of the First Schedule' the words 'in the territory of India' be substituted."

"That with reference to amendment No. 2614 of the List of Amendments, in clause (b) of Explanation I to clause (2) of article 193 for the words 'British India' the word 'India' be substituted."

"That with reference to amendment No. 2622. . . . "

Mr. President : Before moving that, you may formally move amendment No. 2622.

The Honourable Dr. B.R. Ambedkar : Sir, I formally move:

"That for Explanation II to clause (2) of article 193, the following be substituted:—

'Explanation II.—In sub-clauses (a) and (b) of this clause, the expression 'High Court' with reference to a State for the time being specified in part III of the First Schedule means a Court which the President has under article 123 declared to be a High Court for the purposes of articles 103 and 106 of this Constitution.' "

Sir, I move:

"That with reference to amendment No. 2622 of the List of Amendments, Explanation II to clause (2) of article 193 be omitted."

The object of all these amendments 196 to 200 is to remove all distinctions between British India and the Indian States. Some of the amendments particularly amendments 199 and 200 are merely consequential upon the main amendment.

(Amendment Nos. 2611, 2612, 2613, 2615 and 2616 were not moved.)

Mr. President : No. 2617 does not arise. 2618.

Mr. Mohd. Tahir (Bihar: Muslim): Sir, I beg to move—

"That in sub-clause (b) of clause (2) of article 193, after the words 'in succession' the words 'or has been a pleader practising for at least twelve years' be inserted."

I beg to move:

"That in sub-clause (a) of Explanation I of clause (2) of article 193, after the words 'High Court' the words 'or has practised as a pleader' be inserted, and for the words 'which a person' the words 'which such person' be substituted and the words 'or a pleader' added at the end."

I beg to move:

"That in sub-clause (b) of Explanation I of clause (2) of article 193, after the words 'First Schedule or' the word 'has' be inserted, and after the word 'Court' wherever it occurs the words 'or a pleader' be inserted."

Sir I had moved similar amendments as regards the appointment of the Judges of the Supreme Court. I want to give the same position to the Pleader lawyers as we are going to give to advocates, because I am of opinion that so far as qualification is concerned, they hold the same qualification and in the third amendment if it is accepted it will read thus—

"In computing the period during which a person has held judicial office in a State for the time being specified in Part I or Part II of the First Schedule or has been an advocate of a High Court or a pleader, there shall be included any period before the commencement of this Constitution, etc., etc."

[Mr. Mohd. Tahir]

In explanation I clause (a) will read as follows:—

"In computing the period during which a person has been an advocate of a High Court or has practised as a Pleader there shall be included any period during which such person held judicial office after he became an advocate."

With these few words, I move these amendments.

(Amendment Nos. 2619 and 2623 were not moved.)

Mr. President : All amendments have been moved and the article and amendments are open for discussion.

Dr. P. S. Deshmukh (C.P. & Berar: General): Sir, the appointment of the Judges of the High Court has been left to the President and only consultation with the Chief Justice of India and the Governor of the State has been provided for. I quite agree that for the independence of our judiciary the authorities appointing the Judges should be as high as possible but I would personally have preferred if the appointment was made by the President on the advice of the Premier and the Governor together. That however is not possible now, but next to that I would like some distinction to be made between Judges of the Supreme Court and the High Court so far as removal is concerned and thus I come to the amendment moved by my Friend Mr. Kamath which I strongly support. According to the provision that has been proposed the removal would be as difficult of a Judge of a High Court as that of a Supreme Court and it is only by reference to Parliament, the highest legislative body in the whole of the Republic, that a removal could be discussed and could be effected. Thus if this provision is retained, then the Legislature of the State will have absolutely no function to perform so far as the High Court and Judges are concerned except the fixation of the maximum age at any age between the ages of sixty and sixty-five and determining their salaries and some such insignificant matters. I do not think the Legislatures of the State should either be distrusted to this extent as to have no say in the matter of the removal of High Court Judges or it should be imagined that they would be trying to removed Judges on frivolous grounds. Secondly, the object of making it difficult for the Legislatures to remove Judges could be achieved by providing that the final order would be passed by the President himself but it should at any rate be competent for the State Legislature to present an address through the Governor to the President for the removal of any of the Judges of the High Court. I think this would be a salutary provision which would work for efficiency as well as better relationship between the Judicature and the State Legislature as well as the Executive in the State. We may further provide that a removal of a judge could take place on a limited and restricted grounds and we might not leave it to their discretion. The ground may be the same as have been stated in the previous 1935 Act, Section 220, where it has been provided that a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed. So these grounds may be taken from this section, and on these grounds appropriately modified it should be competent for the Legislature of a State to present an address to the President so that a judge may be removed. I do not think there is any other means excepting the Governor to know the capacity and the efficiency, character etc. of a Judge of the High Court. It is the Provincial Governor and the Provincial Legislatures who are more competent to know all these things and if they are convinced that a certain judge ought to be removed, I think it should be given the necessary powers for such removal.

So far as the amendment of Mr. Tahir is concerned, the principle has not been accepted that the pleaders should also be competent to be appointed as High Court or Supreme Court Judges and I think that is quite sound; because any pleader who has any practice and who has any competence generally gets himself enrolled as an Advocate—and there is not much difficulty in getting oneself enrolled as an Advocate—and after a few years when he acquires the necessary standing he would be considered eligible to be appointed as a High Court or Supreme Court Judge. So I do not think there is any substance in that amendment.

Dr. Bakshi Tek Chand (East Punjab: General): Sir, I have a few words to say on the amendment which Mr. Kamath has moved and which has been supported by Dr. Deshmukh. In the article as drafted the procedure for the removal of a Judge of a High Court and the authority by which he can be removed are the same as those provided in article 103 clause (4) for the removal of a Judge of the Supreme Court, *viz.*, that an address will have to be presented by Both Houses of Parliament to the President and it should be supported by a majority of the total number of members of either House and also by a majority of two-thirds of the members present and voting at the meeting when the matter is discussed and voted. The amendment seeks to substitute the Provincial Legislature in place of Parliament when the matter concerns a Judge of a High Court. This is the point that the House has to consider. My submission is that the provision contained in the Draft Constitution is the proper one. It is a very important matter—the removal of a Judge of a High Court—and the enquiry should be conducted in a very impartial manner by persons who are not swayed by local prejudices and who take a detached view of the matter. In the provinces—especially in those where the number of members is very small or where there is a sharp division of parties—the members may be swayed by local prejudices and other considerations. It is for this reason therefore, that the Drafting Committee has proposed in clause (b) of the Proviso that this matter should be left to the vote of the two Houses of Parliament. It is said that Members of the Parliament will be far away from the scene and will not be fully cognizant of all local matters. Well, that is the very reasons why this matter should not be left to the vote of the Provincial Legislature. In Provinces like Orissa, Assam, East Punjab, Central Provinces where the number of Members of the Legislature is small and in some of them there will be only one House—the vote of a few members only might decide so important a motion. If there is a Judge whom the leader of the party in power does not like, or who has by his judicial decisions or otherwise incurred the displeasure of that party, there is a chance of local prejudices coming in. In such a case the independence of the judiciary will to a very large extent be impaired. It is for this reason that the Draft Constitution provides that this matter should be left to Parliament. Formerly, under the Government of India Act, 1935, a Judge of a High Court could be removed if the Judicial Committee of the Privy Council, on reference by his Majesty, reported that he is unfit to hold office on the ground of misbehaviour or of infirmity of mind or body. Under the Draft Constitution, It will be on the address of both Houses of Parliament at the Centre that the President will act. This is very salutary provision indeed. I would ask the House not to disturb the provision in clause (b) of the Proviso and to reject the amendment which Mr. Kamath has moved.

Shri Prabhudayal Himatsingka (West Bengal: General): Mr. President, Sir, I beg to oppose the amendment moved by Shri H.V. Kamath in as much as he wants to make the removal of a High Court Judge easier than what has been provided for in the Draft Constitution. It will be a dangerous thing to do so and to empower the Provincial Legislature to be able to remove a High Court Judge. If for removal of a Judge of the Supreme Court provision has been laid down in article 103, clause (4), I do not see any reason why we should make it easier for removal of a Judge of a provincial High Court.

[Shri Prabhudayal Himatsingka]

As has been stated by the previous speaker, Dr. Bakshi Tek Chand, the Provincial Legislature can be very easily swayed by political considerations and by local influence when a Judge of the High Court gives certain decisions which are not acceptable or which may not be palatable to the party in power or to the majority party in the Legislature. Therefore it should not be made easy for a High Court Judge to be removed. After all, a lot depends on the integrity and the stability of a High Court Judge, and if his position be made so unstable that he can be removed by the vote of the Provincial Legislature it will be a dangerous thing, and that will affect the independence of the High Court Judges. Therefore I oppose the amendment moved by Mr. Kamath. I support the amendments moved by the Honourable Dr. Ambedkar inasmuch as the provisions are brought in line for all the High Courts, whether in the States or in the Provinces.

Dr. P.K. Sen (Bihar: General): Mr. President, Sir, I am thankful for this opportunity to enter into the general discussion of the provisions of article 193. There are several amendments which I had tabled with regard to other articles allied in character, but I am not moving them. I feel that a great many factors enter into the consideration of the provisions of article 193. These factors are scattered about in other articles like 196, 197 and so on. Unless and until we consider these other factors, or have them in view while deciding the shape of article 193, I apprehend that we shall not be able to come to the right decision.

Let us take these factors one by one. The essential point in article 193 is the retiring age of the Judge of the High Court—whether it should be sixty or sixty five. It is felt in some quarters—and I do not say that there is no ground whatsoever for that feeling—that at the age of sixty a man becomes incapable of working actively and making his contribution to the service of the country, that on the bench he finds it difficult to command that concentration of mind which is necessary and that therefore sixty should be the proper age for retirement. On the other hand it is felt—and there is very good ground for that feeling too—that the retiring age should be higher at the present moment, because people are often found to be very actively engaged in public life much after sixty. We have many instances of people who can devote a great deal of energy and who can command a great deal of concentration in very important kinds of work on behalf of the State. That being so, there is no reason why in judicial work one should be unfit and incompetent after the age of sixty. So far as I am concerned I make no secret that I am strongly in favour of making it higher than sixty—at least sixty two—for the High Court Judge. Now, the question that we have to consider is how the age-limit is affected by other considerations. Take it from the point of view of the Judge. The man who is going to be appointed and who has to make his choice as to whether he should accept the office when it is offered to him or decline it—what are the matters that will enter into his consideration? The question of salary comes in, the question of pension comes in, and also a very important thing,—the question as to whether or not after having held the office for a particular period of time, he will be allowed to practise in other Courts, if not in the same High Court, or in the courts subordinate to its jurisdiction. Now the man who is going to be appointed, we must assume, is one of the men pre-eminently fitted for the work in the province. The choice would naturally fall upon the man who is most distinguished in the province for legal acumen and ability. He has to make his choice: if he finds that there are only about five years to run, that there will be no pension at all after he attains the age of sixty, that he will have to be thrown back upon his own resources, or that the pension would be rather a small pittance and not that liberal pension which is awarded to the Judges of the High Court in Great Britain, for instance,

which is 75 percent of their salary; and when he finds also that there is no other way in which he can earn an income: that he cannot possibly go even to another High Court or to the Courts under the jurisdiction of another High Court and take up engagements in important cases; if he is debarred from practising altogether, then what is he to do? The only conclusion which he can come to is that although it is a post of very high dignity and prestige, he is reluctantly obliged to decline it. That will be the result. I submit that it will be a loss because the State will fail to command the services of men who really count, and instead of those men the second-rate or third-rate men will have to be selected for the office of the High court Judge. I submit therefore that it is a very serious matter. It is not at all a trivial matter—this question of age. It really acts and reacts upon other considerations. If he has to retire at sixty, well and good. But has he got a good pension provided for him? has he the right to practice, even if there is no pension? Can he make a living from the practice of law not in the High Court where he held office but in some other Court, in some other High Court, or in one of the Courts subordinate to that other High Court?

Sir, I had tabled another amendment which I submit—Although I am not moving the amendment formally—has a great bearing upon this question. Suppose a man at the age of fifty-eight is obliged on account of ill-health to retire. It is to be presumed that a man in that high office will not continue if for reasons of health he feels that he cannot possibly do justice to the work which has been entrusted to him. He will naturally say, "I am sorry I cannot go on any longer. I wish to retire". Now in that case, I submit, there should be some provision about his being allowed full pension in spite of the fact that he has not been able to work till the age of sixty. It may involve a little expense, but that expense will be more than compensated for by the amount of efficiency secured by substituting in his place a person who is in full enjoyment of health. Thus it will be seen that the question not only of pension in the ordinary cases but pension in those cases where a person is obliged to retire on account of ill-health has to be taken into consideration.

Now we do not know as yet—because the relevant articles have not come up before us for discussion—whether there would be temporary judges or whether there would be additional judges appointed or not. There are certain articles relating to their appointment provided in the Draft Constitution. What will happen to those articles—whether the House will accept them or not—is a matter which one does not know. But assuming that temporary judges are to be appointed, or additional judges are to be appointed, the additional judges to hold office for not more than two years. After being two years in office as High Court Judge, would the additional judge be then able to practise? Well if he is not able to practise after two years of office as High Court Judge, the result will be that very few people will be prepared to accept the office of Additional Judge. It may be said that it will not be necessary to appoint additional Judges because if you have a full complement of judges, such as would be able to cover the work satisfactorily without any appointment of temporary or additional judges, then the question does not arise. But if it should be the desire of the House to provide for additional judges or temporary judges, then I submit that the right to practise or restriction in that behalf should be considered in their cases also.

I am pointing out these things. Sir, because I believe that without consideration of these points one will not be in a position to accept office if he is offered such a post when he is fifty-four or fifty-five because he will never be able to earn the full pension. Therefore, these are just the factors that will enter into his consideration in the decision which he has to arrive at.

[Dr. P. K. Sen]

I submit that these points should be kept in view in discussing the question as to the retiring age limit and that the question of age limit should not be considered as if it were utterly unconnected with these other factors which appear in several different sections of this chapter of the Draft Constitution.

Shri K. M. Munshi (Bombay: General): Sir, the age at which a High Court Judge is to retire has caused considerable differences of opinion and this age of sixty has been fixed after exhaustive enquiry and scrutiny at the hands of those responsible for this decision. I submit, Sir, that the decision to which the Drafting Committee has come, together with the amendments which are going to be moved and accepted, is the best one under the circumstances.

In the first instance, we must consider the point of view not of individual judges but of the judiciary as a whole and of its independence which we are so anxious to maintain and preserve. Firstly, the age limit of the judges of the High Court is kept at sixty. The provision as to higher age, not exceeding sixty-five, which finds a place in the existing article, has to be deleted. This is so because it would be cardinally wrong that a judge of the High Court should be in a position to canvass for the extension of the period, or that the retirement of judges at sixty-two or sixty-five should depend on the wish of the Legislature—central or provincial. Once a person is appointed a judge, there must be fixity of tenure during his good behaviour and no extension or dimunition of his term. In this view that clause has to go. Then the other amendment which will, I hope, be moved and accepted is for the elimination of the temporary judges and additional judges. It has been found that the appointment of temporary judges and additional judges is not a very satisfactory procedure in India as it leads to departure from that strict impartiality and independence which is necessary in a High Court Judge.

Then comes the other article to which my Friend Dr. Sen referred article 196 is a bar against a High Court judge practising in any court in India. Naturally therefore the question whether it would be possible to draw to the High Court Bench such talent as is necessary for the due administration of justice requires to be examined. We are accustomed to the present system. But we must see as to what kind of judiciary we are setting up by this Constitution. In the first instance, it is admitted on all hands that at the age of sixty most of the judges of the High Court— I do not say all— become unfit for further continuance on the Bench. If that is so, any further age limit prescribed by the Constitution would be a danger. The judges are not allowed to practise after retirement; otherwise during the last years of his tenure there may be temptation to so behave as to attract practice after retirement.

The question of pension has been referred to. I know that the pension given to judges is not adequate; but that is a matter that has to be considered by the legislature. The question therefore is restricted to talent which at 60 is sufficiently vigorous and whose services may be required for the country. The Constitution provides two avenues for judges who retire at sixty. The age of retirement of a Supreme Court Judge is sixty-five. The brilliant or the sound judges who are physically fit may have the opportunity to be appointed to the Supreme Court. There is also the provision of *ad hoc* judges in the High Court under article 200. Such of the judges who are physically and mentally fit after retirement can always be invited to administer justice under that article. Avenues therefore are open to those judges who are able to do their work after retirement. The difficulty, however, has been that, as experience has shown, in quite a large number of cases most of the judges becomes even before the age of sixty, not fit for their work. In the last year or two of their tenure on the Bench they are more of a handicap to the

administration of justice than otherwise. Therefore it is that the definite limit has been fixed at sixty. The scheme as a whole which has been adopted departs from the existing practice. Ultimately its success will depend upon whether the distinction and prestige of a High Court Judge is such as to attract talented people. Unfortunately in this country the tradition which prevails in England does not hold good. There, even for the ablest of practitioners with a very large amount of income, to be invited to the Bench is an honour and if the honour is twice offered by convention it could not be rejected. Even a lawyer like Justice Greene with one of the largest practices in the English Bar, when invited to be a judge, accepted the position. If we invest the High Court judges with the prestige which they enjoy in England, I am sure talent will be drawn to this office whether retirement is at sixty or sixty-five and whether the pension is meagre or adequate.

Shri Brajeshwar Prasad (Bihar: General): Sir, I am opposed to the fixation of any age limit for the High Court Judge. I feel that to say that after the age of sixty a judge becomes an imbecile and therefore he must retire is arbitrary. It should be left to the discretion of the President on the advice of the Governor and the Chief Justice to ask a judge to retire from the Bench. It is quite possible that even at the age of fifty he may not be in a position to discharge his functions efficiently and properly.

Sir, I feel that clause 2(a) which lays down the qualifications for a High Court Judge also ought to be omitted. It should be left to the discretion of the President to choose anybody he likes to be a judge of the High Court. This distrust of the President, the Governor and of the Chief Justice is not warranted by facts and experience. It is obvious that no judge will be appointed who is not a man of experience, who has not put in a practice of at least ten years in any court or who has not been in any judicial capacity as an officer for at least ten years. But there are cases of brilliant men who have not all these qualifications. After all, the creative period in a man's life centres round about the ages of 30-35. I do not see any reason why a young man should not become a judge of the high court.

I have another point to make. I oppose the amendment moved by Mr. Kamath. He wants that a judge should be removable on an address presented by the Lower House of the Provincial Legislature. I feel that when the provincial legislatures are reconstituted under adult franchise it will not be safe to vest such a power in the hands of the provincial legislature. Already passions and prejudices run very high in the provinces. Communalism and provincialism are rampant. Where there is political immaturity, a judgment passed by a judge is likely to be misconstrued and misinterpreted by political parties. Therefore, Sir, in the interests of efficiency, I feel that all power should be vested in the President and in the Parliament.

Mr. Naziruddin Ahmad (West Bengal: Muslim): Mr. President, Sir, I have a few comments to offer. With regard to the amendment moved by Prof. Shibban Lal Saksena, I think there are some very good points in it. His amendment says that in appointing a Judge of a High Court in the States, the President shall consult the Chief Justice of India and such of the other Judges of the Supreme Court and of the High Court of the State concerned as the President may deem necessary for the purpose, and shall hold office until he attains the age of sixty. His proviso runs to this effect: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court of the State shall always be consulted. Sir, I find that this amendment is exactly on a par with article 103 which we have passed. Clause (2) of that article provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts

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in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. The principle of consultation with the other Judges of the Supreme Court as well as with those Judges of the High Court as the President may deem necessary has already been accepted. This amendment is similar to clause (2) of article 103. In fact, this amendment is just an attempt to reconcile this article with the principle which we have already accepted. From a drafting point of view and also from the point of view of the necessity of consulting the other Judges of the High Courts, this amendment should be quite acceptable.

The second part of his amendment is that a distinguished jurist also can be appointed as a Judge of the High Court. In fact, we have adopted this in connection with article 103 which I have just mentioned. In sub-clause (c) of clause (3) of article 103 we have provided that a distinguished jurist can be appointed as a Judge of the Supreme Court. So the principles underlying the present amendment of Professor Saksena have already been accepted by the House.

With regard to the provision for compulsory retirement at sixty, I think this will not be a very good thing. I think longevity and effective age would increase in our country. Judges of the High Courts are not ordinary men. They are selected from the best legal talents and they have to keep in touch with legal literature. I do not think that a Judge would have spent his useful life at sixty. It is provided that he will retire at sixty unless he is appointed a Judge of the Supreme Court in which case he will retire at sixty five. He will not be able to plead before any court or before any authority after his retirement under article 196. The effect of fixing the age limit at sixty and article 196 would not be wholesome. In England there is of course a provision that a High Court Judge is not entitled to practise in any Court there. But there the age limit is seventy-two and than even after seventy-two distinguished Judges are appointed as Law Lords and they hold office as Members of the Judicial Committee of the House of Lords, as Lords in Appeal, etc., and they hold office for life. So they have a large span of useful life both as a Judge and later on as Law Lords. But after seventy-two they are working in an honorary capacity. There are these prospects before an English Judge but there is no prospect before an Indian Judge. After a Judge retires at sixty, he will be incapable of practising in any Court, practically incapable of holding any office under the Government because that would be wrong in principle. He will thus be a political untouchable of the worst type. I submit, Sir, that the age limit should be considered at a suitable opportunity whenever it comes. With these few words, I support the article with the amendments proposed by Professor Shibban Lal Saksena.

Shri H. V. Pataskar (Bombay: General): Sir, I wish to offer a few remarks only with respect to fixing the age limit for the retirement of a High Court Judge. In article 193, as it was drafted, it was fixed at sixty but there was a further provision that a Judge may hold office at such higher age not exceeding sixty-five years as may be fixed in this behalf by law of the Legislature of the State. Now, the general trend seems to be that this latter portion should be deleted from this article, and opinion seems to have gathered round the fact that we should fix the age limit at sixty. Under the Act of 1935 the age limit was fixed at sixty, and there was no provision for extension. Because there was no provision for extension the Drafting Committee has said in their note below this article on page 87 of the Draft Constitution that in view of the different conditions prevailing in different States, the Committee has added the underlined words in article 193 so as to enable the Legislature of each State to fix any age limit not exceeding sixty five years. At the time when this Draft was prepared, probably the Drafting

Committee was of the opinion that some provision should be made by which the age limit might be increased to sixty-five and they made it possible by adding the words "or such higher age not exceeding sixty-five years as may be fixed in this behalf by law of the Legislature of the State". Subsequent to that, Sir, the Home Ministry made its own recommendations with respect to several provisions in the Draft Constitution. In there memorandum in this connection they said they were of the view that the normal age for retirement should be sixty for High Court Judges but that in exceptional circumstances the appointing authority may extend the service of an individual Judge of the High Court to a period not beyond the age of sixty-three and in the case of a judge of the Supreme Court not beyond the age of sixty eight. They also say that experience has shown that most High Court Judges are well past the peak of their usefulness by the time they attain the age of sixty and an automatic extension of the age limit would not be in the public interest. Therefore they suggested that the President may extend the service of a High Court Judge for a maximum period of there years. That was their proposal. Now, Sir, the view seems to be that there should be no extension. My honourable Friend Mr. Munshi, who is also a member of the Drafting Committee, has said that towards the last year or two of their career most of the Judges are not able to work efficiently. Now sir, this article is again connected with another article, *i.e.*, article 200. The original idea of the Drafting Committee was that the Legislature should extend this period; the Home Ministry stated that it must be left to the President in individual cases and now there is a provision in article 200 which says "Notwithstanding anything contained in this Chapter, the Chief Justice of a High Court may at any time, subject to the provisions of this article, request any person who had held the office of a judge of that court to sit and act as a judge of the court etc. etc." When a High Court Judge is to be made to retire at the age of sixty, I cannot understand the propriety of the Chief Justice of a High Court requesting a retired judge to come and fulfil the functions of a High Court Judge; and further if he comes, he can go on working as a High Court Judge with all the privileges, etc for an indefinite period. It really means that while we are laying down in article 193 that he must retire at the age of sixty without any question of extensions of an individuals career either by the President or by the Legislature, we are also laying down that the Chief Justice may call upon any person who has so retired to come and carry on the work of a High Court Judge and the view of the Home Ministry is that this right should be exercised by the President in individual cases. This is to my mind rather anomalous. Probably we have been landed in this difficulty by our hostility to the appointment of additional temporary judges, to which reference was made by my honourable Friend, Mr. K.M. Munshi. No doubt there have been cases in which people who have been appointed as temporary judges might have taken advantage of the fact that they happened to sit on the bench, but there are equally good instances of eminent people who have only worked as temporary Judges but who have subequently taken no advantage of the fact that they were on the bench; it was not a matter of advantage to them, but was a matter of pecuniary and financial loss. I know of some persons who have worked as temporary judges and in their case, it cannot be said by any person whatsoever that they took advantage of their positions. All the same the present trend appears to be that there is a disinclination to the appointment of temporary judges for reasons which may be justifiable, but that has necessitated the fact that some arrangement must be made for clearing of arrears of work. Because judicial work might increase in any High Court and for various reasons we are against the appointment of temporary or additional judges, we have found it necessary to incorporate article 200. It seems to be intended that in such a case some retired judge may be called upon by the Chief Justice to attend to the arrears of old work of the disposal of new work. So far as the age limit of judges is concerned, while we are going to accept

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the recommendation of the Home Ministry that the President as the appointing authority should be authorised to extend the period of the High Court Judge, while we are also not giving power to Legislature for such extension, we are going to enable the Chief Justice to call upon any retired judge to come and work as a judge; it may be for two or three years. The result has been that while we provide in one article that he shall retire at the age of sixty, there in another article (200) by which any Chief Justice can call upon a retired judge to come and do the work of a High Court Judge. Thereby we are practically going to leave this question of extension of the work of a High Court Judge in the hands of the Chief Justice and as we know the Chief Justice may appoint a particular judge because he has been working for so many years and there may be so many reasons for which people will go on getting extension under this article 200. Therefore, I think that the whole question of the period of sixty years has been more confused than what it was before we took it up and it has undergone so many changes. The drafting Committee at one time thought that in individual cases there should be provision for extension of this period beyond sixty and they wanted it to be left to the Legislature. The Home Ministry had stated that it should be left to the President to decide in individual cases and in the final disposal of the matter it appears that we all determined that he must retire at the age of sixty. But by a kind of certain other reasoning and because we do not want any temporary or additional judges, we are again providing for this extension. Practically it will be easy for any High Court Judge to induce his Chief to say that there are a lot of arrears of work to be done and that he should be continued and there is no period even fixed for such extension. This is an anomaly which should be carefully attended to.

Mr. President : Dr. Ambedkar, do you wish to speak on this?

The Honourable Dr. B.R. Ambedkar : No, Sir. I do not think that any reply is called for.

Mr. President : The question is:

"That for clause (1) of article 193, the following be substituted:—

'(1) Every Judge of a High Court shall be appointed by the President by a warrants under his hand and seal on the recommendation of the Chief Justice of the High Court concerned after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India and shall hold office until he attains the age of sixty-three Years.' "

The amendment was negatived.

Mr. President : The question is:

"That for clause (1) of article 193, the following be substituted:

(1) 'Every Judge of a High Court shall be appointed by the President by a warrants under his hand seal after consultation with the Chief Justice of India, and in the case of appointment of a judge other than a Chief Justice, the Chief Justice of the High Court of the State, and shall hold office until he attains the age of sixty years.' "

The amendment was negatived.

Mr. President : The question is:

"That for amendment Nos. 2590, 2619, 2620 or 2621 of the List of Amendments, the following be substituted:—

(i) 'That in clause (1) of article 193, for the words occurring after the words 'Chief Justice of India' to the end of the clause, the following be substituted:—

'and such of the judges of the Supreme Court and of the High Court of the State concerned as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty years :

Provided that in the case of appointment of a judge, other than the Chief Justice, the Chief Justice of the High Court of the State shall always be consulted.'

(ii) 'That after sub-clause (b) of clause (2) of article 193, the following new sub-clause be added:—

(c) is a distinguished jurist.' "

The amendment was negatived.

Mr. President : The question is:

"That with reference to amendment No. 2603 of the List of Amendments, in clause (1) of article 193 the words 'or such higher age not exceeding sixty-five years as may be fixed in this behalf by law of the Legislature of the State' be omitted."

The amendment was adopted.

Mr. President : The question is:

"That in sub-clause (a) of the proviso to clause (1) of article 193, for the word 'Governor' the words 'Chief Justice of Bharat' be substituted."

The amendment was negatived.

Mr. President : The question is:

"That in clause (b) of proviso to clause (1) of article 193 after the words 'Supreme Court' the words 'the State Legislature being substituted for Parliament in that article' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That in clause (c) of the proviso to clause (1) of article 193, after the words 'High Court' the words 'in any State for the time being specified in the First Schedule' be inserted."

The amendment was adopted.

Mr. President : The question is:

"That in sub-clause (a) of clause (2) of article 193, for the words 'in any State in or for which there is a High Court' the words 'in the territory of India' be substituted."

The amendment was adopted.

Mr. President : The question is:

"That in sub-clause (b) of clause (2) of article 193, after the words 'High Court' the words 'in any State for the time being specified in the First Schedule' be inserted."

The amendment was adopted.

Mr. President : The question is:

"That in clause (b) of Explanation I to clause (2) of article 193, for the words 'in a State for the time being specified in Part I or Part II of the First Schedule' the words 'in the territory of India' be substituted."

The amendment was adopted.

Mr. President : The question is:

"That in clause (b) of Explanation I to clause (2) of article 193, for the words 'British India' the word 'India' be substituted.' "

The amendment was adopted.

Mr. President : The question is:

"That in sub-clause (b) of clause (2) of article 193, after the words 'in succession' the words 'or has been a pleader practising for at least twelve years' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That in sub-clause (a) of Explanation I of clause (2) of article 193, after the words 'High Court' the words 'or has practised as a Pleader' be inserted, and for the words 'which a person' the words ' which such person' be substituted and the words 'or a pleader' be added at the end."

The amendment was negatived.

Mr. President : The question is:

"That in sub-clause (b) of Explanation I of clause (2) of article 193, after the words 'First Schedule or' the word 'has', be inserted, and after the word 'Court' wherever it occurs the words 'or a pleader' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That Explanation II to clause (2) of article 193 be omitted."

The amendment was adopted.

Mr. President : The question is:

"That article 193, as amended, stand part of the Constitution."

The motion was adopted.

Article 193. As amended, was added to the Constitution.

Mr. President : There is notice of an amendment that a new article, article 193-A be introduced, by Professor K.T. Shah, amendment No. 2624.

Prof. K.T. Shah : Mr. President, Sir I beg to move:

"That the following new article 193-A after article 193 be added:—

'193-A. No one who has been a Judge of the Supreme Court, or of the Federal Court or of any High Court for a period of 5 years continuously shall be appointed to any executive office under the Government of India of the Government of any State in the Union, including the office of an Ambassador, Minister, Plenipotentiary, High Commissioner, Trade Commissioner, consul, as well as of a Minister in the Government of India or under the Government of any State in the Union.' "

Sir, this is part of the principle which I have been trying to advocate, namely the complete separation and independence of the judiciary from the executive. One way by which the executive has tried in the past to tempt the highest judicial officers is by holding out the prospect of more dazzling places on the executive side which would be offered to those who were more convenient or amenable to their suggestions.

In this connection may I refer to the practice of the preceding Government. The then Government of India had a practice or convention by which, so far, at any rate, as the civilian Judges were concerned, at a very early stage in a civilian's career, he was required to choose the executive or the judiciary side. Once the choice was made, generally speaking bifurcation remained complete. In those days the Executive and Judiciary were not as separate as we desire now; but even so this convention was in force. The transition, if any took place only at a higher level of High Court Judge and so on. The opportunities that that Government could offer being limited, the scope for this kind of influence upon the judiciary by the executive was also limited. In the new dispensation with full sovereign authority with us, the opportunities, the occasions, the number of offices which can be held out as a temptation to useful or convenient judicial officers of the highest level are very much greater, and therefore, the suggestion given in this amendment that is it should be prohibited at least for people who have held any such high judicial office for not less than five years continuously. The possibility of establishing conventions or precedents which may serve in the place of a constitutional provision is also very difficult, especially in the years of transition through which we are just passing. For, any precedent now made or convention established may be regarded as an extraordinary thing under extraordinary circumstances and may not be binding. The provision is therefore suggested by this amendment that the Constitution itself should provide a power against any transition of judicial officers from a judicial post to an executive post of the kind mentioned in this amendment. The matter I take it is so-simple and the principle underlying it is so clear that there could be

no difference of opinion unless you desire your judiciary to be subservient or in any way influencible by the executive. I therefore commend the matter to the House.

Shri H. V. Kamath : Mr. President, I rise to support the amendment that has just been brought before the House by my Friend Professor Shah. The amendment seeks to subserve the cause of judicial independence and integrity. I believe Prof. Shah does not wish to debar retired Judges from aspiring to any office like that contemplated in this amendment, but this intention is that Judges in office, who are on the Supreme Court Bench or on other High Court Benches must be debarred from employment in the executive of the Government in any capacity whatsoever.

Dr. Bakshi Tek Chand : That is not the wording.

Shri H. V. Kamath : Yes, for five years. A judge can serve up to 65 years. Here the amendment seeks to lay down that a judge who has served for 5 years continuously should not be employed in any specified in this amendment. This is in my judgment a very healthy maxim. It has happened in many countries that a judge who has served for a term of 5 years or more has been shunted off to some executive job when his views or independence of mind and judgment became a little too hot for the Executive. I think it was President Roosevelt in the U.S.A.—I do not recollect the occasion when he tried this method but it was in the thirties of this century when he found that the views of some Judges of the Supreme Court were unpalatable, he tried to get over that by appointing more Judges, so that he might get the required majority for that particular measure that he wanted to push through. This is one of the methods—to increase the number of Judges who might favour a particular view. Because you will remember that the Supreme Court in our country will have to arbitrate and adjudicate upon disputes—constitutional disputes between the Centre and the Units as well as between unit and unit. The Executive is interested in many of these questions and it is very likely—more often than not—that a particular matter which is coming up before the Supreme Court may be such vital importance and interest to the President or the Executive that they might like the Supreme Court to give a particular decision upon that matter. They may find to their chagrin, to their discomfiture that the Supreme Court is not inclined that way and one of the methods may be to see that the inconvenient judges are shunted off to some less inconvenient positions. A Judge is after all human, and temptations such as Ambassadorships.

Pandit Thakur Das Bhargava (East Punjab: General): We are only discussing the High Court Judges under this Chapter.

Shri H. V. Kamath : I am sorry Pandit Bhargava has not read the amendment moved by Professor Shah. It relates to Supreme Court as well and as it has been moved in that form, I am entitled—I hope by your leave, Sir,—to speak with regard to judges mentioned in this particular amendment. If a judge aspires to or is made to feel that he can look forward to a job as an Ambassador, High Commissioner, Minister and things like that—he is human and after all we have our own weaknesses and it is human enough to suppose that he will not be above temptation that may be placed in his way by the Executive—that may, I submit, affect his judicial independence and integrity and I am sure none of us in this House desires that such a consequence should ensue. Our judges wherever they might be—in the States or in the Centre—must be models of Judicial independence, fearless in their judgments and action without fear or favour of the State authorities or the Central authorities. If about Judges in harness or in office a condition like this is not laid down, then it is likely that we may not find them as strong, as true, as we would like

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then to be. I hope, however this bar will not apply to retired Judges. If they are competent for a particular job such as Ambassador, certainly they should be employed but for judges in harness I think it is very salutary that this House should lay down a principle of this nature—that so long as they are in service they should not aspire to any office in the Executive. I support the amendment moved by Professor Shah.

Prof. Shibban Lal Saksena : Sir, I also think that the amendment which Prof. Shah has moved deserves our careful attention. Some people might say that talent in this country at present is limited and if we lay down this provision, probably there might be dearth for appointments to these higher posts. But here we are framing a Constitution for the future of this country and it will not be only for a limited period but will last for a very long time and therefore a provision like this deserves our consideration. We have already laid down that Judges of the High Court shall not be allowed to practise after retirement at the bar in any Court. That of course is a very salutary provision and is very good but if the temptation of being appointed to other high positions after retirement is not removed, it will also be liable to be abused by the Executive or by any party in power and they may hold out such temptations which might affect the independence of the judiciary. I personally feel that the amendment is very salutary and healthy. Even though the language may have to be different I hope that somewhere in our Constitution the principle enunciated here will be embodied so that the judiciary may be above temptation and nobody may be able to influence it.

Mr. President : Dr. Ambedkar, do you wish to say anything about Prof. Shah's motion?

The Honourable Dr. B. R. Ambedkar : Mr. President, Sir, I regret that I cannot accept this amendment by Prof. Shah. If I understood Prof. Shah correctly, he said that the underlying object of his amendment was to secure or rather give effect to the theory of separation between the judiciary and the executive. I do not think there is any dispute that there should be separation between the Executive and the Judiciary and in fact all the articles relating to the High Court as well as the Supreme Court have prominently kept that object in mind. But the question that arises is this: how is this going to bring about a separation of the judiciary and the executive. So far as I understand the doctrine of the separation of the judiciary from the executive, it means that while a person is holding a judicial office he must not hold any post which involves executive power; similarly, while a person is holding an executive office he must not simultaneously hold a judicial office. But this amendment deals with quite a different proposition so far as I am able to see it. It lays down what office a person who has been a member of the judiciary shall hold after he has put in a certain number of years in the service of the judiciary. That raises quite a different problem in my judgment. It raises the same problem which we might consider in regard to the Public Service Commission as to whether a Member of the Public Service Commission after having served his term of office should be entitled to any office thereafter or not. It seems to me that the position of the members of the judiciary stands on a different footing from that of the Members of the Public Service Commission. The Members of the Public Service Commission are, as I said on an earlier occasion, intimately connected with the executive with regard to appointments to Administrative Services. The judiciary to a very large extent is not concerned with the executive: it is concerned with the adjudication of the rights of the

people and to some extent of the rights of the Government of India and the Units as such. To a large extent it would be concerned in my judgment with the rights of the people themselves in which the government of the day can hardly have any interest at all. Consequently the opportunity for the executive to influence the judiciary is very small and it seems to me that purely for a theoretical reason to disqualify people from holding other offices is to carry the thing too far. We must remember that the provisions that we are making for our judiciary are not, from the point of view of the persons holding the office, of a very satisfactory character. We are asking them to quit office at sixty while in England a person now can hold office up to seventy years. It must also be remembered that in the United States practically an office in the Supreme Court is a life tenure, so that the question of a person seeking another office after retirement can very seldom arise either in the United States or in Great Britain.

Similarly, in the United States, so far as pension is concerned, the pension of a Supreme Court Judge is the same as his salary: there is no distinction whatsoever between the two. In England also pension, so far as I understand, is something like seventy or eighty per cent. of the salary which the Judges get. Our rules, as I said, regarding retirement impose a burden upon a man inasmuch as they require him to retire at sixty. Our rules of pension are again so stringent that we provide practically a very meagre pension. Having regard to these circumstances I think the amendment proposed by Prof. K. T. Shah is both unnecessary for the purpose he has in mind, namely of securing separation of the judiciary from the executive, and also from the point of view that it places too many burdens on the members who accept a post in the judiciary.

Shri H. V. Kamath : May I say that this amendment applies not to retired Judges but to Judges serving on the bench at the moment?

The Honourable Dr. B. R. Ambedkar : If I may say so, the amendment seems to be very confused. It says that it shall apply to a person who has served "for a period of five years continuously". That means if the President appointed a Judge for less than five years he would not be subject to this, which would defeat the very purpose that Prof. K. T. Shah has in mind. It would perfectly be open to the President in any particular case to appoint a Judge for a short period of less than five years and reward him by any post such as that of Ambassador or Consul or Trade Commissioner, etc. The whole thing seems to me quite ill-conceived.

Mr. President : The question is:

"That the following new article 193-A after article 193 be added:

'193-A. No one who has been a Judge of the Supreme Court, or of the Federal Court or of any High Court for a period of 5 years continuously shall be appointed to any executive office under the Government of India or the Government of any State in the Union, including the office of an Ambassador, Minister, Plenipotentiary, High Commissioner, Trade Commissioner, Consul, as well as of a Minister in the Government of India or under the Government of any State in the Union.' "

The amendment was negatived.

Article 194

Mr. President : The question is:

"That article 194 stand part of the Constitution."

The motion was adopted.

Article 194 was added to the Constitution.

Article 195

The Honourable Dr. B. R. Ambedkar : I move:

"That in article 195 for the words 'a declaration' the words 'an affirmation or oath' be substituted."

It is a very formal amendment.

Mr. President : The question is:

"That in article 195 for the words 'a declaration' the words 'an affirmation or oath' be substituted."

The amendment was adopted.

Mr. President : The question is:

"That article 195, as amended, stand part of the Constitution."

The motion was adopted.

Article 195, as amended, was added to the Constitution.

Article 196

The Honourable Dr. B. R. Ambedkar : Sir, I move:

"That for article 196, the following article be substituted:—

'196. No person who has held office as a judge of a High Court after the commencement of this Constitution shall plead or act in any court or before any authority within the territory of India.' "

Prohibition of practising in courts or before any authority by a person who held office as a judge of a High Court.

It is simply a rewording of the same.

(Amendments Nos. 87 and 2627 to 2631 were not moved.)

Shri Prabhu Dayal Himatsingka : In view of the amendment moved by Dr. Ambedkar now, my amendment (No. 2632) is not necessary.

(Amendments Nos. 2633 to 2637 were not moved.)

Sardar Hukam Singh : (East Punjab: Sikh): Sir, I beg to move:

"That in article 196, for the words 'within the territory of India' the words 'within the jurisdiction of that High Court' be substituted."

It is not necessary for me, Sir, to make a speech as the amendment is self explanatory.

Shri H. V. Kamath : Sir, article 196 has now been brought in an amended form before the House by the Chairman of the Drafting Committee. To my mind even the amended article imposes too sweeping a restriction on persons who have held office as judges of high courts. We had visualised that a person could be appointed as a high court judge either for a long tenure or a very short tenure too. I suppose the amendment that has been moved by Dr. Ambedkar does not do away with the possibility of a person acting or holding office as a high court judge for a few months. Suppose a person has held office as a high court judge for a few months, six or nine months, do we seek to impose a restriction upon him, a man who has acted as a temporary judge for a short time? Do we seek to debar him from pleading or practising not merely in any court but even before any authority within the territory of India? It passes my comprehension why a person who has sat on the high court bench for a short while should not be allowed to appear before any court or authority within the whole of India. There would have been some meaning, as my Friend Sardar Hukam Singh has suggested, if the judge was precluded from appearing

either in that High Court where he held office or within the jurisdiction or within that territory of the Indian Union, where the High Court held sway and jurisdiction,—what I mean to say is, in that high court or in courts or authorities subordinate to that High Court in which he held office as a judge. But to my mind this sweeping constitutional prohibition is unwarranted and, may I say, undemocratic. I am inclined to support the amendment of my Friend Sardar Hukam Singh and I hope that it will receive some serious consideration at the hands of the House, and the article amended accordingly.

Prof. Shibban Lal Saksena : Sir, I am very much surprised at the speech of my honourable Friend Mr. Kamath on this article. This article deserves whole hearted support. In fact I should have thought that the words "after the commencement of this Constitution" should be deleted. I do not see why it should remain there. Everybody who has been a judge should be debarred from practising. The prohibition which you want to impose now has a very salutary reason behind it. In fact in Britain nobody who has been on the bench can practise at the Bar. It is a very well known principle. It is also well known that once when Lord Birkenhead and some others wanted to revert to the Bar, public opinion was so vehemently against it that they did not dare to carry out their resolve and practise. You may ask why should it be so. First of all, the dignity of the High Court demands that an ex-judge should not come back to the Bar. A High Court Judge may not have much money but his dignity is far greater than that of anyone else. So if he comes back to the Bar he would bring down the dignity of his office. It is for that reason that a man who has been a High Court Judge should not revert to his practice at the Bar. I would go even further. I would even say that those who have been ministers of justice should not be allowed to practise at the Bar. I have seen some advocates who have been ministers of justice going back to the Bar thus bringing down the dignity of their office. Probably during office they cultivated especial relations with the Chief Justice and other judges as they knew they might have to revert to the Bar. This should not be permitted.

It has been said that temporary judges should not be debarred from practice. I hope that articles 198 and 199 would be so amended that there will no more be any temporary judges in our high courts and everybody who is on the bench will be there, once he is appointed, for the period the constitution allows him to be there. So the question of temporary judges not being debarred from practice does not arise. It is therefore a very salutary provision that a man who has once been on the bench should not come back to the Bar. I may be asked what are the practical reasons against it. First of all, a man who has been on the Bench and wants to come back to the Bar would always be thinking of the possibility of getting more clients. The clients will be attracted towards such a man and that will be unfair to his colleagues at the Bar. He may also try to develop contacts. It will not be very healthy when back to the Bar he may influence clients by saying that the Chief Justice is his friend. For these reasons I think a retired High Court Judge should not be permitted to resume practice. He should not even be permitted to practice in other High Courts. I agree that he should be given full pension, a sum almost equal to his salary so that he may maintain the dignity of the office which he once held. To enable a man to maintain his dignity and independence it is necessary that we must provide him full pension, seeing that we are not permitting him to revert to the Bar or seek other appointments which will interfere with his dignity and independence.

I am thankful to Dr. Ambedkar for the amendment he has moved. I only wish to remove the words 'after the commencement of the Constitution.' My object is that even those who have been judges before the commencement of the Constitution should not be allowed to revert to practice at the Bar.

Shri Mahavir Tyagi (United Provinces: General): Mr. President, I may be pardoned for venturing to give expression to my views on this issue. I am a layman and as such it may seem somewhat presumptuous that I should talk on academic matters concerning law. At another occasion, Dr. Ambedkar had objected to my saying that my feelings were such and such. He insisted that I should express my opinions and not feelings. It seems with literary men opinions vary with their feelings. To me feelings and opinion mean the same thing. I submit that in the case of judges of the High Court or of the Supreme Court, the seats that they occupy are the seats of God. It is so said in the villages. The villagers say: 'The seat of Justice is the seat of God'. The highest ambition of a man in any country therefore is to occupy the seat which is attributed to God. It has a great sanctity about it. Justice, in fact, does not depend on law. It is very strange that the British have created in the minds of people a sort of misgiving about justice. People have been made to think that a true interpretation of law is real justice. It is not so. In fact justice is an eternal truth; it is much to above law. At present what the lawyers do is to shackle the free flow of godly justice. Sir, the language used in the previous article is such that there is a possibility of laymen having godly qualities being appointed as justices. Why should we always have lawyers as judges? I do not know. Why should we presuppose that in future lawyers only will occupy the seats of judges? The provision for the appointment of judges says that the President, in consultation with the Chief Justice will appoint them. Why should we take it that a judge shall always be a graduate in law? I think there is a good possibility of persons, who are otherwise fully qualified to administer justice, occupying the posts of judges and attain the highest ambition of their life. It is wrong to think that the moment a non-lawyer is appointed a judge the dignity attributed to that post will be gone. My belief is that laymen would not only add to the dignity of this seat, but they would also make it more sacrosanct. If after retirement from this high office, its occupants were allowed to aspire for wordly wealth after doing the work of God, after imparting justice, they would stultify both the office and themselves. Sir, let me confess, I am opposed to the very profession of lawyers. They do not create any values or wealth. They attain knowledge of law and put their talents to auction or hire. Sir, if lawyers were appointed as judges and after retirement they were also permitted to carry on their legal practice in courts, the result would be that they would stultify the great office of 'Justice'; they would use these offices as spiring boards or ladders to build much more lucrative practice after retirement. I therefore submit that lawyers should not be permitted to have any practice in a court of law when they revert from the Bench. Sir, I am anxious that I should put in my views about the present manner of imparting Justice. I am afraid I am going slightly off the track. But I may be given this concession.

Mr. President : I am glad that the honourable Member has realised that he is going off the track.

Shri Mahavir Tyagi : You are also a lawyer and Sir, you will pardon me when I say that they stultify real justice, because they want to make God's justice flow through the artificial channels of law made by man. That is all what the lawyers do. Real justice is not bound by any shackles of law or argument. According to the practice of British jurisprudence justice is given only to the man who can engage a clever lawyer, because the realities are not taken into account. A judge is unfit to try a case if he has a personal knowledge about the incident. Unless he comes forward and gives evidence as a witness and is cross-examined, his knowledge of the facts of a case counts for nothing.

The present conception of justice does not appeal to me. The law courts at the present time are the nucleus and the fountain spring of all corruption, dishonesty and lies, and therefore the seats of judges are no more the seats of God in India. In our future set-up we should see to it that our courts achieve their old past glory and be not enslaved and dominated by "Law". Justice is a fact and Law a mere fiction. Justice is a reality and Law is only a mode of its expression. Let the man who is once appointed a judge, live a life of truthful glory. Once a judge, always a Judge. He must be content with his pension after retirement. If lawyers are ever appointed as judges they should not revert to practice because it is certain that if they do so they will use their posts as ladders for more practice.

I support the original proposition.

Shri B. M. Gupte (Bombay: General): Sir, I concur with my Friend Mr. Kamath in that this proviso is far too wide and drastic for our acceptance. According to the present situation the retired High Court judges are not allowed to practise in that High Court and in the courts subordinate to it. There is no further prohibition than that. I want to ask, what is our experience? Why do you want this change? Has this provision disclosed any defects? Has it brought forward any evil? If it has not, I do not see why there should be a change at all. Is the Bar flooded by retired judges? No, nothing of the sort has happened and can happen because success at the Bar is not so easy a thing that anybody can try his hand at it. The question of dignity may perhaps arise. I can understand that a man who has occupied the Bench should not in that very court set up practice. But apart from that, is it a fact that today no decent-minded person is prepared to accept the position of a High Court Judge because the proposed prohibition is not there? On the contrary the prestige of the post is so high that very able lawyers are prepared to accept it and aspire for it. I therefore submit that the answer to this question is again an emphatic 'No'. Then the point may arise that perhaps the retired Judge may exercise undue influence in the court. To that extent I concede that the ban should extend to all the subordinate courts throughout the territory. But that does not mean that he should be prevented from coming to the Supreme Court. Supreme Court is in no way subordinate to any High Court. He should also not be prevented from practising in other High Court. Therefore I submit there is no reason why we should make a departure from the existing practice.

I may be told the practice in England warrants the introduction of the innovation now being made. But, I ask, why go to England or America or Russia when we have got our own experience to work upon? I submit that the change is not warranted by the experience that we have already got. I am not saying that this change is merely unnecessary; it is undesirable. We have already been informed by the Drafting Committee in their foot-note to article 193 that: 'The result is that the best men from the Bar often refuse appointments on the Bench because under the existing age-limit of sixty years they would not have time to earn a full pension'. So, because of that age-limit, the best men are not coming. That is admitted by the Drafting Committee. Then the Committee has proposed that the salaries and pensions may be reduced. I quite understand Shri Mahavir Tyagi when he says that if pensions are sufficient as in England, the question does not arise. But there is a definite proposal by the Drafting Committee itself to reduce salaries. I am not prepared to say that it should be accepted. But there is that proposal for reduction of salaries and on top of that comes this prohibition that they shall not practise anywhere. What would be the cumulative effect of all theses things? I submit the result will be that the best of men in the High Court Bar or mufassal Bar would not be prepared to accept the appointment. I am not urging this in the interests of the top men. They can take care

[Shri B. M. Gupte]

of themselves. They need no sympathy or pity from us. They would have their flourishing practice. But what would be the result of the whole thing on the independence of our judiciary? That is the problem. In the absence of top men, we shall have to choose men of lower calibre and men who have failed at the Bar will be raised to the Bench. Or otherwise practically the entire High Court will be manned by District Judges and Subordinate Judges. I put it to you whether it is a desirable position. We have all along been clamouring for the independence of the judiciary, but that cannot be achieved by merely laying down that a Judge shall not be removed from office except after an address by the Houses of the Legislature or by providing that their salaries an allowances are chargeable to the revenues of the State. The independence of the judiciary can be achieved only by making their conditions of employment such that men of really independent spirit would be attracted to those posts. I do submit that independent rising men would not be attracted if we make the prohibition so sweeping. I may be told that Sir Tej Bahadur Sapru was in favour of this provision. It may be. Sapru's is an honoured name and his views are entitled to our respectful consideration; but it does not mean that we should follow his views blindly irrespective of the merits of the case. To do that would be to bestow on him posthumously the position of a dictator, which he himself would have detested.

Mr. President : No Member who has supported this proposition has brought in the name of Sir Tej Bahadur Sapru. The honourable Member brings in his name and starts criticising his supposed opinion. I think it is not right.

Shri B. M. Gupte : Sir, I am anticipating an argument. Any way I would only submit, Sir, that we should consider all the relevant argument in favour of this proposal. And if we do that, the conclusion would be that the proposed provision is not such as would attract the proper men at the top to these very important position. I therefore submit that it is worth considering whether we should retain it in the form in which it has been put.

An Honourable Member : The question be now put.

Mr. President : I notice that about half a dozen Members still want to speak on this. I have noticed that in discussing the articles relating to the Supreme Court and the High Courts there is a tendency to prolong the discussion even where discussion is not required. I would ask Members not to have discussion for discussion's sake, as I feel in some cases we are having. I think we had better proceed with the voting on this article. Both points of view have been placed before the House.

The question is:

"That the question be now put."

The motion was adopted.

Shri Prabhu Dayal Himatsingka : I want to draw the attention of the honourable the mover to amendment No. 2627 which says that no person who has held office as a Judge of a High Court shall be entitled to practice before any court. There are a number of temporary Judges in many High Courts at the present moment. As soon as this Constitution comes into being....

Mr. President : I am going to take the vote and you start speaking.

(Some honourable Members rose to speak.)

Mr. President : I will put the closure motion again.

The question is:

"That the question be now put."

The motion was adopted.

Mr. President : Dr. Ambedkar do you wish to say anything ?

The Honourable Dr. B. R. Ambedkar : I do not think anything is necessary.

Mr. President : I will first put Sardar Hukam Singh's amendment to the vote. If that is accepted, Dr. Ambedkar's amendment will stand amended by this.

The question is:

"That in article 196, for the words 'within the territory of India' the words 'within the jurisdiction of that High Court' be substituted."

The amendment was negatived.

Mr. President : The question is:

"That for article 196, the following article be substituted:—

'196. No person who has held office as a judge of a High Court after the commencement of this Constitution shall plead or act in any court or before any authority within the territory of India.' "

Prohibition of practising in courts or before any authority by a person who held office as a judge of a High Court.

The amendment was adopted.

Mr. President : The question is:

"Article 196, as amended, stand part of the Constitution."

The motion was adopted.

Article 196, as amended, was added to the Constitution.

Article 196-A

(Amendment No. 2639 was not moved.)

Mr. President : A similar amendment, No. 1870 was moved and discussed at great length and it was held over.

The Honourable Dr. B. R. Ambedkar : I suggest that article 196-A may be held over. A similar article (No. 103-A) was held over.

Mr. President : I agree. This article will then stand over.

Article 197

The Honourable Dr. B. R. Ambedkar : Article 197 also may be held over.

Mr. President : I agree, this article also is held over.

Article 198

The Honourable Dr. B. R. Ambedkar : Sir, I move:

"That for article 198, the following article be substituted:—

'198. When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office the duties of the office shall be performed by such one of the other judges of the court, as the President, may appoint for the purpose.' "

Temporary appointment of Acting Chief Justice.

(Amendment No. 2649 was not moved.)

Shri T. T. Krishnamachari : Sir, amendment No. 2650 is covered by the amendment moved by Dr. Ambedkar because it relates to clause (2).

[Shri T. T. Krishnamachari]

Dr. Ambedkar's amendment is substantially the same; it deletes clause (2) and only retains clause (1).

Dr. P. K. Sen : I do not want to move that amendment.

(Amendments Nos. 2651, 2652 and 2653 were not moved.)

Mr. President : The question is:

"That for article 198, the following article be substituted:—

'198. When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office the duties of the office shall be performed by such one of the other judges of the court as the President, may appoint for the purpose.' "

Temporary appointment of Acting Chief Justice.

The motion was adopted.

Mr. President : The question is:

"That article 198, as amended, stand part of the Constitution."

The motion was adopted.

Article 198, as amended was added to the Constitution.

Article 199

Mr. President : There are some amendments which want the article to be deleted. I do not take them as amendments. Amendment No. 2656 is one of a drafting nature.

Mr. President : The question is:

"That article 199 stand part of the Constitution."

The motion was negatived.

Article 199 was deleted from the Constitution.

Article 200

(Amendment No. 2657 was not moved.)

Shri Jaspat Roy Kapoor (United Provinces : General) : Mr. President, Sir, I beg to move:

"That in article 200, for the words 'The Chief Justice of a High Court' the words 'The President' be substituted."

To this amendment, Sir, I beg to move another amendment and that is this:

"That in article 200 after the words 'at any time', the words 'with the previous consent of the President' be inserted."

The article, when amended would read thus:—

"Notwithstanding anything contained in this Chapter the Chief Justice of a High Court may at any time, with the previous consent of the President request any person who has held the office of a Judge of that court to sit and act as a judge of the court and every such person so requested shall, while so sitting and acting, have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that court."

Prof. Shibban Lal Saksena : Do you drop the proviso?

Shri Jaspat Roy Kapoor : I have not come to that yet. It is not necessary for me to read it. I only want to deal with amendments for the time being to the first para of article 200. I will come to the question of deletion of the proviso later on.

Sir, under this article a retired Judge of the High Court is liable to be called back to sit on the Bench of the High Court if the Chief Justice thinks that it is necessary for him to call such a judge back. Now recalling a retired judge to sit again on the Bench of the High Court virtually amounts to a new appointment, though it may be only for the time being and since the President is the appointing authority, I think it is only proper and advisable that before such a request is made by the Chief Justice to any retired High Court Judge, the previous consent of the President must be obtained. The words that appear in this article, as it stands at present, are:

"That the Chief Justice of a High Court may at any time request any person....."

without of course, any reference to the President. That does not seem to be proper. I think, therefore, Sir, that my amendment needs being accepted so that no retired judge may be called back without the express consent of the President taken in advance. Now, Sir, there is another amendment of which I have given notice and it reads thus:—

"That with reference to amendments Nos. 2658 and 2659 of the List of Amendments, in article 200, the proviso be deleted."

"The proviso is: Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a judge of the court unless he consents so to do."

I do not desire to formally move this amendment, but I do certainly wish Dr. Ambedkar to consider as to whether it is really necessary that this proviso should be retained at all. To me it appears, Sir, that this proviso is not only redundant, but it also does not appear to be a dignified one. It is redundant in this way. It seems to presume that the Chief Justice of a High Court would request a retired High Court Judge to come back and serve on the Bench without having previously consulted the retired Judge that is going to be requested. We should presume that the Chief Justice would be acting as a prudent man of ordinary common sense and he would certainly not make a request to a person only to get a 'no' from him. He would certainly take the retired Judge into confidence, ask him whether he is prepared to come back to the Bench and perform certain duties, and then alone he would approach the President to obtain his consent. In this view, Sir, I think this proviso is absolutely unnecessary. It does not look dignified to have this proviso here because it means that a request would be made by the Chief Justice and thereafter it would be open to the retired Judge to say, 'no'. Of course, it is always open to a retired Judge to express his inability to accede to the request. Once a request having been made to him and thereafter to ask whether he is prepared to accede to the request or not looks like putting the cart before the horse. Therefore, this proviso is both unnecessary and gives a rather undignified appearance to this article.

Again, I have given notice of an amendment which is No. 212 in List III which runs thus:—

"The term 'privileges' shall not include the right to draw salary."

I am not moving this amendment even formally. But I would very much like the Honourable Dr. Ambedkar to make it plain on the floor of this House whether the term 'privileges' does or does not include the right to draw salary. I believe, Sir, it is not the intention of the Drafting Committee that a retired Judge of the High Court when called back to serve on the Bench of the High Court should be given again the salary which a permanent judge of the High Court is entitled to. I believe, it is not their intention. But I certainly wish that no ambiguity in regard to this matter should be left and it should not be open to interpret this term later on as meaning that salary also is due to the Judges

[Shri Jaspat Roy Kapoor]

who are called back after retirement. If the term were to include the right to draw salary, it only nullifies one of the previous articles which we have just passed laying down that a Judge shall retire at the age of sixty, because under this article, even after retirement at the age of sixty, a Judge can be called back even though he may be sixty-one, sixty-two, or seventy-five; if the Chief Justice or the President so like, they can call back a retired Judge even after the age of sixty and enable him to continue to sit on the Bench of the High Court for any number of years and give him even the full salary that a permanent Judge of the High Court is entitled to. That would be a position that we should not be prepared to accept. It is be said that the President and the Chief Justice should be relied upon and that they would never like to circumvent a previous article which we have just passed, I would say, when we are framing a Constitution and when we are framing it in such an elaborate and detailed manner, we should not leave these things merely to the good sense of the Chief Justice or the President, but make a definite provision for everything. My purpose, of course, would be amply served if the Honourable Dr. Ambedkar makes it plain today that the word 'privileges' does not include the right to draw salary.

Mr. President : There is amendment No. 201 of which notice has been given by Dr. Ambedkar which is exactly the same as the amendment moved by Mr. Jaspat Roy Kapoor. That amendment need not be moved.

The Honourable Dr. B. R. Ambedkar : Sir, I move:

"That in article 200, the words 'subject to the provisions of this article' be omitted."

Mr. President : Two amendments have been moved. Does anybody wish to speak?

Mr. Tajamul Husain (Bihar: Muslim): Mr. President, Sir, article 200 lays down the manner in which a retired High Court Judge can be asked to come back and perform the duties of a Judge temporarily. It says that it is the Chief Justice of that High Court who would request him to come and sit on the Bench. If he agrees, then, of course, he will be appointed for the time being. There is an amendment by my honourable Friend Mr. Jaspat Roy Kapoor which says that instead of the Chief Justice of that Court calling him, the President of the Union should do it. I think there is very little difference between the two, whether it is the Chief Justice or the President who should make the request. But I personally think in a matter like this where a retired Judge, who was appointed when he was appointed by the President of the Union and who is a man known to the Chief Justice, is being called back, there is no reason why in a matter of day-to-day administration, we should ask the President to perform this task. The Chief Justice knows every retired judge, the merits of each of the judges. I submit that this amendment of Mr. Jaspat Roy Kapoor is not right and therefore I oppose it. I think the article as it stands may be accepted and it is the Chief Justice who should make the request and not the President.

Shri Rohini Kumar Chaudhari (Assam: General) : Mr. President, Sir, I welcome this article as amended by my honourable Friend Mr. Jaspat Roy Kapoor. I fully endorse the remarks which have been made by him so far as the deletion of the proviso is concerned. I consider this proviso is absolutely meaningless and redundant. A request from the Chief Justice does not stand in the place of any command from a Sovereign and a request when it is made by the Chief Justice should not be treated as such. Everybody knows it. After all a request is a request. That is to say, when a Chief Justice makes a request to one of his ex-colleagues that request does not have the force of a command, and nobody would consider it disloyal if he does not comply with

that request. I am inclined to think there will be hardly any occasion when such a request will be disregarded. If the *ex*-Judge is not prevented by illness or some other serious reason, he is bound to accept that position with alacrity. We have seen how District Magistrates after retirement have scrambled for the position of honorary magistrates. Therefore, it is not very easy to imagine a position when an ex-Judge would refuse to hold the position temporarily or where he would be unwilling to accept that position without very strong reason.

I consider that article 200 as it stands amended by my honourable Friend Mr. Jaspat Roy Kapoor helps us a good deal. That helps us to get out of the hole which the amendment of my honourable Friend Dr. Ambedkar has put us in today. According to the amendment of Dr. Ambedkar, anyone who has held office as a Judge even for a single day will be disqualified from practising in any court in India; that is to say he will absolutely find himself out of employment, unless the Government is pleased to appoint him as an Ambassador or as a Minister Plenipotentiary or the finds his way through election and becomes a minister of some State, because the amendment which was moved by Prof. Shah has not been accepted by this House. The Chief Justice or a Judge of any Court even after retirement can look forward to the position of an Ambassador or High Commissioner or Minister or any other similar executive office. I do not understand why a Judge who has been sitting as Judge for five years and who has—so to speak—acquired the judicial habit—how can he be called upon to accept the position of a High Commissioner or that of an Ambassador is more than I can grasp.

Mr. President : The honourable Member is now discussing a proposition which we have already disposed of.

Shri Rohini Kumar Chaudhari : I am only talking of the position which has been created after the rejection of the amendment of Professor Shah and after the acceptance of the Honourable Dr. Ambedkar. The only solution which can relieve us of that position is the present article 200 which enables us to make provision for employment of ex-Judges, who have left the service at a fairly good age. He is fit to hold the responsible position of Minister or High Commissioner or Ambassador and still he is not in a position to practice in any Court in India, and the only help you can render to that man who had fortunately or unfortunately been selected as High Court Judge and held that position for one year or so is that his plight should be borne in mind by the Chief Justices of the different High Courts that whenever any opportunity occurs of providing any employment for such *ex*-Judges, they should be remembered and they should be requested to render service. Therefore I welcome this provision because in this method there is no limit of age; if only the Chief Justices of different High Courts in India will only bear in mind their *ex*-colleagues and try to provide for them in every opportunity, then the question of finding employment for *ex*-Judges gets solved to some extent at least.

I also wanted to mention another fact which require clarification, *viz*., whether these *ex*-Judges who will be requested to sit as Judge will get any emolument. The article says that they will be given privileges of a High Court Judge. Whether the word 'privileges' includes also salaries or emoluments or remuneration, I want to know whether they will be honourary Judges or whether they will be stipendiary Judges, whether they will be merely content with the privileges of a High Court Judge which are of different variety or whether they will also be in the same status as the other Judges of the same Bench and whether they will get any salary or not, and whether there can be any limit of the term of their office or whether they can be requested to hold the office for any term exceeding two years, because in one of the articles I find that it was intended that in no case a temporary Judge should be appointed in this manner for more than two years. This is a point which requires clarification. I also want to know what designation they will have, whether

[Shri Rohini Kumar Chaudhari]

they will be called Judge of the High Court or not for the term in which they are working, but the article says they will not be deemed to be Judge of that Court for any other purpose excepting for sitting as a Judge. What will be their designation, will they form the personnel of the Judges of that High Court or they will have no designation and be merely requested to work for seven or eight days temporarily? I hope Dr. Ambedkar will clarify these two points, *viz.*, what will be their designation, what will be their salary, if any, and what would be the term of their office.

Dr. Bakshi Tek Chand : Mr. President, Sir, I had no intention of taking part in the debate on this article, if it had not been for the speeches which have been made by Shri Jaspat Roy Kapoor and Shri Rohini Kumar Chaudhari. It seems to me that the whole purpose and object of introducing article 200 in the Constitution has been misunderstood. It has been thought that this article is intended to nullify the article which has been passed already by the House that the Judges of the High Courts shall retire compulsorily at the age of 60. It is supposed that a Chief Justice of a High Court, acting under the powers given to him in article 200, may ask a retired Judge who is his friend or favourite to come and join the Court and may keep him there for any length of time. Mr. Chaudhari's suspicions are that this period may be two years or longer, that is to say, a Judge who has retired at the age of 60 may two years later, when he is 62, be recalled and may be asked to work again for a year or two or a longer period. Surely, if that is the underlying idea, there is a great deal in what the honourable Members have said. But if I may say so with great respect, that is not the intention of this article and that could not have been the intention of the Drafting Committee.

Pandit Thakur Das Bhargava : The question is whether this article is susceptible of this interpretation or not.

Dr. Bakshi Tek Chand : This article has been introduced in order to make it possible for the Chief Justice to introduce here the practice which has been in vague in England and U.S.A. for a very long time. There, retired Judges are not invited to come back and become regular members of the Court even for 6 months or 8 months. It is only for decision of a particular case, or a group of cases of difficulty and importance, where it is thought that the ripe experience and expert knowledge of persons who had retired but who are still available in the realm will be very helpful, that their services may be requisitioned by the Chief Justice for assistance. In England a retired Judge when he is asked to do so, receives no salary at all. He gets only a small allowance, which used to be 2 guineas a day *plus* conveyance expenses—something like the Rs. 45 a day which the Members of this House receive when they sit in the House. It is considered derogatory to the position of a retired Judge to be re-employed as a regular member of the Court for six months or for a longer period and it will be very improper—indeed, it is inconceivable—that the Chief Justice of the Court will resort to this method of having his own "favourites" back on the Bench in order to get a particular decision in a case when he finds that his other colleagues do not take the particular view that he takes. Such a thing is unthinkable. Certainly, that could not be the object of enacting article 20. In England, eminent Judges—*e.g.* Lord Darling to asked at the age of 82 to come and sit for a particular case or group of cases, in which difficult questions of law had arisen and it was thought necessary to have the benefit of his talent and expert knowledge in that branch of law. After deciding the particular case or cases the Judges go back to their retirement. They come to London, stay there for a short time, receive this meagre allowance to meet hotel charges. About ten years ago they used to get two guineas a day *plus* taxi expenses, which used to come to twelve shillings a day that is Rs. 30 to Rs. 40 a day and no more.

It is considered a compliment by the Judge also, that the Chief Justice thinks that though he is retire, his talent will be of assistance in deciding cases. He therefore ungrudgingly placed his services at the disposal of the court. It is the Lord Chancellor who invites Members to sit in the Judicial Committee and it is the Chief Justice who asks the assistance of retired Judges in the High Court. I take it that that is the intention and all suspicions and fears, which have been expressed, are unfounded. Similarly it will be undesirable that when arrears pile up the Chief Justice should invite a retired judge at the age of 63, or 65, or 67 or more to come back to clear off these arrears. This would be very derogatory to the retired Judge and very improper for the Chief Justice to do so. If such a Judge is not to receive an allowance, then it will be introducing a system of having 'Honorary' Judges of the High Court, something like glorified Honorary Magistrates with all the attendant evils, of the system. That is not the intention. It could never have been the object of introducing this article in the constitution. The idea is to introduce in India the time-honoured practice which has been in vogue in England and U.S.A. for many many years and which is resorted to very rarely-once or twice a year for a period of a few weeks or so to decide a particular case or set of cases of every great difficulty and importance. That is what the article contemplates. I therefore submit that the article, as drafted, should be passed without any amendments and Members should have no apprehensions of the kind that have been expressed.

Shri H. V. Kamath : Mr. President, I desire to sound a note of caution. I am afraid that this article, if we adopt it in its present form incorporating the amendment of Dr. Ambedkar, or my Friend Mr. Kapoor, might entail unpalatable consequences at some time, consequences to my mind other than those which the wise men assembled here have intended. I am not aware from which written constitution of the world this article has been borrowed. In this article, neither the circumstances under which certain judges can act, nor the time during which they should sit has been mentioned. My learned Friend Dr. Bakshi Tek Chand, has stated that a judge will not be employed merely to dispose of accumulated arrears. I agree with him that it would be derogatory to the dignity of a High Court Judge to be called upon to dispose of some arrears. If that be not the case, then for what purpose will his talents be utilised? Obviously to my mind there is only one other category of cases, and that might be important cases involving issues of vital constitutional importance—issues that might arise between the Centre and the units, or between different units. Here as I stated earlier, it may be that the Executive may like to have a decision in a particular fashion and we have already decided here in this Assembly that the Judiciary shall not be completely separate from the Executive. We might take steps some time or other, but.

Dr. P. S. Deshmukh : May I point out that this section refers to the High Court and not to the Supreme Court?

Shri H. V. Kamath : We have laid down that the Judiciary will not be independent of the Executive and so long as that is so, there is no obviating the possibility or no guarantee against the judiciary being the handmaid of the executive: or if that is too strong a word, the judiciary kowtowing to the executive, not on all occasions but on some occasions, now that the House has not accepted Prof. Shah's suggestion that the plums of executive office should not be open to judges in office. So there is no guarantee that the judiciary will be actuated by a sense of the completest integrity and independence.

Dr. Ambedkar has moved another amendment seeking that the power of appointing the High Court Judges or the acting Judge of the High Court should be divided between the Chief Justice and the President. The Chief Justice

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shall consult the President. It may be making assurance doubly sure that the right man will be called in. But we are not always sure—in fact none of us here can be sure—about the calibre of the men who will be filling these exalted offices and becoming the high dignitaries of our State in future. So long as the constitution does not ensure the separation of the judiciary from the executive, nor its independence, if the President is inclined to meddle in the judiciary, or is inclined to see that the judiciary. Kowtows to ko his will, or his subservient to his will, or is the handmaid of the executive, then the President will on certain issues dictate to the Chief Justice. But it is also quite likely that in effect the President will tell the Chief Justice to do such and such.....

Mr. President : Article 107, which we have already adopted relating to similar judges being invited to the Supreme Court is in exactly the same wording as this article, and all this argument now seems to me to be beside the point.

Shri H. V. Kamath : Have we incorporated this amendment about the President?

Mr. President : Yes.

Shri H. V. Kamath : I thought it was not there. I thought this was a new amendment, inserting the President in connexion with the appointment of acting Judges to the High Court. I should therefore submit so far as the High Court is concerned, if it is not merely to dispose of accumulated arrears then it must be to deal with certain cases which may involve technical or constitutional issues. In that event, I feel that the Chief Justice, so far as the acting Judges are concerned, is the competent authority and he need not consult the President at all. So far as the acting period is concerned, Dr. Bakshi Tek Chand has mentioned four, five or six weeks, and he has mentioned the case of Justice Darling. There was another great Judge, Justice Haldane. But such judges are rare and I hope that this system of appointing acting judges will not occur in our country.

Mr. President : The word "appointment" does not occur in the article at all. It is not an appointment but a request for particular occasions.

Shri H. V. Kamath : The article says that he acts as a Judge of the high court. It may not be technically an appointment.

Dr. Bakshi Tek Chand : He has to "act" because he has to decide cases.

An Honourable Member : He is not an acting judge.

Shri H. V. Kamath : He is an acting judge certainly. He acts as a judge of the high court, and is certainly an acting Judge of the High Court. Let us not do hair-splitting here.

To my mind when it is a case of a small period of ten days or a fortnight, as Dr. Bakshi Tek Chand told us, I do not see why the President should come into the picture at all. The Chief Justice is competent enough to ask any judge to dispose of any cases for the time being. The President, to my mind, need not come in, and the Chief Justice should be entrusted with the task of requesting a retired judge to act as a judge on any particular occasion.

Lastly, Sir, the proviso is absolutely meaningless, purposeless, redundant and superfluous. I do not know why the wise men of the Drafting Committee thought fit to incorporate the proviso here. It must have been in a fit of, may I say, adding a little verbiage to the constitution. No person can be compelled to do this work, unless you are going to enforce a system of *begar* in the country. We have done away with *begar* and I suppose, so far as the judges are concerned too, we shall not enforce *begar*. If the judge agrees to work he will

comply with the request of the Chief Justice. The proviso is therefore absolutely meaningless and pointless, and I hope the wise men of the Drafting Committee will see their way to delete the proviso.

Prof. Shibban Lal Saksena : It has been said in the note to this clause that the employment of retired judges follows the practice in the U. K. and the U.S.A. That has been said in defence of retaining the section. In the U.S.A., as has been pointed out by the Chairman of the Drafting Committee himself the judges get a pension almost equal to their salary and in England they get a pension equal to 80 per cent of the salary which they drew as judges. If after retirement they are called to the Bench, it is not a matter of monetary gain to them, it is only a matter of distinction and of duty done for the state. I give my conditional support to this clause. If we also lay down that the retired judges of the High Court shall get as pension the full salary which they were getting when in office or at least 80 per cent of it as they do in England, then judges will not try to seek the favour of the Chief Justice so that they may be called back by him to the Bench. My Friend, Bakshi Tek Chand, said that this is only for particular occasions and for particular periods but the wording of the article does not warrant this. Under article 189 we should not have any additional or temporary judges. It is quite possible that there may be arrears and this may be a device to be adopted by the Chief Judges to recall retired judges and ask them to dispose of the arrears. The article does not say that the men requested shall not continue to act for two or three years. In fact I feel that this is calling back judges by the back door. I should have personally preferred a higher age of retirement for judges, sixty-six for High Courts and seventy for the Supreme Court. We could then have said that these judges will not have to be recalled. You retire them at sixty and then call them back. It only means that you are throwing open possibilities of nepotism and favouritism. The judges will be inclined to see that they do not get on the wrong side of the Chief Justice with the result that they will have no chance of recall. My suggestion is firstly, that the pension of the judges should be almost equal or 80 per cent. of their salary when in office and secondly, that they shall be called only in particular cases and for a stated period. They shall not be acting judges brought in by the back door.

The Honourable Dr. B. R. Ambedkar : Sir, I did not think that this article would give rise to such a prolonged debate, in view of the fact that a similar article has been passed with regard to the Supreme Court. However, as the debate has taken place and certain Members have asked have asked me certain definite questions, I am here to reply to him.

My friend Mr. Kamath said that he did not know whether there was any precedent in any other country for article 200. I am sure he has not read the Draft Constitution, because the footnote itself says that a similar provision exists in America and in Great Britain. (Inaudible interruption by Mr. Kamath). In fact, if I may say so, article 200 is word for word taken from section 8 of the Supreme Court of Judicature Act in England. There is no difference in language at all. That is my answer, so far as precedent is concerned.

But, Sir, apart from precedent, I think there is every ground for the provision of an article like 200. As the House will recall we have now eliminated altogether any provision for the appointment of temporary or additional judges, and those clauses which referred to temporary or additional judges have been eliminated from Constitution. All judges of the High Court shall have been eliminated from the Constitution. All judges of the High Court shall have to be permanent. It seems to me that if you are not going to have any temporary or additional judges you must make some kind of provision for the disposal of certain business, for which it may not be feasible to appoint a temporary judge in time to discharge the duties of a High Court Judge with

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respect to such matters. And therefore the only other provision which would be compatible with article 196 (which requires that no judge after retirement shall practise) is the provision which is contained in article 200. As my Friend Dr. Tek Chand said, there seems to be a lot of misgiving or misunderstanding with regard to the purpose or the intention of the article. It is certainly not the intention of the article to import by the back door for any length of time persons who have retired from the High Courts. Therefore nobody need have any misgiving with regard to this.

The other question that has been asked of me is with regard to the proviso. Many people who have spoken on the proviso have said that it appeared to them to be purposeless and meaningless. I do not agree with them. I do think that the proviso is absolutely necessary. If the proviso is not there it would be quite open for the authorities concerned to impose a sort of penalty upon a judge who refuses to accept the invitation. It may also happen that a person who refuses to accept the invitation may be held up for contempt of court. We do not want such penalties to be created against a retired High Court Judge who either for the reason that he is ill, incapacitated or because he is otherwise engaged in his private business does not think it possible to accept the invitation extended to him by the Chief Justice. That is the justification for the proviso. The other question that has been asked is whether the word 'privilege' in article 200 will entitle a retired judge to demand the full salary which a judge of the High Court would be entitled to get. My reply to that is that this is a matter which will be governed by rules with regard to pension. The existing rule is that when a retired person is invited to accept any particular job under Government he gets the salary of the post minus the pension. I believe that is the general rule. I may be mistaken. Anyhow, that is a matter which is governed by the pension rules. Similarly this matter may be left to be governed by the rules regarding pension and we need not specifically say anything about it with regard to this matter in the article itself. This is all I have to say with regard to the point of criticism that have been raised in the course of the debate.

Shri H. V. Kamath : Is there such a provision in the Constitution of the United States?

The Honourable Dr. B. R. Ambedkar : I have not got the text before me. In the United States the question does not arise because the salary and pension are more or less the same.

I am prepared to accept amendment No. 89 of Mr. Kapoor, because some people have the feeling that article 200 is likely to be abused by the Chief Justice inviting more than once a friend of his who is a retired judge. I therefore am prepared to accept the proposal of Mr. Kapoor that the invitation should be extended only after the concurrence of the President has been asked for.

Shri Jaspat Roy Kapoor : May I know whether it is the intention that the interpretation of the term 'privileges' should be left to the Parliament?

The Honourable Dr. B. R. Ambedkar : It may have to be defined. There is no doubt about it that Parliament will have to pass what may be called a Judiciary Act governing both the Supreme Court and the High Courts and in that the word 'privilege' may be determined and defined.

Shri Jaspat Roy Kapoor : But the privileges will be the same in the case of a judge who has been called back and that of the permanent judges. That is what article 200 lays down.

The Honourable Dr. B. R. Ambedkar : Yes, but privilege does not mean full salary.

Mr. President : Amendment No. 89 moved by Mr. Jaspat Roy Kapoor has been accepted by Dr. Ambedkar. I will now put it to vote.

The question is:

"That in article 200 after the words 'at any time', the words 'with the previous consent of the President' be inserted."

The amendment was adopted.

Mr. President : I will not put to the House amendment No. 2659.

The question is:

"That is article 200, the words, 'subject to the provisions of this article' be omitted."

The amendment was adopted.

Mr. President : Now the question is:

"That article 200, as amended, stand part of the Constitution."

The motion was adopted.

Article 200, as amended, was added to the Constitution.

Article 201

Mr. President : There are no amendments to article 201. If nobody wants to speak on it, I will put it to vote.

The question is:

"That article 201 stand part of the Constitution."

The motion was adopted.

Article 201 was added to the Constitution.

Article 202

Mr. President : Article 202 is now for discussion.

Shri H. V. Kamath : Mr. President, I move:

"That in clause (1) of article 202, for the words 'to issue directions or orders in the nature of the writs of *habeas corpus, mandamus*, prohibition, *quo warrants* and *certiorari*' the words 'to issue such directions or orders as it may consider necessary or appropriate', and for the words 'and for any other purpose' the words 'or for any other purpose' be substituted respectively."

If amendment No. 2660 were accepted, clause (1) of article 202 will read as follows :—

"Notwithstanding anything contained in article 25 of this Constitution, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue such directions or orders as it may consider necessary or appropriate, for the enforcement of any of the rights conferred by Part III of this Constitution or for any other purpose."

The second part is purely verbal but I think this change is necessary. The clause as it stands relates both to the enforcement of the rights conferred by Part III and for any other purpose. If the word 'or' is substituted for the word 'and', it would make the meaning quite clear, that is to say, that the High Court has power to issue orders not merely when both are affected but on either ground. I think there should be no difficulty in the way of the House accepting this second part of the amendment. I sent in two separate amendments and that is why I am speaking about them separately.

As regards the first part of the amendment, I believe that in the interests of brevity, not however, at the expense of precision or clarity, we can omit the mention of the various writs. The courts should be competent to issue whatever

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orders or writs that may be necessary for the enforcement of any of the rights enumerated in Part III, *i.e.* Fundamental Rights. By omitting the mention of these writs, the meaning of the clause would not be affected adversely in any manner. We have already stated in Part III, article 25, the writs that can be issued for the enforcement of the various fundamental rights. I remember that there was an amendment accepted by Dr. Ambedkar and the House on that occasion which slightly modified it by saying that the Supreme Court shall have powers to issue orders or writs including writs in the nature *of habeas corpus*, etc., or something to that effect; but in any case I believe that this clause, as its stands, is loaded with unnecessary and useless verbiage. The High Court Judges know what particular writs or orders or directions should be issued in particular cases. We need not lay down in the Constitution what particular writs or orders may be appropriate on particular occasions. The passage of time and the evolution of case law may bring to birth decrees or writs of some other nature. Why should we bind the High Courts to these particular writs mentioned in this clause? The verbal amendment substituting the word 'or' for the word 'and' will make the meaning clearer. Sir, I move.

Dr. Bakshi Tek Chand : Mr. President, Sir, I formally move:

"That in clause (1) of article 202, before the words 'in the nature of' the words 'including those' be inserted."

There is another amendment which I would like to move with your permission as an amendment to this amendment, which is of a verbal character and will clarify the position. This amendment to amendment reads as follows:—

"That with reference to amendment No. 2661 of the List of Amendments, in clause (1) of article 202, for the words 'or orders in the nature of the writs' the words 'orders or writs including writs in the nature' be substituted."

This amendment to amendment brings the phraseology of this article in line with that of article 115 which we have already passed in regard to the Supreme Court, and also of article 25, where similar powers are given to the Supreme Court in respect of the Fundamental Rights. This amendment is, therefore, purely of a verbal character and I would ask the House to accept it. In doing so, I may make one or two observations with regard to the remarks made by my Friend, Mr. Kamath. He suggests that it is not necessary to enumerate or specifically mention in the article the writs of *habeas corpus, mandamus, prohibition quo warranto and certiorari*. With great respect, I entirely differ with my honourable Friend. It is, in my opinion, very necessary that these writs should be mentioned by name. We have done so with regard to the Fundamental Rights in article 25 and we have also mentioned them in connection with the Supreme Court in article 115; and for the reasons for which these writs were specifically mentioned in these articles, they should be mentioned here also. These are the writs which, I may remind the House, have been among the greatest safeguards that the British judicial system has provided for upholding the rights and liberties of the people, and it is very necessary that they should be incorporated in our Constitution. At present High Courts which are not Presidency High Courts, viz., the High Courts of Allahabad, East Punjab, Patna, Nagpur, Orissa, Assam, etc. have not got any of these powers. The writ of *certiorari* cannot be issued by any of these High Courts. Even in the provinces of Bengal, Bombay and Madras, this particular writ can be issued only within the limits of their respective ordinary original jurisdiction. For instance, in the province of Madras, if a particular proceeding is pending in the court of Trichinopoly or Madura, the High Court in Madras has got on jurisdiction to issue a writ. It is only in regard to cases coming from the city of Madras and a few miles around that the High Court has got this power. Outside these limits, it had got this power only with regard to European subjects. The reason for this was that the jurisdiction of these

High Courts was supposed to be derived from the Charters of the Supreme Courts which had been established in these provinces during the time of the East India Company by charters issued by the King of England, and it was said that their jurisdiction was limited only to the Presidency towns or to subjects of British extraction wherever they are found. In the new Constitution it is intended to give the power to issue these writs to every High Court, and will be exercised throughout the territories within its jurisdiction, and in order to put matters beyond doubt, it is necessary that these writs be specifically mentioned. Sir, we all know that the writ of *habeas corpus* is, the most important of these writs. With regard to this writ, until section 491 was added to the Code of Criminal Procedure, there was no power to issue this writ in the High Courts of Allahabad, Patna, Lahore and Nagpur. Section 491 gave this power to these High Courts only partially. Recently, before the East Punjab High Court the question arose whether the powers and procedures of the High Court under section 491 were co-extensive with the powers and procedure of the High Courts of England in this matter. As you know, Sir, if a writ is refused by one Judge, the party can move a second Judge, and in succession, a third Judge or a fourth Judge and so on, until he has exhausted all the Judges. In the East Punjab High Court the question was raised some six or eight months ago whether a party had a similar right to go to each Judge in succession, and it was held that this cannot be done, because they have not got the same powers as the High Courts of England to issue writs of *habeas corpus*. The power of non-Presidency High Court in India is derived from section 491 and under it you can apply for a writ only once. This will illustrate as to why it is very necessary that these writs should be mentioned by name so that there be left no ambiguity that the power and the procedure prevailing in England is to be followed here. I hope the amendment which I have moved will be accepted by Dr. Ambedkar and that the article, as amended, will be passed by the House.

Mr. President : Dr. Ambedkar, do you wish to move amendment No. 2663?

The Honourable Dr. B. R. Ambedkar : No. Sir, I accept Bakshi Tek Chand's amendment. I do not think that any reply is necessary.

Shri H. V. Kamath : There has been an amendment to substitute "or" for "and".

The Honourable Dr. B. R. Ambedkar : There is no difference as to the substance of the article.

Shri H. V. Kamath : It makes a difference as to the meaning.

Mr. President : The question is:

"That in clause (1) of article 202, for the words 'to issue directions or orders in the nature of the writs of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*' the words 'to issue such directions or orders as it may consider necessary or appropriate', be substituted."

The amendment was negatived.

Mr. President : The question is:

"That in clause (1) of article 202, for the words 'and for any other purpose', the words 'or for any other purpose' be substituted."

The amendment was negatived.

Mr. President : The question is:

"That with reference to amendment No. 2661 of the List of Amendments, in clause (1) of article 202, for the words 'or orders in the nature of the writs' the words 'orders or writs including writs in the nature' be substituted."

The amendment was adopted.

Mr. President : The question is:

"That article 202, as amended, stand part of the Constitution."

The motion was adopted.

Article 202, as amended, was added to the Constitution.

Article 203

The Honourable Dr. B. R. Ambedkar : Sir, I wish that article 203 be held over.

Mr. President : Article 203 is held over.

Article 203-A

(Amendment No. 2673 was not moved.)

Article 204

Prof. K. T. Shah : Mr. President, Sir, I beg to move:

"That in article 204, for the word 'shall' the word 'may' be substituted."

The amended article would read thus:

"If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, it may withdraw the case to itself dispose of the same.

Explanation.—In this article, 'High Court' includes a court of final jurisdiction in a State for the time being specified in Part III of the First Schedule with regard to the case so pending.

Mr. President : It may withdraw the case to itself.

Prof. K. T. Shah : I do not wish that the withdrawal of the case must be compulsory or mandatory, but some discretion must be left, and the case may be withdrawn if the judge so decides, but not necessarily, as this article requires him to do as a clear compulsion on the judge to ask the case to be withdrawn.

There may be points of law, or even other issues involved; and in the absence of specific reasons or grounds on which you make it mandatory for him to withdraw the case, I think it would as well to make it permissive, and allow the case to be withdrawn if the judge so chooses, but not as a matter of necessary obligation. Had there been grounds stated, *viz*., in the following events or in the case of any political or other factor being involved, then it would be compulsory to so withdraw, I would not have objected to the article as it stands. The substitution of "may" for "shall" will really help the courts of justice rather than hinder them. I therefore commend my amendment for the acceptance of the House.

Mr. Mohd. Tahir : Sir, I beg to move:

"That in article 204, after the words 'it shall' the words 'after taking the opinion of such court in writing' be inserted."

If the amendment is accepted, the clause will read thus :

"If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, it shall after taking the opinion of such court in writing, withdraw the case to itself and dispose of the same.

I have moved this amendment, Sir, because if any question of interpretation of this Constitution arises in any subordinate court, there can be no objection to such a matter being disposed of by the High Court after the case is withdrawn if such questions to arise in subordinate courts. I think it is better that the opinion of such court in writing should be obtained so far as the interpretation of such matter is involved in that court, because in many cases we find that the High Courts do agree with the judgments of the subordinate courts. Therefore, Sir, it does not mean that the subordinate courts are not in a position to

give their opinion so far as the constitutional matter is concerned, because they are not given this power to dispose of such matter the case has to be withdrawn by the High Court and when they are going to withdraw such matters, it is not only desirable but reasonable that the opinion of such subordinate courts where the questions of interpretation of constitution do arise should be taken before it is disposed of by the High Courts. With these few words, Sir, I move my amendment.

The Honourable Dr. B. R. Ambedkar : Sir, I move:

"That the explanation to article 204 be omitted."

Sir, it is unnecessary.

Dr. Bakshi Tek Chand : Sir, I wish to say a few words in opposing the amendments which have been moved by Prof. K.T. Shah and Mr. Mohd. Tahir. The Amendment of Prof. Shah is to the effect that the word "may" be substituted for the word "shall" in the first part of article 204. If this amendment is accepted, then the whole of this article 204 will become unnecessary, as both under Section 24 of the Civil Procedure Code, and 526 of the Criminal Procedure Code the High Court has the power to withdraw in its discretion, any civil or criminal cases pending in any court subordinate to itself. The reason for inserting the word "shall" in article 204 is to make it obligatory on the High Court to withdraw the case, provided it is satisfied that the case pending in the Subordinate court involves a substantial question of law as to the interpretation of this Constitution. If the High Court is satisfied that such a question is involved, it shall withdraw the case to itself and dispose of the same. It is very necessary that all questions relating to the interpretation of the Constitution should be decided as early as possible. A case in a subordinate court may last for a year or two or more. Then, there may be an appeal to the District Judge and the case may come in the first or second appeal to the High Court after a very long time. In the meantime, the important question of constitutional law will remain unsettled. This will be very undesirable, indeed.

The second reason in this. There should be an authoritative decision on these questions by the highest court in the province at the earliest possible date. Otherwise, a particular point may be involved in a case pending in one district; the same point may be involved in three or four other cases pending in other districts and there may be contradictory decisions by these various subordinate courts, and this will result in great confusion. In order to ensure a speedy decision of important constitutional questions, and at the same time to see that an authoritative decision is given on those points by the highest court in the province, it is necessary that the word 'shall' should remain. It was with this object that this special provision is sought to be incorporated in the Constitution Questions relating to the interpretation of the Constitution are likely to arise soon after the Constitution comes into force. For that reason alone it is necessary that speedy and authoritative decisions should be given. From such a decision of the High Court, an appeal may, if necessary, be taken to the Supreme Court and the matter finally decided for the whole country. It is therefore, desirable to make a provision with regard to this in the Constitution.

The other amendment moved by Mr. Tahir, is that the opinion of the court in which the case is pending should be taken in writing. I do not know what useful purpose will be served by taking the opinion of the subordinate court on these points. It should be borne in mind that the article does not lay down that every case in which a question of law as to the interpretation of the Constitution is involved will automatically be transferred to the High Court. There are two very important conditions which must be fulfilled. One is that the question involved must be a substantial question of law as to the interpretation of this Constitution,and not every question involving such interpretation, even if it

[Dr. Bakshi Tek Chand]

arises incidentally or collaterally. It should be a question of importance which goes to the very root of the case. Even then, it is not necessary that the case will be transferred to the High Court. The words of the article are that "the High Court is satisfied." The High Court shall examine the matter when it comes to its notice. If the Judges are satisfied that the question involved is a substantial question of law as to the interpretation of this Constitution, only in that case, will the case be withdrawn to the file of the High Court. Why it is necessary in such a case to obtain the opinion of the Subordinate Judge before coming to the High Court? This amendment will have the effect of delaying the decision of the point and of holding up the proceedings unnecessarily. I submit, therefore, that the article as drafted should be accepted with the amendment moved by Dr. Ambedkar, that the Explanation be deleted. That amendment is necessitated because, the explanation originally made this article applicable only to the provincial High Courts. Now, as in the new setup, the High Courts of the Indian States are being brought in line with the provincial High Courts, the Explanation has become unnecessary. The article, without the Explanation, contains a very important and salutary provision and should be accepted.

Shri L. Krishnaswami Bharathi : (Madras: General): Mr. President, Sir, I have only a small suggestion to make to Dr. Ambedkar. This article is very necessary. When a High Court is satisfied that a substantial question of law as to the interpretation of this Constitution is involved, it should certainly withdraw that case and decide it. But as the article reads, the High Court shall withdraw the case to itself and dispose of the same. It is for the Drafting Committee to consider whether it is necessary to withdraw the whole case and dispose the same. There may be many cases in the Munsiff's courts where this question may be raised. In my view, it is not quite necessary for the High Court to withdraw the whole case and try the case itself. It is quite enough that it may decide this question relating to the interpretation of the Constitution and then refer it back to the particular court to dispose of the case in conformity with the decision given regarding the interpretation of the Constitution. We have made a similar provision with reference to the Supreme Court. The Supreme Court is not bound, whenever there is mention of a question of interpretation of the Constitution, to refer it to a Full Bench of five Judges. If they are satisfied that it is a substantial question, they may refer it to a Fuller Court, get their opinion and thereafter the original court will decide the case in conformity with the opinion so given. Therefore, I think it may quite suffice if we say, it shall withdraw the question to itself. The High Court need not to be bound to dispose of the case. It may be very difficult for the High Court to be disposing of all manner of cases. For instance, in an injunction suit, the question may arise. It is not necessary for the High Court to try the whole case. I would therefore wish that the High Court may only withdraw the question relating to the interpretation of the Constitution and then refer it back to the original court to dispose of the case in conformity with the opinion so given. I leave it to Dr. Ambedkar to decide this matter.

Mr. Tajamul Husain : Mr. President, Sir, the High Court has got an inherent power to call for the record of any case and dispose of it. Article 204 says that the High Court shall, if there is any substantial question of law as to the interpretation of this Constitution involved in the case, call for record of the case and dispose of the case. My honourable Friend, Prof. Shah, wants that instead of the word 'shall' it should be 'may'. If you want to have the word 'may', the inherent power is already there and according to the inherent power, if there is a substantial question of law, or no point of law at all, it can call for the record and dispose of the case. Therefore, the word 'may' does not

help us at all. This point has been dealt with very thoroughly by my honourable Friend Dr. Bakshi Tek Chand and I do not wish to repeat the arguments. The only thing that I wish to say is this. Suppose a substantial question of law is involved, according to Professor Shah, the High Court may call for the record or it may not. It is not incumbent on the High Court to call for the record. Suppose, the High Court does not call for the record, look at the waste of time. By the time a case is decided in the subordinate court and goes to the High Court, it may take three or four years. Also look at the amount of expenses that will be incurred in the lower court as well as in the appellate court. Apart from that, a very important point of law will be pending and nobody will know what the decision is going to be. The sooner a substantial question of law is decided by the High Court, the better it is. Therefore, I oppose the amendment moved by Professor Shah.

As regards the amendment moved by Mr. Mohd. Tahir, he says that the opinion of the subordinate court should be taken. It always happens that in every case that the High Court calls for record, it takes the opinion of the lower court. It is absolutely unnecessary and redundant to have these words here. With these words, I oppose this amendment also.

The amendment moved by Dr. Ambedkar is perfectly correct. I support that amendment.

Mr. President : I want to dispose of this article before we rise. It is already twelve.

The Honourable Dr. B. R. Ambedkar : I am afraid I have to go to a Cabinet Meeting at 12 o'clock.

Mr. President : Then I do not think there is much to be said either against or for the amendment. All that could be said has been said. No more speeches.

The Honourable Dr. B. R. Ambedkar : With regard to the observations made by my Friend Mr. Bharathi . . .

Shri H. V. Kamath : Sir, you have called upon me to speak, I shall not take more than 2 or 3 minutes. Shall I speak now to tomorrow?

Mr. President : Tomorrow.

The House now stands adjourned till 8 o'clock tomorrow morning.

The Assembly then adjourned till Eight of the Clock on Wednesday the 8th June 1949.
