CONSTITUENT ASSEMBLY OF INDIA

Tuesday, the 7th June, 1949

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

DRAFT CONSTITUTION—(*Contd.*)

Article 193—(*Contd.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

'(e) is a distinguished jurist.' "

[Prof. Shibban Lal Saksena]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Amendment No. 2607 was not moved.)

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

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

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

[Shri H. V. Kamath]

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

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

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

Sir, I move:

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

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

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

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

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

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

Sir, I move:

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

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

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

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

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

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

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

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

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

Sir, I move:

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

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

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

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

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

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

I beg to move:

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

I beg to move:

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

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

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

[Mr. Mohd. Tahir]

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

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

With these few words, I move these amendments.

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

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

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

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

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

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

[Shri Prabhudayal Himatsingka]

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

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

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

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

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

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

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

[Dr. P. K. Sen]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. President : The question is:

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

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

The amendment was negatived.

Mr. President : The question is:

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

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

The amendment was negatived.

Mr. President : The question is:

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

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

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

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

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

(c) is a distinguished jurist.' "

The amendment was negatived.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was negatived.

Mr. President : The question is:

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

The amendment was negatived.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The amendment was negatived.

Mr. President : The question is:

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

The amendment was negatived.

Mr. President : The question is:

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

The amendment was negatived.

Mr. President : The question is:

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

The amendment was adopted.

Mr. President : The question is:

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

The motion was adopted.

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

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

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

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

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

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

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