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CONSTITUENT ASSEMBLY DEBATES

OFFICIAL REPORT

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THE CONSTITUENT ASSEMBLY OF INDIA

President:

THE HON'BLE DR. RAJENDRA PRASAD.

Vice-President:

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MR. S.N. MUKERJEE.

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SHRI JUGAL KISHORE KHANNA.

Marshal:

SUBEDAR MAJOR HARBANS LAL JAIDKA.

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CONSTITUENT ASSEMBLY OF INDIA

Monday, the 23*rd May* 1949

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

DRAFT CONSTITUTION—(*Contd.*)

Article 67-A—(*Contd.*)

Mr. President : We will take up article 67-A which was taken up the other day and was postponed.

The Honourable Dr. B. R. Ambedkar : (Bombay: General): Sir, I move for permission of the House to withdraw this article.

Mr. President : I think he did not move it and so there is no question of withdrawing it.

Mr. B. Pocker Sahib (Madras: Muslim): No, it was taken up and the House is in possession of it. The honourable Member should therefore give his reasons for withdrawing it.

Mr. President : Yes, I am sorry I made a mistake. The honourable Dr. Ambedkar may give his reasons for withdrawing the article.

The Honourable Dr. B. R. Ambedkar : Sir, my reason is this. As I explained on the last occasion, we have made a provision for nominating certain persons to Parliament. The original proposal was to nominate fifteen persons; subsequently it was decided that these fifteen persons should be divided into two categories, *viz.*, twelve representing literature, science, arts, social services, and so on; and a further provision should be made for the nomination of three persons to assist and advise the Houses of Parliament in connection with any particular Bill. I feel Sir, that the provision which is already contained in article 67 which permits the President to have twelve persons nominated to Parliament would serve the purpose which underlies this new article 67-A. The services that would be rendered by the persons nominated, if article 67-A were passed into law, would be also rendered by the persons who would be nominated under article 67; and therefore the nominations under article 67-A would be merely a duplication of the nominative system covered in article 67. Besides, it is felt that in an independent Parliament which is fully sovereign and representative of the people there should not be too much of an element of nomination. We have already twelve; there may be some nominations also regarding the Anglo Indians; and it is felt that to add to that nominated quantum would be derogatory to the popular and representative character of Parliament. That is why I wish to withdraw this article 67-A.

Article 67-A was, by leave of the Assembly withdrawn

Statement *re* **Articles 92 to 99**

The Honourable Dr. B. R. Ambedkar : Sir, I propose that we start now with article 100.

Mr. President : I take it that the discussion on articles 92 to 99 should be held over for the time being to enable the business relating to finance and finance bills to be considered further.

The Honourable Dr. B. R. Ambedkar : Yes. The position is this. When article 90 was under debate I suggested that the debate should not be concluded and that the article should not be put to the vote because I discovered, at the last moment, a flaw in the article, which I thought it was necessary to rectify. Now if that flaw is to be rectified, then articles 96 to 99 also require to be reconsidered in the light of that article. Article 91 we have passed. Articles 92 to 99 require further consideration and therefore I want those articles to be held over for the time being. But we can begin with article 100.

Seth Govind Das (C. P. & Berar: General). *[Mr. President, article 99 relates to our language and if consideration of articles 92 to 99 is postponed now, may I know when article 99 will be discussed? As I stated the other day, we have to adopt our Constitution in our national language also. I am told that the translation committee appointed by you has already translated the first fifty articles. Hindi version of these articles may be taken up at this stage also for consideration. If consideration of article 99 is deferred I would like to be enlightened on two points *viz.,* when it will be taken up and whether the Hindi version of the articles that have already been translated can be taken up and discussed, irrespective of whether article 99 has been passed or not by that time.]

Mr. President : *[So far I have no information from the committee. I do not know how far they have proceeded. We can consider the translation of the articles already passed, if it is ready. Therefore there should be no difficulty if we do not take up the Hindi version now.]

Seth Govind Das : *[My point remains yet unanswered, Sir. Consideration of article 99 stands deferred, but I want to know for how long it is deferred.]

Mr. President : *[I cannot say exactly for how long it remains deferred but certainly we shall take it up at some future date.]

Seth Govind Das : *[May I take it that when articles, that are passed here, are rendered into Hindi and are submitted to you, they will be taken up for consideration even if article 99 is not adopted?]

Mr. President : *[I cannot say anything at this stage. I shall have to think over the matter and fix a time for it. It is just possible that article 99 may have to be held over for some time.]

We shall then start with article 100.

Shri H. V. Kamath : (C. P. & Berar: General): May I bring to your notice another aspect of this matter, namely, if we jump over certain articles we are taken unawares, when articles are taken up for which we are not quite prepared. I request that you will consider this matter for the future, if not today.

Mr. President : The Constitution has been before the Members for a pretty long time and I assume Members have studied the Draft. The number of amendments itself shows that the whole Draft has been considered in great detail by all the Members. So nobody is being unawares if an article, which does not come after the article which we have considered,

*[ ] Translation of Hindustani Speech.

is taken up. But we shall accommodate the Members in this respect and I do not think any serious inconvenience is caused if we take up article 100 and those that follow it.

Article 100

Mr. President : Amendment No. 1784, of which notice has been given by Shri Himmat Singh K. Maheshwari, is not really an amendment. It is a negative amendment so far as that is concerned.

Amendment No. 1785 is by Mr. Naziruddin Ahmad. That is a drafting amendment. So we can leave that there.

The question is:

"That Article 100 form part of the Constitution."

The motion was adopted.

Article 100 was added to the Constitution.

Article 101

Mr. President : Article 101.

Shri H. V. Kamath : Sir, I move:

"That in clause (1) of article 101, after the words, 'called in question', the words 'in any court' be inserted."

I only wish to make explicit what I believe is tacit in this article, and I suppose what is meant here is that the validity of any proceedings shall not be called in question in any Court, and therefore to make it quite clear and explicit I suggest the insertion of these words.

Mr. Naziruddin Ahmad (West Bengal: Muslim): Sir, I move:

"That in clause (2) of article 101, for the words 'or other member', the words, 'and no member' be substituted."

Clause (2) in the article runs thus:

"No officer or other Member of Parliament....." and so forth.

In fact, 'No officer or other Member' seem to imply that an officer is a Member of the House. The word 'other' is absolutely misleading. It gives a false impression. The amendment is accepted would make the passage run like this :

"No officer and no Member of Parliament....." and so forth.

In fact, I want to draw a distinction between an officer and a Member. This is the simple reason for this amendment. I do not wish to move the next amendment.

Mr. President : I think that seems to be an unnecessary amendment.

The Honourable Shri K. Santhanam : (Madras: General): I think both the amendments are mistaken. In the one case, the proceedings are not to be called in question in any court, while in the other case the Speaker and the Deputy Speaker may be rightly called officers of Parliament. So they must also be exempted. I think that is the intention of that clause.

Mr. President : Does it cover the other officers?

The Honourable Shri K. Santhanam : 'An officer of Parliament' will include the Speaker and other officers appointed by the Speaker for the purpose of Parliament. It is intended to be comprehensive and not restricted.

Mr. President : 'No Member' will also include the Speaker?

The Honourable Shri K. Santhanam : The Speaker will also be a Member. So I think the words 'other Member' is used.

Mr. President : Supposing it is 'no officer' and 'no Member' it will include Speaker and Deputy Speaker.

The Honourable Shri K. Santhanam : May be. I do not think there is any great harm.

Mr. President : Probably it is intended that other officers should be protected, as for example, the Marshal.

The Honourable Shri K. Santhanam : 'Officers' includes all officers. The question is whether 'Member' should be there. There would not be any particular difficulty felt if it is left as it is. So far as the first part is concerned, I do not think we would restrict it by putting in the words 'and no member'.

Shri K. M. Munshi (Bombay: General): There is something wrong with the loud speaker in front of you, Sir.

The Honourable Dr. B. R. Ambedkar : Sir, with regard to the amendment of Mr. Kamath, I do not think it is necessary, because where can the proceedings of Parliament be questioned in a legal manner except in a court? Therefore the only place where the proceedings of Parliament can be questioned in a legal manner and legal sanction obtained is the court. Therefore it is unnecessary to mention the words which Mr. Kamath wants in his amendment.

For the reason I have explained, the only forum there the proceedings can be questioned in a legal manner and legal relief obtained either against the President or the Speaker or any officer or Member, being the Court, it is unnecessary to specify the forum. Mr. Kamath will see that the marginal note makes it clear.

With regard to the amendment moved by my Friend Mr. Naziruddin Ahmad, he has not understood that the important words in sub-clause (2) are 'in whom powers are vested'.

Mr. Naziruddin Ahmad : For maintaining order.

The Honourable Dr. B. R. Ambedkar : 'No officer of other Member of Parliament in whom powers are vested' are the persons who are protected by sub-clause (2). The Speaker is already an officer and also a Member. No power has to be conferred upon him. The Constitution confers the power on him. Therefore, having regard to the fact that it is only 'other Member' that is to say, Member besides the Speaker or the Deputy Speaker as the case may be who requires to be protected. Therefore the word 'other' is important.

Mr. President : What is the effect of the words 'or for maintaining order ?

The Honourable Dr. B. R. Ambedkar : Supposing there is a brawl in the House I do not like to put it that way. But, supposing there is a brawl in the House, and the Speaker, not finding any officer at hand to remove a certain Member, asks certain other Member who is present to remove the Member who is causing the brawl. Then that particular Member is the Member who is invested with this authority by the Speaker and he would come under "other Member".

Mr. President : 'Or any other officer who is not a Member of the House' Does he come under that.

The Honourable Dr. B. R. Ambedkar : 'Officer' would be there.

Shri H. V. Kamath : May I ask for some clarification? Mr. Santhanam, referring to my amendment said that the validity of any amendment can be called in question not merely in the court of law, but also in a legislature. Does Dr. Ambedkar agree with him?

The Honourable Dr. B. R. Ambedkar : I am responsible for the explanation I have given.

Shri H. V. Kamath : As regards the other point mentioned by Dr. Ambedkar that the marginal sub-head is clear, may I point out that in the other forum, *viz.,* the Legislative Assembly. I was told that the marginal headings have nothing to do with legislation as such and that articles or sections are taken without reference to the marginal headings. If this is so, if you do not read the marginal heading and the article together, the meaning to my mind is not clear.

The Honourable Dr. B. R. Ambedkar : On that point there are two views. One is that the marginal note is not part of the section and the other view is that the marginal note is: for instance, Mr. Mavalankar when he was in Bombay held the view that the marginal note was not part of the section, but the present Speaker of the Bombay Assembly recently said that the marginal note was very much part of the section as it gives the key to the meaning of the section.

Mr. President : The question is:

"That in clause (1) of article 101, after the words 'called in question', the words in any court' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That in clause (2) of article 101, for the words 'or other member', the words, 'and no member' be substituted."

The amendment was negatived.

Mr. President : The question is:

"That article 101 stand part of the Constitution."

The motion was adopted.

Article-101 was added to the Constitution.

PART V—CHAPTER III

Mr. President : Part V—Chapter III.

(Amendments Nos. 1789 and 1790 were not moved.)

Prof. K. T. Shah : (Bihar: General): Sir, I beg to move:

"That in heading to Chapter III of Part V for the word 'Legislative' the word 'Extraordinary' be substituted."

It would then be

'Extraordinary Powers of the President'.

I particularly wish to draw attention to this aspect that any power the Head of the State or the Chief Executive has should be of an executive character. If any other powers are proposed to be put in under this article, it should be clearly understood that they are extraordinary; that is to say, they are not to

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be employed in normal times, in ordinary circumstances. Of course in extraordinary circumstances, as in the case of an emergency, the use of extraordinary powers would be both necessary and justified. I think that it is important, therefore to make it clear, in the heading itself that this is an avowedly extraordinary power which may take the form of the legislation without our calling its legislative power. Legislative power the executive head should not have. Or it may even take the form of an executive decree or whatever form seems appropriate in the circumstances. The point that I wish to stress is that we must not, by any mention here imply or convey or suggest that the law making powers of the President are any but extraordinary powers. I think this is sufficiently clear, and will be acceptable to the House.

Mr. Tajamul Husain (Bihar: Muslim): Sir, Chapter III deals with the legislative powers of the President. Professor Shah wants that instead of the word "legislative" the word "extraordinary" should be used. Article 102 makes it clear that it is an extraordinary power of the President. It is nothing but extraordinary but it is still legislative power. Therefore I oppose this amendment.

Mr. President : I do not think that any further discussion is necessary. The question is:

"That in heading to Chapter III of Part V for the word 'Legislative' the word 'extraordinary' be substituted."

The amendment was negatived.

Article 102

Mr. President : Then we come to the article itself. The first amendment is No. 1792 by Shri Damodar Swarup Seth.

(The amendment was not moved)

Shri H. V. Kamath : Mr. President, Sir, I request permission at the outset to move this amendment in two parts. By some accident they have been lumped together in the Secretariat as one amendment.

Mr. President : Yes.

Shri H. V. Kamath : Sir, I move:

"That in clause (1) of article 102, for the words 'when both Houses', the words 'when one or both Houses' be substituted."

If we turn to article 69 of the Constitution, and read clause (2) thereof, we find that the President may from time to time summon the Houses or either House of Parliament. So it is not unlikely that at a particular time both Houses may not be in session but only one House may be in session. Therefore I would restrict the power of the President only to such occasions when no House will be in session. According to this article the President is empowered to promulgate ordinances when both Houses are not in session. As I have already stated, referring to article 69, an occasion may arise when one House will be in session. Therefore to make this clear, we will have to say "except when both Houses or one of the Houses of Parliament are in session."

My second amendment, that is the latter half of amendment No. 1793,* is purely verbal. I only move it formally and leave it to the Drafting Committee for its consideration, because it is obvious that the President may promulgate

*That for the words "Such Ordinances" the words "Such Ordinance or Ordinances" be substituted.

one ordinance or more than one ordinance. The article, as it stands, uses the plural. To provide for the contingency I have mentioned, I move this amendment. It is purely verbal and I do not wish to dilate on it any further.

There is a third amendment, amendment No. 1794, which stands in my name. On re-reading this article 102, I think it is not necessary because the President, before satisfying himself, will have recourse to every means at his disposal including consultation with his Council of Ministers. Therefore I do not propose to move amendment No. 1794.

Mr. President : Amendment No. 1795 is verbal and therefore disallowed.

Sardar Hukum Singh (East Punjab: Sikh): Amendment No. 1794 stands in my name also. I would like to move it.

Mr. President : I will give you an opportunity later.

Mr. B. Pocker Sahib : Mr. President, Sir, I move:

"That to clause (1) of article 102, the following proviso be added :

"Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law.' "

Sir, this is a very important matter and affects the fundamental right of every citizen to be tried by a competent court of law before he is deprived of his liberty. No doubt there may be circumstances in which action should be taken immediately but that should not deprive the citizen of his fundamental right of being tried by a court of law. The reason why I have given notice of this amendment is the recent experience we have had in the various provinces in the matter of enforcing ordinances and even the Public Safety Acts which have taken the form of ordinances. The ordinances were later made into law, but the important matter to be noted is that the fundamental right of the citizen to be tried by a court of law has been lost to him. I know that in the province of Madras there have been hundreds of cases in which even the provisions made in the Public Safety Act passed by the legislature of that province have not been complied with the persons were arrested and detained in custody not merely for weeks but for months without even being the grounds for which they were arrested. This is a very scandalous state of affairs. You might have come across the judgments of the High Court which were published in the Press and this practice has been condemned in strongest words by the High Court of Madras, very recently. After all there may be some emergency in which some extraordinary power has to exercised, but that should not in any way deprive a citizen of his elementary right, and after all, I do not know why the citizen should be deprived of that right, even though emergencies might arise, in which quick action is necessary. But the scandalous way in which even the Public Safety Act has been administered in an eye-opener to us that to give such a power to the President to pass ordinances, which give unrestricted powers to deprive the citizens of their liberty, should not be tolerated; and therefore, Sir, I submit that this is a very necessary and desirable proviso that should be added to this clause, and I would request the House to take into considerations the recent experiences in the administration of Public Safety Ordinances and Public Safety Acts, by which innocent citizens have been kept without trial for months and months together in very many cases a person is kept in custody for months and months and then he is just released without giving any reason. I submit, Sir, that in future there should be no rule for tolerating such a state of affairs, and therefore I would request honourable Members of this House to pay serious consideration to this aspect of this matter and though the drafters of this clause may have in view the Communists or such other bodies, even that is no justification for depriving the citizens of their liberty, entirely by such ordinances and that too indefinitely. Therefore, I submit, Sir, that this House may be pleased to accept this amendment.

Mr. President : Amendment No. 1797 is covered by an amendment which has been moved by Mr. Kamath.

(Amendments Nos. 1798 and 1799 were not moved.)

Shri Jaspat Roy Kapoor (United Provinces: General): Mr. President, I have given notice of an amendment to No. 1798.

Mr. President : Amendment No. 1798 has not been moved. No question of moving an amendment to an amendment, which has not been moved, arises.

Shri Jaspat Roy Kapoor : I am sure it will be readily accepted by Dr. Ambedkar. It is a formal amendment, but yet necessary.

Mr. President : If it is a formal amendment, you can talk it over with him.

Shri Jaspat Roy Kapoor : I leave it to you whether it may be allowed to be moved or not.

The Honourable Dr. B. R. Ambedkar : It is not in the printed list.

Mr. President : It is in the list which has been circulated today. Item No. 39—List II (Second week).

Shri Jaspat Roy Kapoor : I submit, Sir, that the words "assented to by the President" in clause (2) of article 102, may be deleted, because they are obviously redundant. It is a Bill which is assented to and not an act. Once a Bill has been assented to by the President, it becomes an Act. Thereafter, no further assent of the President is necessary.

Mr. President : This is not an amendment to an amendment. It is really an amendment to the original article.

Shri Jaspat Roy Kapoor : It is only an amendment with reference to the amendment.

Mr. President : I have disallowed that kind of amendment on a previous occasion, which comes under the guise of an amendment to an amendment. I rule this out also.

(Amendment No. 1800 was not moved.)

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

"That in sub-clause (a) of clause (2) of article 102, after the words 'both Houses of Parliament', the words 'within four weeks of its promulgation' be inserted."

If my amendment be accepted by the House, the clause will read thus:

"Every such ordinance, shall be laid before both Houses of Parliament within four weeks of its promulgation, etc. etc."

The importance of the appropriateness of this amendment of mine arises out of a lacuna which has crept in here. No article in this Chapter provides for the life of an ordinance promulgated by the President. So far, we were under the impression, at least going by the experience of the Government of India Act and the ordinance making power of the Governor General provided for therein, that an ordinance expires or dies a natural death at the end of six months. But, some how or other, this Chapter is silent on that point.

Mr. President : The article says, "shall cease to operate at the expiration of six weeks from the re-assembly of Parliament."

Shri H. V. Kamath : Six weeks from the re-assembly of Parliament. Suppose, Parliament is not summoned at all. We expect our President to be a Constitutional President and that he would always act upon the advice or direction of Parliament. But if the President is inclined to dictatorship, or to exercise dictatorial powers,—who knows what the future has in store for us ?—and if this article is left as it is, he may very well refrain from summoning Parliament to consider the emergency that has arisen or the circumstances which has made it necessary for him to promulgate the ordinance. If we read the entire chapter, we will find that there is no time limit specified for summoning Parliament. The article merely says that the ordinance shall be laid before both Houses of Parliament. For that also there is no time limit. Then, it shall cease to operate at the expiration of six weeks from the reassembly of Parliament. Suppose the President summons Parliament, say, after one year—Dr. Ambedkar says 'no' by a gesture—perhaps he is constitutionally minded and he does not aspire to dictatorial powers if he be elected President—certainly a man different from him might take unfair advantage of this article and refrain from summoning Parliament within a reasonable period. Therefore, I think it is necessary ....

Mr. President : Article 69 clause (1) might take the position clear. It says: "The Houses of Parliament shall be summoned to meet twice at least in every year and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in their next session."

Shri H. V. Kamath : He can summon the next session six months after promulgating the ordinance. Then, six weeks after the re-assembly of Parliament, the ordinance expires. This means that an ordinance can continue in force for seven and a half months or a day or two less than seven and a half months, and not six months as it was even during the British regime. This is a very important chapter in as much as we are seeking to clothe or invest the President with certain powers against which the Congress and all patriots fought during the British regime,—I mean the ordinance-making power of the Governor-General. I want to restrict this power as far as we can. Therefore, I want to provide a constitutional safeguard against the misuse of this article. I want this article to provide that an ordinance promulgated by the President shall be laid before Parliament within four weeks of its promulgation. There is no practical difficulty about this at all. Parliament can be summoned, I am sure, as it is done in many other countries, even within two weeks. You can summon an emergent session, and four weeks is a liberal period of time within which to summon both Houses of Parliament.

If we turn to article 275, there it is definitely laid down in sub-clause (c) of clause (2) that a Proclamation "shall cease to operate at the expiration of six months...." But, here, as I have already pointed out, this lacuna has crept in and I would be happy if it is definitely laid down that an ordinance promulgated by the President would expire at the end of six months. I do not know how this oversight has overtaken the wise men of the Drafting Committee. I would be happy if this safeguard is laid down in this chapter to the effect that no ordinance shall continue in force after the expiry of six months, or that every ordinance will die a natural death at the end of six months. If that be not accepted, then, I think my amendment is the only way out, that Parliament must be summoned within four weeks of the promulgation of the ordinance. The article provides that it shall cease to operate within six weeks after that. This would make the ordinance making power very much restricted. This would give an ordinance a life of ten weeks at most. It may happen that now and then the President may have to promulgate ordinances and it may be that it will not be practicable, for various reasons to summon Parliament every time. But, then, it must be made

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clear in this article that no ordinance shall have effect six months after its promulgation. I hope Dr. Ambedkar, even if he does not accept my amendment—I am not pressing my amendment in case this article stipulates the maximum life of an Ordinance,—will provide specifically for this, that no ordinance shall continue in force as the expiration of six months from the date of its promulgation. We should not leave it merely to the working of article 69, because under that article, as I have already calculated by simple arithmetic, an ordinance could continue in force for seven and a half-months. I hope therefore, that the Drafting Committee would reconsider this matter and definitely provide for an ordinance expiring at the end of six months from the date of its promulgation, at the latest.

Mr. President : Amendment No. 1802. I think this amendment goes with amendment No. 1805. Both of them might be moved together. Would you like to move both the amendments together or separately?

Pandit Hirday Nath Kunzru (United Provinces: General): I do not propose to move amendment 1805. Sir, I beg to move:

"That in sub-clause (a) of clause (2) of article 102, for the words 'six weeks from the re-assembly of Parliament' the words 'thirty days from the promulgation of the Ordinance' be substituted."

Article 102 requires that:

"An Ordinance promulgated under this article 'shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of these resolutions.' "

This is a vital matter to which the Constitutions recently passed in several European countries have attached the greatest importance. The power of passing an Ordinance is equivalent to giving the executive the power of passing a law for a certain period. If there is such an emergency in the country as to require that action should be immediately taken by the promulgation of an Ordinance, it is obviously necessary that Parliament should be summoned to consider the matter as early as possible. Suppose that law and order in the country are seriously affected and the Government of the day consider it necessary that an Ordinance should be promulgated at once in order to prevent the situation from deteriorating or to bring it under control, it is obvious that if the Legislature is not sitting, the Executive must be enabled to arm itself with adequate power to maintain the peace of the country; but it is equally necessary that the Legislative should be summoned without avoidable delay to consider the serious situation that makes the promulgation of the ordinance necessary. I do not therefore see why an Ordinance promulgated by the Governor-General should be in force for several months. The article, as it is, implies two things, first that the Ordinance will remain in force as long as Parliament does not meet, and secondly that even when Parliament meets, it will not expire immediately but will remain in force for six weeks from its re-assembling unless it is disapproved by both Houses before the expiry of that period. I know that a similar procedure is laid down in the Government of India Act, 1935, but such a procedure was understandable in the circumstances in which that act was passed. That Act was not meant to confer full responsible Government on us. The executive was not even partially responsible to the Legislature. The provisions of the Act were such as to enable the British Government to exercise authority with regard to the maintenance of law and order in the country in the last resort. All that has changed now. We have now a responsible Ministry. There is no reason therefore why the process laid down in the Government of India Act, 1935, should be sought to be copied in the new Constitution.

Sir, There are several countries in which the Executive does not possess this power. There are some countries in which the Executive though armed with the power of promulgating decrees has to summon the Legislature as soon as possible and to be place certain kinds of decrees before it. Take for instance France. My impression is that the period during which an Ordinance can remain in force there is much shorter than it will be if article 102 is passed by the Assembly. I do not think that in the new circumstances there is any justification for arming the Executive with the wide powers conferred on it under the Government of India Act 1935. All legislation, and ordinance is a particular kind of Legislation, should be subject to the approval of Parliament and this approval should be sought as early as possible.

Sir, I shall make my meaning clearer by giving an illustration. Suppose soon after the winter session of the Assembly a situation requiring the promulgation of an Ordinance manifests itself in the country. Normally another session will be held only in October or November next. If article 102 is accepted the Ordinance will remain in force for about six months and possibly six weeks thereafter. The maximum period during which the Ordinance may remain in force can therefore be seven and a half months. This obviously is much too long a period and there is no reason why the Executive should have the power to legislate for so long a period. I think therefore that the period should be long enough to enable the legislature to meet and consider the extraordinary situation requiring the promulgation of an Ordinance, at any rate an Ordinance made necessary by factors affecting the peace or security of the country. For instance, if there are certain tariff laws that require to be changed immediately in the economic interests of the country, the Executive may well make the necessary change and nothing may be lost if we wait for six, seven or eight months and the Legislature considers the ordinance only after that. But when the ordinance relates to the peace or security of the country, or to similar circumstances, requiring extraordinary action to be taken by the executive under an Ordinance, then I think, we have to see that the period during which the Ordinance remains in force is as short as possible, and that any legislation that may be required should be passed by Parliament after a due consideration of all the circumstances.

Sir, my objection is not merely that the period during which the ordinance may remain in force is too long; it also relates to the character of the Ordinance that may be promulgated. The executive may in a hurry pass an ordinance which enough partially necessary, may not be required in all its details. It is therefore necessary that the legislature should be given an opportunity, not merely of considering the situation requiring the passing of an Ordinance, but also the terms of the Ordinance. It is quite possible, Sir, that the legislature, while taking the view that some legislation is necessary, may not agree completely with the Executive, and may modify the Ordinance that has been promulgated. For these two reasons, Sir, I consider it very necessary that the power of passing an Ordinance given to the executive should be much more limited than it would be under article 102. I hope that my honourable Friend Dr. Ambedkar will give the matter the consideration that it deserves and will agree within me that this is a matter in regard to which, if necessary, the House may be asked to postpone consideration, if he is not ready with the necessary amendment.

It is quite possible Sir, that the amendment in the form in which I have put it may be defective. It may be perfectly easy for any Member to get up and point out the defects in it. But what is necessary is not that destructive criticism should be resorted to, but that such action should be taken as will be consistent with the new constitutional status of the country, and be in conformity with the responsibilities of the legislature.

Mr. President : May I just point out that you have to move amendment No. 1805 also, as that becomes necessary in case this amendment is accepted.

Pandit Hirday Nath Kunzru : Yes, Sir, I agree. I see that it should be moved. I therefore move, Sir:

"That the Explanation to clause (2) of article 102 be omitted."

I need not say anything about this amendment, because it is a necessary consequence of the amendment that I have already moved.

Mr. President : Mr. Jaspat Roy Kapoor has given notice of an amendment to this amendment. Does he move it?

Shri Jaspat Roy Kapoor : No, Sir.

Mr. President : Prof. Shah.

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

"That in sub-clause (a) of clause (2) of article 102, after the word 'Parliament', where it first occurs, the words 'immediately after each House assembles' be inserted; after the word 'and' where it first occurs the words 'unless approved by either House of Parliament by specific Resolution' and after the word 'operate' the word 'forthwith' be inserted; and the words 'at the expiration of six weeks from the re-assembly of Parliament, or if, before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions;' be deleted."

Sir, the amended clause would be thus:

"Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, and unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith."

The words "at the expiry of six weeks, etc. etc.", will be all gone.

Sir, the principle of my amendment is the same as that which found such a powerful support from Pandit Kunzru. Most of us, I am sure, view with a certain degree of dislike or distrust the ordinance-making power vested in the Chief Executive. However we may clothe it, however it may necessary, however much it may be justified, it is a negation of the rule of law. That is to say, it is not legislation passed by the normal Legislature, and yet would have the force of law which is undesirable. Even if it may be unavoidable, and more than that, even if it may be justifiable in the hour of the emergency, the very fact that it is an extraordinary or emergency power, that it is a decree or order of the Executive passed without deliberation by the Legislature, should make it clear that it cannot be allowed, and it must not be allowed, to last a minute longer than such extraordinary circumstances would require.

This power is either not given in many constitutions, to the chief executive; or if given it is restricted as effectively and rigorously as possible, in some such manner as is proposed by this amendment. That is to say, if the ordinance has to be passed, in the hour of emergency or to meet extraordinary circumstances, it must be laid before either Houses of Parliament immediately it assembles; and unless each House approves of it by a Specific Resolution, it must cease to operate forthwith. This is the minimum needed in the interests of civil liberty.

I think we cannot show our distrust of this extreme power in the hands of the Executive more clearly than by requiring that, unless Parliament approves and thereby makes it, so to say, its own Act, unless the Legislature makes it

its own enactment, executive legislation of this kind, passed by the President, must cease to operate immediately. We must leave no room for any doubt as to the maximum length of time during which the Presidential Ordinance can remain in operation. If Parliament is not in sessions, or if a general election is pending and therefore Parliament is not able to meet a margin of time may be allowed; but it must be the shortest possible. In that case, of course, other amendments which have been moved will operate, and I hope will operate, that is to say, the maximum life of the Ordinance must be limited by the Constitution. Even if it is any time necessary, even if it is unavoidable and justifiable under an emergency, the maximum life of the ordinance itself must be limited to three or four weeks, or six weeks at the most. The period is immaterial; the principle is important. By saying that the period is immaterial I do not suggest that it can be extended to any length. All I say is that between three, four or six weeks not much material difference may be found. Ordinance-making by itself being an unusual, extraordinary, and undesirable power, it should be qualified by a maximum period being described for its life.

Secondly, if a longer period or duration appears necessary, in any case within that period, the Parliament must be called; and either House must consider the Ordinance, and unless approved by each House by a special resolution the ordinance must be deemed forthwith to cease to operate.

On those terms, and under those limitations only, I think it may be possible to agree to this extraordinary power being vested in the President.

It is true that though the nominal authority which makes the Ordinance, is that of the President, he would be acting only on the advice of the Prime Minister and the Prime Minister naturally would be responsible to Parliament, where the ordinary remedies of responsible Ministries may take effect. Inspite of this factor, I would not leave it to the exigencies, or to the possibilities of party politics, to see that such extraordinary powers are exercised at any time or for any time, and that is why I would require, under the constitution and by the constitution, that a maximum period is prescribed to the life of an ordinance; and that a definite procedure be laid down whereby the ordinance can be approved by either House of Parliament by a specific resolution. Otherwise it shall cease to operate immediately thereafter. I hope this very important matter will commend itself to the House, and the amendment will be accepted.

(Amendments Nos. 1804, 1806, 1807 and 1808 were not moved.)

Sardar Hukam Singh : Sir, I beg to move:

"That in clause (1) of article 102, after the words 'except when both Houses of Parliament are in session' the words 'after consultation with his Council of Ministers' be inserted."

This is so evident that I might be met with the reply that in all constitutions it is supposed that the constitutional head always acts on the advice of his Council of Ministers and in other constitutions it is never put down expressly that he should do so. With that consciousness I have moved this amendment, because I feel that we are framing a written constitution wherein we are giving every detail, with the result that it is so cumbersome and bulky. Under such circumstances I feel that a matter of such importance and which is so apparent must be expressly put down. It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers. My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should

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we leave this fact to caprice or whim of any individual, however high he may be? If we clearly put down that he is to act on the advice of his Ministers, it is not derogatory to his position. With these words, Sir, I move my amendment.

Shri R. K. Sidhva (C.P. & Berar: General): On a point of order, Sir, the amendment moved by Mr. Pocker is out of order. His amendment reads:

> "Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."

If you refer to article 15 under Fundamental Rights, which we have already passed, it says:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India."

This article which we have passed definitely defines what are the personal liberties and how they should be safeguarded. Hence this amendment would be out of order.

Mr. President : I do not think it is out of order. It is not consistent with article 15 which we have passed. It only confirms it. Therefore I, allow the amendment.

Dr. P. S. Deshmukh (C.P. Berar: General): Sir, there are a good many amendments moved to this article. It is quite natural for the House to emphasise that the ordinary powers of the Parliament shall not be circumscribed nor the Parliament's wishes defeated in any indirect way. It is with that intention that many Honourable Members of this House have come forward to limit the period of time of the operation of the ordinance and to insist that the President shall call a session of the Houses of Parliament at the earliest possible moment. I am afraid I have not been much impressed by the speeches in support of any of the amendments that have been moved.

The first amendment that has been moved by Mr. Pocker has been moved at a very wrong place. Not only has adequate provision been made already by the House regarding arresting of any person without there being any law under which he can be arrested but this is not the place where such an amendment should be moved because essentially I do not think that the House need fear that the President would misuse his power for the sake of arresting people without providing for it, or would promulgate an ordinance only for the sake of depriving any set of the citizens of India of their liberties. In any case the fundamental rights having already been approved I do not think there is any need for the amendment moved by Mr. Pocker. At the present moment many people have lost their liberties under the law of detention, the Public Safety Act and other laws passed in the Provinces. Honourable Members are correct in complaining that the provisions of the Public Safety Acts operating in the provinces have been somewhat arbitrarily and oppressively used and that it has caused considerable amount of dissatisfaction. But we are not dealing with the provinces, or their powers. we are here dealing with the legislative powers of the President and we have got to take notice of the fact that at the present moment Governments have ceased to be merely policemen or judges. A time there was when the Governments of the world were only policemen and judges. But now-a-days there is nothing that is outside the sphere of governmental activity. Amongst other things, Governments of the present day are shop-keepers; they are commission agents and even contractors. Every sort of duty that an ordinary citizen was performing is being performed

by the State under the exigencies of the present circumstances. I therefore feel, Sir, that the powers that we are giving to the President are all the more necessary because the day to day administration has become so complex.

Take, for instance, the administration of the controls. There are a thousand and one occasions when it would be necessary for the Executive to possess some such power. In the present extraordinary times through which the world is passing, Sir, I think it is absolutely necessary and desirable that the Head of the State should be empowered with these extraordinary powers.

Shri H. V. Kamath : The Constitution is not framed merely for extraordinary times; it is intended for many many years to come.

Dr. P. S. Deshmukh : I am sure, Sir, that the provisions that exist in this Constitution are such that there is no possibility of their being abused in ordinary circumstances also.

Pandit Kunzru said that it was well for the British Government to have had a section like this in the Government of India Act, 1935, when the Government was irresponsible. But when the Government is responsible to the Legislature there is no fear of its being abused. I think Pandit Kunzru has himself suggested a reply to his own argument. I am sure no President will act without the consent of the Cabinet and no Cabinet will act without the consent of the majority of the Members of the House. So, any power that is likely to be exercised under this Section by the President will have the tacit approval and consent of the Legislature, and for that reason I think the amendment of Sardar Hukum Singh is also not necessary. No President can continue to be in office if he were to issue ordinances which have not the consent of the Cabinet and ultimately of the Legislature. I, therefore, think, Sir, that there is no need for the safeguard which have been suggested. When the powers of withdrawal of Ordinance has been given to the President, I am sure, Sir, he will, as constitutional head—as the guardian of the people—not permit any legislative measure to continue for a day more than is absolutely necessary.

Then, Sir, as a consequence of the amendment which Pandit Kunzru has moved, he wants to omit the explanations. Now, actually, Sir, there are not two explanations. There is only one explanation. The third sub-clause of the article is also, in my opinion, a very important provision. It reads as follows:

> "If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

I think this provision should satisfy Mr. Pocker Sahib also, because if the legislative power exercised by the President goes counter to any of the Fundamental Rights, to that extent it shall be *ipso facto* void and shall be of no consequence whatever.

Under all these circumstances, Sir, I do not think there is need of any of the amendments that have been moved. I think the time which has been stated here, will probably be quite sufficient. But if in spite of this Dr. Ambedkar feels that he is convinced by the arguments that have been advanced and wants to make a provision for the immediate calling of the Parliament within the specified period of thirty days, I should have no objection, but I feel, Sir, that there is no likelihood of the legislative powers given to the President being misused and the powers of the sort which have been mentioned in the article are essential.

Mr. Tajamul Husain : Sir, I should first take up amendment No. 1802 moved by my honourable Friend Pandit Kunzru. Now, Sir, sub-clause (a) of clause (2) says that every ordinance shall be laid before Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, etc. My honourable Friend Pandit Kunzru says that it should cease to operate at the expiration of thirty days from the promulgation of the Ordinance. I submit, Sir, I am unable to understand this. Ordinances are promulgated only in cases of emergencies. Suppose an emergency is such that it would last for more than thirty days, then what are we to do in that case?

Shri H. V. Kamath : Sir, the honourable Member has not properly understood Pandit Kunzru's amendment.

Mr. Tajamul Husain : Sir, I was not here when Pandit Kunzru moved his amendment. But from his amendment it is clear that he wants that the Ordinance should cease to operate at the expiration of thirty days from the time of promulgation of the ordinance. If that is the case, then I will place an example before you. Supposing the House of the People is dissolved today for the purpose of general election. It may take more than one month and in that case as soon as the dissolution takes place, the next day an emergency arises and the President of the Union promulgates an Ordinance. What are you going to do? There are no more members. How are you going to summon Parliament again? I oppose the amendment.

Now let me take amendment No. 1796 moved by Mr. Pocker. He says: 'Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by the competent court of law.' I cannot understand this. This is an extraordinary procedure. Ordinance means extraordinary procedure. In such an emergency the question of personal liberty does not arise. We do not know what will happen at that time. Therefore his amendment also should be opposed.

The amendment moved by Sardar Hukam Singh says that when an Ordinance is promulgated, there should be prior consultation with the Council of Ministers. It is very reasonable. We should support it. After all, the Prime Minister and the Cabinet are the chief representatives of the people. No doubt the President also represents the entire Union. But the Prime Minister and his Cabinet are I think more responsible people and they should be consulted before an Ordinance is promulgated. Therefore I support that amendment.

Mr. Mahboob Ali Baig Sahib (Madras: Muslim): Mr. President, Sir, I am in complete agreement with the amendment moved by Pandit Kunzru and also with the amendment moved by Mr. Pocker. I will speak first on the amendment moved by Pandit Kunzru. I think it must be possible for my Friend Dr. Ambedkar to accept it. Pandit Kunzru has clearly pointed out that the ordinance regime might continue for six months, and for six weeks added on to six months. Now the question is whether it is desirable that in a democracy, where you have got people's representatives in the country who could be summoned at short notice, that you should give any opportunity to the executive to postpone calling the Parliament which the executive is entitled to do for six months and give six weeks more. It is I submit undemocratic and will lead to executive oppression, to say the least. What I find in the present day is the tendency on the part of Members of the Cabinet to bring forward legislation or make proposals in

the Constitution itself based upon the present fears. The Government in power or the persons in charge of these matters consider that tension always exists and provision must be made for it, giving the executive power to meet any contingency. Well, we are prepared to give power to the executive to meet the situation the moment any contingency arises. When Parliament can be called at once within a week or ten days, I do not see any reason why we should allow an opportunity to delay calling the Parliament in order to decide whether the ordinance promulgated should continue. It is fraught with danger and the chances are that the executive might arrogate to itself the powers and will be tempted to postpone calling the Parliament. So, Sir, democratically-minded Dr. Ambedkar must be able to accept the suggestion embodied in the amendment of Pandit Kunzru.

Now, with regard to the amendment of Mr. Pocker. I do not want to revive the controversy which arose in the course of the discussion of article 15. There it was ruled that the protection of personal liberty can be in accordance with the procedure laid down by law, that is by Parliament. We have passed that. But why should we now not protect the liberties of the persons even from the arbitrary rule of the President, even though it may be for six months or two months? The merit of article 15 which was passed in that Parliament is to legislate with regard to the procedure. It is Parliament that has to lay down the procedure with regard to certain matters. For instance, when a man is deprived of his liberty without being brought to trial he may be clapped in jail, in accordance with the procedure laid down by Parliament. But now why should a single individual, the President, be allowed to pass an ordinance by which he might deprive a person of his liberty without letting him to be tried by a court of law? Therefore I support this amendment. I think it must be possible for Dr. Ambedkar to accept them.

The Honourable Dr. B. R. Ambedkar : Mr. President. Sir, my Friend, Pandit Kunzru, has raised some fundamental objections to the provisions contained in this article 102. He said in the course of his speech that we were really reproducing the provisions contained in the Government of India Act, 1935, which were condemned by all parties in this country. It seems to me that my Friend, Pandit Kunzru, has not borne in mind that there are in the Government of India Act, 1935, two different provisions. One set of provisions is contained in Section 42 of the Government of India Act and the other is contained in Section 43. The provisions contained in Section 43 conferred upon the Governor-General the power to promulgate ordinances which he felt necessary to discharge the functions that were imposed upon him by the Constitution and which he was required to discharge in his discretion and individual judgement. In the ordinances which the Governor-General had the power to promulgate under Section 43 the legislature was completely excluded. He could do anything—whatever he liked—which he thought was necessary for the discharge of his special functions. The other point is this; that the ordinances promulgated by the Governor-General under Section 43 could be promulgated by him even when the legislature was in session. He was a parallel legislative authority under the provisions of Section 43. It would be seen that the present article 102 does not contain any of the provisions which were contained in Section 43 of the Government of India Act. The President, therefore, does not possess any independent power of legislation such as the powers possessed by the Governor-General under section 43. He is not entitled under this article to promulgate ordinances when the legislature is in session. All that we are doing is to continue the powers given under Section 42 of the Governor-General to the President under the provisions of article 102. They relate to such period when the legislature is in recess, not in session. It is only

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then that the provisions contained in article 102 could be invoked. The provisions contained in article 102 do not confer upon him any power which the Central Legislature itself does not possess, because he has no special responsibility, he has no discretion and he has no individual judgment. Consequently my suggestion is that the argument which was propounded by my friend, Pandit Kunzru, went a great deal beyond the provisions of article 102. If I may say so, this article is somewhat analogous—I am using very cautious language to the provisions contained in the British Emergency Powers Act, 1920. Under that Act, also, the King is entitled to issue a proclamation, and when a proclamation was issued, the executive was entitled to issue regulations to deal with any matter, and this was permitted to be done when Parliament was not in session. My submission to the House is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation arisen, which it must deal with *ex hypothesi* it has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again *ex hypothesi,* the legislature is not in session. Therefore it seems to me that fundamentally there is no objection to the provisions contained in article 102.

The point was made by my Friend, Mr. Pocker, in his amendment No. 1796, whereby he urged that such an ordinance should not deprive any citizen of his fundamental right of personal liberty except on conviction after trial by a competent court of law. Now, so far as his amendment is concerned, I think he has not read clause (3) of article 102. Clause (3) of article 102 lays down that any law made by the President under the provisions of article 102 shall be subject to the same limitations as a law made by the legislature by the ordinary process. Now, any law made in the ordinary process by the legislature is made subject to the provisions contained in the Fundamental Rights articles of this Draft Constitution. That being so, any law made under the provisions of article 102 would also be automatically subject to the provisions relating to fundamental rights of citizens, and any such law therefore will not be able to over-ride those provisions and there is no need for any provision as was suggested by my Friend, Mr. Pocker, in the amendment No. 1796.

The amendment suggested by my Friend, Mr. Kamath, *i.e.,* 1793, seems to me rather purposeless. Suppose one House is in session and the other is not. If a situation as I have suggested arises, then the provisions of article 102 are necessary because according to this Constitution no law can be passed by a single House. Both Houses must participate in the legislation. Therefore the presence of one House really does not satisfy the situation at all.

Shri H. V. Kamath : Does it mean that when one House only is in session, say, the House of the People, the President will still have this power?

The Honourable Dr. B. R. Ambedkar : Yes, the power can be exercised because the framework for passing law in the ordinary process does not exist.

Shri H. V. Kamath : Shameful, I should say.

The Honourable Dr. B. R. Ambedkar : Now I come to the other question raised by my Friend, Mr. Kunzru, in his amendment No. 1802. His suggestion is that legislation enacted by the President under article 102 should automatically come to an end at the end of thirty days from the promulgation of the ordinance. The provision contained in the draft article is

that it shall continue for six weeks after the meeting of Parliament. Now, the reason why my Friend, Pandit Kunzru, has brought in his amendment is this: he says that under the provisions contained in the draft article, a much longer period might elapse than six weeks, because he thinks that the executive may take, say, a month or two for summoning Parliament. If Parliament is summoned, say in four months, then the six weeks also might be there—that would be practicable—or it might be longer if the Executive delays the summoning of the Parliament. Well, I do not know what exactly may happen, but my point is this that the fear which my honourable Friend Pandit Kunzru has is really unfounded, because we have provided in another article 69, which says that six months shall not elapse between two sessions of the Parliament, and I believe, that owning to the exigencies of parliamentary business, there will be more frequent sessions of the Parliament than honourable Members at present are inclined to believe. Therefore, I say, having regard to article 69, having regard to the exigencies of business, having regard to the necessity of the Government of the day to maintain the confidence of Parliament, I do not think that any such dilatory process will be permitted by the Executive of the day as to permit an ordinance promulgated under article 102 to remain in operation for a period unduly long, and I therefore, think that the provisions as they exist in the draft article might be permitted to remain.

Shri H. V. Kamath : Mr. President, Sir, may I ask one last question? Is it not repugnant to our ideas of conceptions of freedom and democracy, which are, I presume, Dr. Ambedkar's also, not to lay down the maximum life of an ordinance in this article?

The Honourable Dr. B. R. Ambedkar : My own feeling is this that a concrete reason for the sentiment of hostility which has been expressed by my honourable Friend, Mr. Kamath as well as my honourable, Friend Mr. Kunzru, really arises by the unfortunate heading of Chapter "Legislative powers of the President". It ought to be "Power to legislate when Parliament is not in session". I think if that sort of innocuous heading was given to the Chapter, much of the resentment to this provision will die down. Yes. The word 'Ordinance' is a bad word, but if Mr. Kamath with his fertile imagination can suggest a better word, I will be the first person to accept it. I do not like the word "ordinance", but I cannot find any other word to substitute it.

Mr. President : There is another amendment which has been moved by Sardar Hukam Singh in which he says that the President may promulgate ordinances after consultation with his Council of Ministers.

The Honourable Dr. B. R. Ambedkar : I am very grateful to you for reminding me about this. The point is that amendment is unnecessary, because the President could not act and will not act except on the advice of the Ministers.

Mr. President : Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?

The Honourable Dr. B. R. Ambedkar : I am sure that there is a provision, and the provision is that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

Mr. President : Since we are having this written Constitution, we must have that clearly put somewhere.

The Honourable Dr. B. R. Ambedkar : Though I cannot point it out just how, I am sure there is a provision. I think there is provision that the President will be bound to accept the advice of the Ministers. In fact, he cannot act without the advice of his Ministers.

Some Honourable Members : Article 61 (1).

Mr. President : It only lays down the duty of the Ministers, but it does not lay down the duty of the President to act in accordance with the advice given by the Ministers. It does not lay down that the President is bound to accept the advice. Is there any other provision in the Constitution? We would not be able even to impeach him. Because he will not be acting in violation of the Constitution if there is no provision.

The Honourable Dr. B. R. Ambedkar : May I draw your attention to article 61, which deals with the exercise of the President's functions. He cannot exercise any of his functions, unless he has got the advice, 'in the exercise of his functions.' It is not merely to 'aid and advise'. "In the exercise of his functions" those are the most important words.

Mr. President : I have my doubts if this word could bind the President. It only lays down that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. It does not say that the President will be bound to accept that advice.

The Honourable Dr. B. R. Ambedkar : If he does not accept the advice of the existing ministry, he shall have to find some other body of ministers to advice him. He will never be able to act independently of ministers.

Mr. President : Is there any real difficulty in providing somewhere that the President will be bound by the advice of the ministers?

The Honourable Dr. B. R. Ambedkar : We are doing that. If I may say so, there is a provision in the Instrument of Instructions.

Mr. President : I have considered that also.

The Honourable Dr. B. R. Ambedkar : Paragraph 3 reads: In all matters within the scope of the executive power of the Union, the President shall, in the exercise of the powers conferred upon him, be guided by the advice of his ministers. We propose to make some amendment to that.

Mr. President : You want to change that. As it is, it lays down that the President will be guided by the ministers in the exercise of executive powers of the Union and not in its legislative power.

The Honourable Dr. B. R. Ambedkar : Article 61 follows almost literally various other constitutions and the Presidents have always understood that that language means that they must accept the advice. If there is any difficulty, it will certainly be remedied by suitable amendment.

Shri H. V. Kamath : You will be leaving this article silent on the subject of the maximum life of an ordinance which can extend to seven and a half months. It is impossible.

Mr. President : Is Mr. Kamath going to make a second speech on his amendment.

The Honourable Dr. B. R. Ambedkar : Our President is quite different from the President of the United States.

Shri H. V. Kamath : I only wish to say that inframing this article, we have gone one better than the British regime and it is a most atrocious position.

Mr. President : You have already made your speech. I do not think you are entitled to make that observation at this stage. I will now put the amendments to vote.

The question is:

"That in clause (1) of article 102, for the words 'when both Houses', the word 'when one or both Houses' and for the words 'such Ordinances', the words 'such Ordinance or Ordinances' be substituted respectively."

The amendment was negatived.

Mr. President : The question is:

"That in clause (1) of article 102, after the words 'except when both Houses of Parliament are in session', the words 'after consultation with his Council of Ministers' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That to clause (1) of article 102, the following be added:

'Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law.' "

The amendment was negatived.

Mr. President : The question is:

"That in sub-clause (a) of clause (2) of article 102, after the words 'both Houses of Parliament' the words 'within four weeks of its promulgation' be inserted."

The amendment was negatived.

Mr. President : The question is:

"That in sub-clause (a) of clause (2) of article 102, for the words 'six weeks from the re-assembly of Parliament' the words 'thirty days from the promulgation of any Ordinance' be substituted" and

"That the explanation to clause (2) of article 102 be omitted."

The amendment was negatived.

Mr. President : The question is:

"That in sub-clause (a) of clause (2) of article 102, after the word 'Parliament', where it first occurs the words 'immediately after each House assembles' be inserted; after the word 'and' where it first occurs the words 'unless approved by either House of Parliament by specific Resolution' and after the word 'operate' the word 'forthwith' be inserted; and the words 'at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions;' be deleted."

The amendment was negatived.

Mr. President : I think those are all the amendments.

The question is:

"That article 102 stand part of the Constitution."

The motion was adopted.

Article 102 was added to the Constitution.

CHAPTER IV

Mr. President : There is an amendment of which I have a notice that a new article be added, article 102-A. We shall take it up.

[Mr. President]

There is an amendment with regard to the heading of the Chapter.

Amendment No. 1809 by Mr. Naziruddin Ahmad about the numbering of the chapter. I do not think it is necessary to take it up.

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

"That in the heading to Chapter IV of Part V, for the words 'Federal Judicature' the words 'Union Judiciary' be substituted."

This is merely consequential to the earlier article where India has been described as a Union.

Mr. President : The question is:

"That in the heading to Chapter IV of Part V for the words 'Federal Judicature' the words 'Union Judiciary' be substituted."

The amendment was adopted.

Mr. President : Mr. Gupta's amendment is the same as the previous one.

New Article 102-A

Prof. K. T. Shah : Sir, I move:

"That under Chapter IV of Part V, the following new article be added:—

'102-A. Subject to this constitution the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature."

Sir, this amendment enunciates a very important proposition in constitution making, which I have urged from a variety of angles already, but which I should now like to urge from this angle, in the hope that, at least for securing the independence of the Judiciary, it may commend itself to the House.

Sir, the principle of the separation of powers has been regarded in many countries as the foundation stone of democratic Government. Unfortunately, I have not been able to persuade the House, in regard to this very important principle, on other occasions that I had enunciated it either generally or in regard to the Legislature being independent of the executive, and the executive of the Legislature. In the case, however of the Judiciary, I submit that the proposition is still more important than anywhere else. After all, in this country, the history of the popular movement has been associated ever since its commencement with the demand that the Judiciary at least should be separate from and completely independent of the Executive. One of the characteristics of the preceding Government was that, upto a considerable stage in the scale of judicial organisation, the powers of the judiciary and the executive were combined in one and the same officer. That was the situation to which exception was taken ever since the democratic movement began in this country.

Though it has not even now found acceptance in this constitution in the fulness of form that I would have desired, I am sure that a majority even in this House does not object in principle to this proposition. I have, however, made it a much wider proposition. In this amendment: it is not merely the separation of the Judiciary from the Executive, but also it independence, and I want it to be also separate from the legislature and the executive as well.

The presence of the judicial element in the legislature is, I think of no advantage, no help either to the legislature or to the judges themselves, in as much as the Judges, if members of the Legislature, are liable to be influenced by the debates of the proceedings that may have taken place in the making of the law, and not keep themselves strictly to the letter of the law as it may come before

them in any specific case. It has, however, been accepted as a very sound principle of administration of justice, that Judges do not concern themselves with anything that has happened in the legislature while the law in question was being passed, and whatever arguments were used, whatever points were made while the law was under discussion in that body, must have no weight with the Judges. They must confine themselves only to the final Act of the legislature as it has been worded and they remain the supreme authority for interpreting that law as and when any matter comes up before them involving such law.

That, I think, in itself is a very sound position and ought to be normally emphasised in the Constitution. Hence, that part of my amendment, which relates to the separation and independence of the Judiciary from the legislature.

Much more important, from the point of view of civil liberty and the general democratic character of the governance of the country, is the complete separation of the Judiciary from the Executive in every way that we can possibly guarantee. I think it is of the utmost importance that the Judiciary, which is the main bulwark for civil liberties, should be completely separate from and independent of the Executive, whether by direct or by indirect influence. The possibility of the translation, that has frequently occurred in the past, of high judicial officers being available for promotion or transfer to equally high or even higher executive offices, is, in my opinion, it self a temptation against which Judges should be guarded. By law, I think, Judges should be barred from any such translation from the judicial to executive offices, however eminent, however imposing that office may be, lest, in such translation, they should be even indirectly influenced, and that they should model their judgments, unconsciously perhaps, in the hope of proper appreciation being shown at suitable moments by the powers that be.

I think this cannot be emphasised too much in a country particularly like this, new yet to the forms of democratic Government, new yet to the limits of Party Government and party dispensation of not only the loaves and fishes of office, but also other advantages, that the Judiciary should be completely independent, and in no sense open to influence in any way by the executive. The spectacle used to be frequent in the past,—perhaps this is within the knowledge of many of us here, when superior executive officers did not scruple even to issue instructions, certainly demi-official advice, as to the course of legal proceedings. I trust that is no longer the case now in this country. But lest there may be the slightest unconscious room for influence being exercised by the Executive upon the Judiciary, I suggest the very possibility should be avoided. The Constitution should therefore definitely provide that the Judiciary shall be completely separate from and independent of the Executive or the Legislature. I trust this simple proposition will find no objection and will be accepted by the House.

Shri K. M. Munshi : Mr. President, Sir, I have only a few remarks to offer with regard to the amendment proposed by my Friend Professor Shah. In this amendment as the House will see, two ideas have been mixed up. The first is about the separation of Judicial from the Executive Powers. The other is the independence of the Judiciary. Now if I may remind the House, the doctrine of separation of powers which was originally put forward by Montesquieu in the middle of the eighteenth century was the basis on which the Constitution of the United States of America was framed. But the last 150 years of experience has shown that the doctrine of separation of powers cannot be maintained in a modern State. Today we find the Executive appointing numbers of tribunals of a quasi-judicial character. We find a large number of rules made by the Executive under law regulating conduct of different kinds. In modern

[Shri K. M. Munshi]

State the Executive enjoys certain powers of legislation as well as of deciding disputes. We also find Industrial courts which are taking upon themselves the right to adjudicate upon rights between the parties. On the other hand we find that the Judiciary has sometimes to perform functions which may be Executive in a very narrow sense. Therefore the doctrine of separation of powers is an exploded doctrine. This Constitution has been based on an entirely different principle, adopting the British model. We have invested the Judiciary with as much independence as is possessed by the Privy Council in England and to large extent, by the Supreme Court of America; but any water-tight compartments of powers have been rejected. That is with regard to separation of powers.

As regards the question of the independence of the Judiciary, which my Friend Professor Shah emphasised, ample care has been taken in this Chapter that the judicial system in India under this Constitution should be an integrated system, and that it should be independent of the Executive in so far as it could be in a modern State. The House will see as it proceeds to deal with this Chapter that once a Judge is appointed, his remuneration and allowances etc. remain constant. Further he is not removable except under certain conditions like a two-thirds majority of the two Houses. He is precluded from practicing afterwards and I am sure he is not going to look up to any future prospects from Government after his term of Judge is over. These are considered sufficient guarantees of the independence of the Judiciary throughout those countries which have adopted England as the model. These safe guards are there. Largely however it will depend on how the Judiciary works, what the spirit of the Legislature is and what spirit the Executive works. That is a matter which principally lies with the public opinion in the country as well as with those working the Constitution. But so far as the Judiciary is concerned, it is as independent as in any other country of the world and there should be no fear that by reason of not accepting the first part of Professor Shah's amendment the independence of the Judiciary would in any way be crippled or whittled down.

Shri R. K. Sidhwa : Mr. President, Sir, the Congress is committed for the last over fifty years that the Executive should be separated from the Judiciary. The main reason that this has been advocated every time and this subject came up before the public is that it is bad in principle. The prosecutor and the Judge should not be the same person and that is what is at present existing in this country and there has been miscarriage of justice in past when the Prosecutor and the Judge is the same person who sits on trial over the accused person. I would not go on stating details because it is very well known to the people as to why we have been advocating the separation of these two functions and it is absolutely necessary that these two functions should be separated. But, Sir, I might state that this question came up for discussion in this House in the last Assembly and we discussed it for nearly three hours. If you will kindly see the Directive Principles of State Policy there has been an article passed-article 39-A-which says:

"The State shall take steps to separate the judiciary from the executive in the public services of the State."

Now it is one of the articles which has been passed and adopted as a Directive Principle given to the Governments that may be in Office, and that is of greater force than the amendment which my Friend Professor Shah desires to move. The matter having been already discussed and decided and forming part of one of articles, while I agree in principle about this matter, as it has been discussed threadbare on the floor of this House in the last Session.

I see no reason why we should again put in another clause on this matter and complicate the issue. 'Directive' means in my opinion that it has a greater force than this article. It may be that any Government may not accept that Directive Policy. Well, for that matter, the measure lies in the hands of the Legislature if they do not accept this Directive Policy. I therefore contend that while I accept in principle, as the matter has been discussed threadbare for three hours as far as I remember and forms part of an article, there is no necessity for passing a resolution of this nature.

Dr. P. K. Sen (Bihar: General): Sir, I cordially support the amendment moved by my honourable Friend Prof. Shah. The question as to the combination of judicial and executive functions has been mooted, I do not know, how many times. From the time of Raja Ram Mohan Roy this question about the absolute necessity of separating judicial and executive functions has been before the nation. I was rather taken by surprise—in fact it took my breath away—when my honourable Friend Mr. Munshi said that it was an exploded doctrine that there should be no combination of executive and judicial functions. Of course the question does not arise in connection with the Judges of the Supreme Court or the Judges of the High Courts.

Mr. President : I may point out that here in this Chapter we are concerned only with the Union Judiciary. Here we are not concerned with the subordinate judiciary or any other judiciary. There is no question of combination of functions so far as the Union is concerned, between the Executive and the Judiciary.

Dr. P. K. Sen : But, Sir, the amendment, I think is:

"Subject to this Constitution, the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature."

It does not necessarily come under the Union Judicature. I should submit that what ever the proper place for it, which can be a matter of dispute, the principle itself—and the amendment represents a principle—is one which we must accept. Now is the time for us definitely to say that there should be a separation between the Executive and the Judiciary. I do recognise that coming as it does at this particular place, it seems that it is under Union Judicature, but that is not the case. The amendment simply says this, that under Chapter IV, of Part V, a new article should be added. Let there be a separate heading even. I do not know at which place exactly it should appear. But that is really immaterial. I do hope that this amendment will not be rejected in a hurry, but that the House will really give its considered opinion that it should be regarded as accepted doctrine. It is a very important principle that we have insisted upon for many years past, and therefore it should be embodied in our Constitution. It does not come under Federal Judicature, or under the High Court even; but it is notorious that in the Subordinate Judiciary, there is this combination of functions practically everywhere in India, and it is this which leads to the mischief that we have complained against for many many years. I therefore, beg to support the amendment.

Shri H. V. Kamath : Mr. President, I rise to support the amendment that has been moved by my Friend Prof. Shah, seeking to incorporate a new article, article 102-A, in the Constitution. I was rather surprised to hear Mr. Munshi come forward and plead against the separation of the judicial and executive powers, considering that the House has already passed an article, as Mr. Sidhva rightly pointed out—article 39-A—in the Directive Principles of State Policy which lays down that the State shall take steps to secure the separation of the judiciary from the executive in the public services of the State. The original article, 39-A, as moved before the House, specified a time limit, namely a period

[Shri H. V. Kamath]

of three years from the commencement of this Constitution. Subsequently, however, the time limit was eliminated, and article 39-A was passed without the specification of any period or time limit within which this separation of the two functions was to take place. This deletion of the time limit aroused suspicions in various parts of the country, among judges among lawyers, who thought there was really an attempt to shelve the whole issue for an indefinite period. Soon after this article 39-A was adopted by this House, the Chief Justice of the Patna High Court Mr. Clifford Manmohan Agarwala, while inaugurating the Bihar Judicial Officers' Conference referred to this article—I am reading from the Hindustan Times of the 9th December 1948—and said,

> "Is it not obvious that having discovered that power over those appointed to administer the criminal law helps to lubricate the creaking machinery of administration, the Government is reluctant to part with that power, even though the public they claim to represent demands this long over-due reform and even though they themselves are fully aware that is a necessary step if the administration of criminal law is to command the confidence of the people for whose protection it exists?"

When the amendment incorporating this article 39-A was moved in this House, in November or December last the honourable Pandit Jawaharlal Nehru said that the Government of India were entirely in favour of the separation of the judiciary from the executive.

Mr. President : Mr. Kamath, was that remark of the Chief Justice made in reference to this article?

Shri H. V. Kamath : Yes, regarding the suspicion that was aroused. I was reading from the Hindustan Times of the.....

Mr. President : Does it refer to this particular article?

Shri H. V. Kamath : It refers to the suspicion. Shall I read the whole extract? It says that this article seeking to eliminate a period, or time limit arouses suspicion in the minds of various people, and "this suspicion was voiced eloquently by the Chief Justice of the Patna High Court etc. etc." The late Sarojini Devi "who also spoke at this Conference of Bihar Judicial Officers" I am again reading from the Hindustan Times of the same date.

Mr. President : I am afraid all these references have nothing to do with this particular article.

Shri H. V. Kamath : I only want to refer to article 39-A without the time limit of three years, and this aroused suspicion in the minds of various people. Though we know as the Prime Minister has stated, the Government of India were entirely in favour of the principle of separation, yet, by agreeing to omit this limit of three years, many people suspected or thought that we were not earnest about it. In my judgment, the paramount need for an independent judiciary arises from the fact, firstly, that we are here building a federal Union Constitution where an independent judicial authority is necessary to arbitrate or to settle disputes that might arise between the Centre and the Units; and secondly in my humble judgment, it is essential that the citizen should in a democratic state be in a position to refer complaints against the State to an impartial authority. These two functions which I just referred to, namely, the functions of the judiciary to adjudicate or settle disputes between the Centre and the Units in the first place, and to give justice to the citizen as against the State cannot be fulfilled unless and until the judiciary is separate from the executive and is completely independent of the executive. Therefore, in the context of the free State that we are going to build, the free

democratic State that we are going to build up in our country, an independent judiciary should assume a high priority, before we proceed to confer fundamental rights upon the citizen, or before we allocate various functions and powers between the Centre and the Units. If the judiciary is not there to protect and safeguard these rights that you confer on the citizen, how are we going to preserve the sanctity of our Constitution? Therefore, I say, I was rather not prepared to hear Mr. Munshi say that it is an exploded doctrine and that it has no validity in the present age. On the contrary, Sir, I make bold to say that with the increasing in roads upon personal liberty and democratic freedom that we witness all over the globe today, that need for such separation and for an independent judiciary was at no time higher than it is today. Therefore, Sir, I support the amendment that has been brought before the House by my Friend, Prof. K. T. Shah and appeal to the House to accept this amendment.

Shri Alladi Krishnaswami Ayyar (Madras: General): I have a number of objections to the amendment moved by Prof. Shah. In the first place it is not germane to the chapter which deals with the constitution and the functions of the Supreme Court. The general question as to the relation between executive and the judiciary is not the subject of the chapter. As a matter of fact, we have not in the Draft Constitution a general chapter relating to the Judicature, the High Court, the Supreme Court and the Subordinate Courts. If that were so and if we were defining the relation between the executive and the judiciary, possibly it might be different. If there is to be any article of that description it must find a place in some other part of the Constitution.

The second point is that this House has already considered the general question in some form when the fundamental rights were debated by the House. Having regard to the present condition of things, it would be impossible to work the constitution in the first few years, it was felt, if immediately the question of the separation of the executive and the judiciary is to be undertaken. Therefore this amendment goes against the spirit of the resolution which has already been arrived at by the House. That is the second point.

Thirdly, a general clause like this may place the whole administration out of gear. I shall illustrate it in a minute.

From the date the Constitution comes into being there shall be a complete separation of the executive and the judiciary. Today, as a matter of fact in the framework of the administration in the different provinces of India, there is a certain combination of fusion between the executive and judicial functions. How exactly is the administration to work in the meantime if you have a general article of this description, without having specific provisions in regard to the judiciary and upon the way in which the Judiciary is to work in different parts of the Constitution? Leaving that apart, there are other weighty constitutional objections to an article of this description. I may at once mention that I am in wholehearted agreement with the general principle of the separation of the executive from the judiciary functions. But if you put a general article like this or an amendment like this in the Constitution, it is likely to give rise to considerable difficulties. If only we survey the working of administrative institutions in different parts of the world, including America, where this theory of separation is recognised—at least the separation of the executive from the judiciary—you will find a large number of quasi-judicial functions being invested in what may be called executive or administrative bodies. Without that the ordinary administration cannot get on. Those functions may not be completely judicial in the sense in which the functions are to be discharged by a Court of Law. But certainly their work bears upon the rights and obligation between parties.

[Shri Alladi Krishnaswami Ayyar]

I would ask the Members of the House to take any volume of the United States Supreme Court reports and the number of cases which have come up from what may be called the Inter-State Commission and various other quasi-judicial commissions working in different parts of America. No doubt in those cases there is the ultimate recourse of the Supreme Court. Apart from the difficulty to it, it is impossible to work a modern administrative machinery without some kind of judicial functions being vested in administrative bodies. I might mention that even without a clause as to separation an article in the Australian Constitution, investing the Judicial power in Courts, has given rise to difficulties. There the expression used is 'Judicial powers shall be vested in so and so'. The question has arisen in Australia whether income tax tribunals exercising quasi-judicial functions could deal with the question of assessment at all. After considerable difficulty and exploring the history of Courts and tribunals, the Privy Council got over the thing and pointed out that a body which is exercising judicial functions but is not exercising judicial powers may not be strictly a Court.

Therefore, even if we are anxious to put this through, it must be undertaken by the different Legislatures. The Legislatures in undertaking such legislation will have to examine the various functions which have to discharged by administrative, quasi-administrative, quasi-judicial tribunals, and then see how far the ultimate recourse to the Courts or the Superior Courts can be guaranteed, consistent with certain quasi-judicial functions being invested in administrative bodies.

I think a general article like this will land us in considerable difficulty. While I do not want to espouse the cause of the executive or to say that there should not be any separation between the executive and the judiciary it requires a certain exploring of the world field and you must be in a position to go into the entire field of administrative working, have a regard to the way in which the thing is being worked in countries where this theory of separation is recognised, profit by their example in recent times and see that we avoid the pitfalls into which they have fallen. That is the proper way to approach this problem.

I therefore oppose the amendment on these grounds: first that it is not germane to the particular chapter: secondly, that it involves the exploring of the whole field of general administration: thirdly that it is sure to put the whole administration out of gear; fourthly, the words 'wholly independent' and 'wholly separate' will lead of considerable difficulty.

I oppose the amendment of Prof. K. T. Shah.

Dr. P. S. Deshmukh : Sir, I regret I cannot find myself in a line with Prof. K. T. Shah and I cannot support the amendment moved by him. There have been two speeches made on the other side (Shri K. M. Munshi and Shri Alladi Krishnaswami Ayyar) but I regret to have to say that they were not fully audible, and so if I repeat a point here or there I shall be forgiven. As a matter of fact, I want to be as brief as possible.

The amendment that has been proposed wants two things. It wants the separation of the executive from the judiciary and it also wants to provide for the independence of the judiciary. So far as the Supreme Court is concerned it is separate from the Executive and no question of separation therefore arises. The second thing which Prof. Shah wants to achieve is independence. Now how is independence of the Supreme Court to be secured? If we look into the Constitutions of various other countries it is

nowhere provided how the judiciary of any particular country shall be independent. The independence of the judiciary is secured more by a proper selection of the method of the appointment of the judges, by providing that there shall be no interference by the executive in the judicial functions of the judicature, by making the judges not easily removable and so on and not by a direct provision that the Judges of the Supreme Court shall be independent. I would make bold to say, irrespective of what I heard Mr. Munshi and Shri Alladi Krishnaswamy Ayyar say (I do not know if I heard them correctly) that I, for one, take the view absolutely and emphatically that the independence of the judicature is provided for in the Draft Constitution, which is before the House, and beyond this it is not necessary and advisable to go. We cannot make it independent by saying that it shall be independent, just as we cannot create an opposition just by saying that certain Members should form an opposition. In the same way you cannot have an independent judiciary by telling them "You are independent." Actually from my own experience of the judiciary in India for a long time I can safely say that an Indian judge is likely to be more independent than he should be, rather than contrary. If one were to observe the working of the judiciary of India as a whole, the High Court Judges, and the Federal Court Judges, I can safely say that even without providing for this clause by which we propose to tell them that they are independent and they are not amenable to executive influence, they have acted as independently as the country would like them to act. From that point of view I say that the provisions are absolutely adequate, and that we are providing for an adequately independent judicature. I would like to differ respectfully from Mr. Munshi if he thought and says, that it is not possible to provide for an independent judiciary. In my view it is absolutely necessary to provide for an independent judicature but I feel convinced that provisions in this chapter secure this purpose.

I have a small suggestion to make. I have already stated that our Constitution is neither a Union nor a Federation: It is a hotch-potch of both. Dr. Ambedkar is bringing forward an amendment for the alteration of the word "Federal" to the word "Union". I do not think there is much meaning in that. But so long as there is any trace of federation in the constitution, I would beg of Dr. Ambedkar to give this important subject an independent part of itself in the constitution rather than include it in another part and give it only a chapter. The three essential elements of a constitution which is federal in character are the Legislature, the Executive and the Judicature. As far as dignity is concerned the Judicature is no less than the other two and should therefore have for itself a separate part. That suggestion I would like to make to Dr. Ambedkar. It should not be left to Chapter IV but should have a separate part for itself.

Mr. Naziruddin Ahmad : Sir, I wholeheartedly support the principle of the amendment which has been moved. Much has been said as to the propriety of putting it at this place and also as to the exact wording. What I wish to emphasise is the principle behind the separation of the Judiciary from the Executive and the independence of the Judiciary. As to where it should be inserted and what should be the exact wording is a matter which is of secondary consideration. In fact, in discussing and deciding upon this important issue it is very desirable to keep these two matters entirely distinct. If we do not like the principle we should say so plainly but if we do, then the question of its being placed in the proper place or its exact wording can be a matter of adjustment in the House.

It is somewhat surprising to hear in the House after over fifty years of agitation for securing the independence of the Judiciary, that the independence of the Judiciary is no longer a desirable thing. In one form or another, it

[Shri Naziruddin Ahmad]

has been suggested here that this is not the proper time, and that this country is not now suited to this experiment of separating the Judiciary and the Executive, and the independence of the Judiciary is no longer a covered thing. We have been under slavery for centuries and it seems to me that we have not yet been able to get rid of that slave mentality, so that having obtained independence we want to subjugate our judiciary to the wishes and whims of the executive. From the Congress and Muslim League platforms as also in the press and everywhere else the cry was that the Judiciary must be made independent and separate from the Executive.

Mr. Tajamul Husain : What about the Mahasabha platform?

Mr. Naziruddin Ahmad : They also, I believe, supported this principle. There is no one today who does not support the principle, except those who are now in power and who hitherto cried for it the most. Having obtained power they do not want to part with it so as to make the Judiciary independent of, and separate from, the Executive. That is the impression that I get from listening to the debate.

The poisonous effect of joint executive and judiciary functions is notorious. Cases have happened where the Government or the Prime Minister telegraphed to the District Magistrate that a particular case should be decided or dealt with in a particular manner. These matters have come to the notice of the High Court. One such case arose in Calcutta only a few years ago and there were severe strictures made about it. This is also happening today. It is a revealing thing that in these days of independence such things are possible. In fact, the magistracy is controlled indirectly by wire-pulling from the top. I submit that the arguments of one very distinguished Member of the House and a distinguished lawyer, Mr. Munshi, require adequate consideration. Mr. Munshi seems to suggest that the separation and independence of the Judiciary is not practicable at this stage and the argument he has advanced is somewhat unexpected, if I may respectfully say so. He pointed out that we have taken rule-making powers. There are the Industrial Courts and other things where Government has to take decisions. I would however submit that rule-making power has nothing to do with the separation of the Judiciary and Executive. Take as much power as you like. A democratic House will give you power that is needed. You can pass any laws you like. All that the independence of the Judiciary means is that within the rules you make, the power that you give to the Courts, should be allowed to be exercised without Executive interference—that when a magistrate exercises judicial functions he should be above any influence. The worst thing that he can do is to refuse real justice to the people. If there is one thing which will thrill the hearts of people and will make our independence a solid achievement it is the confidence in the Judiciary. The moment you let any person think that he will not have confidence in the Judiciary, the stability of the Government will be undermined. I submit that from this point of view the independence of the Judiciary should be guaranteed. It is not as if this is being asked for too soon. This is a reform for which we have been asking for a long time. What is the argument today against this reform? It is the argument which the British Government had been advancing for over fifty years. We are repeating their argument today. I submit that the principle should be accepted here and now without any qualification and without any mental reservation. I submit that the rule-making power and the need for interference by the State in many matters will not really go to the root of the matter. The Judiciary may yet remain independent of them. The Executive should have the power to make rules. But within the narrow limits of powers given to Court, let them be exercised independently. Sir,

a distinguished Member of the House with rich judicial experience has pointed out that this agitation is as old as the time of Raja Ram Mohan Roy, more than a hundred years ago. In fact this has been the strongest plank in the platform of our nationalist agitation. I mean to say that if the judiciary is not separated from the influence of the Executive there will be intellectual corruption. There will be undermining of the faith of the people in the judiciary.

Shri Alladi Krishnaswami Ayyar, another distinguished lawyer and jurist and a great patriot has given us the view that he accepts the principle, but says that this is not the time for it. The present time does not allow it, he says. I implore the House to consider whether we should be repeating the arguments of the bureaucratic British Government in refusing to accept the reform at once. Sir, I have said enough. I do not wish to prolong the debate. I simply wish that the principle should at once be accepted without any reservation.

Mr. President : It is eight o'clock now. I think we had better close the discussion.

Shri Brajeshwar Prasad (Bihar: General) : May I have one minute of the time of the House to speak on this motion?

Mr. President : I think the House is not willing to hear further speeches now.

The Honourable Dr. B. R. Ambedkar : Sir, I do not think any reply is necessary. If I may say so, it was rather unfortunate that Professor Shah should have moved this amendment. This matter was discussed in great detail when we were discussing the Directive principles of State Policy. I do not therefore see why this matter was raised again and why there was a debate. The matter had been practically concluded in article 39-A.

Mr. President : I will now put the amendment to vote.

The question is:

"That under Chapter IV of part V, the following new article be added:

"102-A, Subject to this constitution the Judiciary in India shall be completely separate from and wholly independent of the Executive or the Legislature.' "

The motion was negatived.

The Assembly then adjourned till Eight of the Clock on Tuesday, the 24th May, 1949.