CONSTITUENT ASSEMBLY OF INDIA

Wednesday, the 8*th 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.*)

Shri B. Das (Orissa : General) : Sir, may I know whether the House is sitting tomorrow or not?

Mr. President : I understand it is a public holiday.

Shri B. Das : Republican as I am I do not like a holiday on the English King's birth day.

Mr. President : You are free not to attend any functions.

Shri T. T. Krishnamachari (Madras : General) : Are we working on Saturday as a compensation for tomorrow's holiday?

Mr. President : I have no objection if the House has none.

Shri R. K. Sidhwa (C. P. & Berar : General) : We have some other Committee meetings on Saturday.

The Honourable Shri Satyanarayan Sinha (Bihar : General) : We have already fixed so many other engagements for Saturday.

Mr. President : It seems the Members are not willing to sit on Saturday.

Shri T. T. Krishnamachari : It has to be remembered that the taxpayer has to pay Rs. 45 to each Member for every day spent here.

Shri Mahavir Tyagi (United Provinces : General) : If we sit on Saturday the King will feel that he is hoodwinked by us !

Article 204—(*Contd.*)

Mr. President : We shall not take up the discussion of article 204.

The Honourable Dr. B. R. Ambedkar : (Bombay : General) : Sir, I would like to move an amendment to article 204. I mentioned that I would have to consider the position; I have since considered it and I would like to move the amendment. Sir, with your permission I move :

"That with reference to amendment No. 2674 of the List of Amendments, for article 204 the following article be substituted :

'204. If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

Transfer of certain cases to High Court.

(a) either dispose of the case itself, or

[The Honourable Dr. B. R. Ambedkar]

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.' "

That is the amendment. If you like, Sir, I will speak something about it now. But I would rather reserve my remarks to the end to save time instead of speaking twice.

Mr. President : Just as you please.

Shri H. V. Kamath (C.P. & Berar : General) Mr. President, at the outset let me say that this article comes at the fag end of a long series of articles dealing with various procedural matters. In the first place, I am at a loss to understand why our Constitution has to be cumbered with so many rules of procedure. I have gone through various constitutions of the world and I find that no constitutional precedent supplied by our secretariat contains so many rules of procedure relating to High Courts or the Supreme Court. Yesterday also I raised his point as to why Article 200 should find a place in the Constitution. But Dr. Ambedkar twitted me with a facile gibe that I had not read the Draft Constitution. I gladly concede this to him, if it is a debating point that gives him pleasure, and I will freely admit that I have not perhaps read the Draft Constitution with the same care that he has done. But may I point out to him that the point I raised was quite different? As is sometimes usual with him he, however, evaded my question and gave a different answer. I had definitely and explicitly asked him whether articles of this nature had been incorporated in any written constitution of any of the countries of the world. Dr. Ambedkar pointed out to the foot-note and twitted me by saying that I had not read the Draft Constitution. I have read it with some care though not with the same care as he has done. When I went home last evening took up the various constitutions of the world and went through all of them. I found to my surprise that so many rules of procedure as we have tried to provide here.....

Mr. President : Are you replaying to yesterday's debate?

Shri H. V. Kamath : I am trying to show that this article need not be incorporated in the Constitution itself like so many other articles.

Mr. President : Then you may confine yourself to this point and not reply to something that happened yesterday.

Shri H. V. Kamath : I am more or less in a quandary. The other day you were good enough to tell us that you would not encourage the practice of asking questions of Dr. Ambedkar when he was speaking; and if you would not let us clarify our position at a later stage in connection with another article we are in a fix.

Now I will come to article 204. Because it is on a par with the articles that we have adopted already, dealing with procedural matters, I thought I could say something germane to the article in question by reference to the previous articles.

Dr. Bakhshi Tek Chand yesterday expounded saying that it shall be obligatory on the High Court to dispose of cases involving substantial questions of law. So, now, I suppose, there is no dispute so far as this matter is concerned : that is to say, that wherever cases involving substantial questions of law are pending in a subordinate court, the High Court shall withdraw such cases.

Mr. President : Relating to the interpretation of the Constitution and not merely a question of law.

Shri H. V. Kamath : Yes, Sir, that is so. The High Court shall be bound to withdraw such cases it itself. The amendment which was moved by Prof. Shah, and which stands in my name as well, sought to make it discretionary with the High Court. My Friend, Mr. Bharathi, raised a very pertinent point, which I thought my amendment would more or less indicate, if not completely cover. Mr. Bharathi cogently argued that if the High Court were to *dispose* of all these cases that come up before a subordinate court, involving substantial questions of law as to the interpretation of the Constitution, the High Court might become burdened with hundreds and thousands of cases and it would become perhaps more a court of original jurisdiction than appellate jurisdiction. To take only one instance, we have a whole chapter on Fundamental Rights—the third chapter—and when that was being discussed in the House, the criticism was frequently voiced here that we were creating more or less a paradise for lawyers with every article containing provisos restricting the freedoms and rights conferred by the article—the article conferring a right or freedom with one hand and the proviso taking it away with the other. I am afraid that when courts are moved for enforcement of these rights, substantial questions of law as to the interpretation of the Constitution are very likely to arise, because there are so many loopholes and so many provisos provided that ingenious lawyers are bound to take advantage of them—I do not say unfair advantage but fair advantage—and try to raise questions of law as to the interpretation of these articles in the Constitution. Therefore, I suggested through my amendment seeking to substitute the word "may" for the word "shall", that the High Court being a very competent body—we do not differ on that point—must be left to decide which question should be considered to be a substantial question of law as to the interpretation of the Constitution, and if it thinks it necessary to dispose of it itself, it should withdraw the case and dispose of it accordingly. Otherwise, the High Court can send it back to the subordinate court and ask it to dispose of that case and if the parties are aggrieved by the decision of the subordinate court there is the avenue of appeal and the High Court will sit as an appellate authority on that question.

With regard to the amendment of Dr. Ambedkar, I find that the first of the amendment is to the effect that the High Court, if it feels that a question of law is involved as to the interpretation of the Constitution, the High Court may dispose of the case itself. So I think, with a view to avoiding needless verbiage and wordy padding, the word "may" should be substituted leaving it to the High Court entirely to deal with the matter as it likes. I therefore feel that the amendment seeking to substitute the word "may" for the word "shall" will serve the purpose in most cases.

One last point. This article is silent on the point as to whether the reference to the High Court as regards a case involving substantial questions of law as to the interpretation of the Constitution should be made by the subordinate court itself or by the parties concerned. If the parties make the reference and invite the attention of the High Court, there is no difficulty. But if we intend that the subordinate court itself, when it entertains a case of this nature involving a substantial question of law, must invite the attention of the High Court and send the case to the High Court for a decision, then we must make the article clearer and we should say that it shall be the duty of the subordinate court to refer to the High Court a case pending before it, involving a substantial question of law as to the interpretation of this Constitution. But if we leave it to the parties, then this question does not arise. I hope Dr. Ambedkar or Mr. Munshi will throw some light on this point when either of them answers the debate. I personally feel that the simple word "may" for "shall" should meet the requirements of the article.

Prof. Shibban Lal Saksena (United Provinces : General) : The criticism which my Friend, Mr. Kamath made that this article is an article of detail and should not have found a place in this Constitution applies to most part of this Constitution. We have framed a Constitution which is a detailed Constitution, and therefore to complain now at this stage and try to chop off some portions of it will interfere with the whole scheme of things. That is something that we cannot help now.

The question raised in this article is an important one. We have provided in article 110 that all questions as to the interpretation of the Constitution shall be referred to the Supreme Court and the Supreme Court shall decide them. Therefore, if some cases involves such a question of law, it is only proper that the question regarding the Constitution should be settled first by the High Court and if the parties want to go in appeal against the order of the High Court, by the Supreme Court. Otherwise, the whole case will have to be gone through in the Lower Court, the appellate court and the Supreme Court and the expenditure will be very heavy. It is much better that when a case involves a question of the interpretation of the Constitution, this should be resolved first by the High Court and if an appeal is preferred, then by the Supreme Court. After that it remains as to who will decide the case.

The amendment moved by Dr. Ambedkar provides that the High Court may either withdraw the case to its own file or it may refer it back to the Lower Court to resolve it. I think this is a good compromise. Personally, I feel that it would be much better if such a case was originally filed in the High Court. This will mean that the litigants will not be first put to the expense of filing the case in the Lower Court and then in the High Court. I think the original case should be filed in the High Court and the High Court could, after resolving the constitutional point, send the case to the Lower Court. If there is a big case—and there have been such cases in the past, such as the Taiji case of Poona—I feel that it should be disposed of not by the High Court but by the original court. Such a case should be originally filed in the High Court and it should first decide the question of constitutional law and then decide whether it should take the case on its own file or send it to the original court. This will be fair to the litigants and the people at large.

Mr. Naziruddin Ahmad (West Bengal : Muslim) : Sir, I wish to say a few words on this article. I feel that article 204 will lead to many practical difficulties. In fact it may be mentioned that a question of interpretation of the Constitution may be raised in a petty case in a Munsif's or a Magistrate's Court. The provision is that as soon as it is known to the High Court that a question of the interpretation of the Constitution is raised, it must withdraw the case to itself and decide the question of such interpretation. The matter is not so simple as that. The question of interpretation of Constitution might depend upon the determination of facts in a particular case. It may be that a question is raised in the written statement which on the examination of witnesses and a decision on facts may no longer arise. So it may be premature for the High Court to interfere and give a decision on the interpretation of the Constitution. The question may arise in an appeal or a motion or even in the midst of a jury trial in a Sessions case. The hearing must stop and the High Court must decide the question and the case must be adjourned. After decision by the High Court, a new jury will have to be called. Endless complications will arise.

Then again, supposing the High Court withdraws the case for the interpretation of the Constitution and after its decision it goes back for determination of facts. The trial is resumed and the Court gives its finding on the facts. I would ask what would happen to a man who is dissatisfied with the preliminary

judgment of the High Court? Will he go to the Supreme Court on appeal or will be wait till the facts are decided by the original court? These are complications which the article will give rise to.

Then again, as soon as the Court or the jury, after the preliminary decision by the High Court, tries the case, is his decision open to appeal? Also, may I know whether the decision given by the High Court on the interpretation of the Constitution is subject to appeal? Will the decision of the High Court be deemed to be a decision by the trial Court or deemed to be a decision by the High Court? In the meantime the trial Court will be in a great difficulty as to what to do. The question of transfer must not depend upon a mere interpretation of the Constitution. There is no charm in a law involving interpretation of the Constitution. The vast majority of questions of law do not involve interpretation of the Constitution. The article does not say that only difficult or intricate questions of interpretation of the Constitution will be the criterion of transfer. I submit that at least it should be so limited to difficult and important questions. It may be that the question of interpretation of the Constitution that is raised is easy or extremely frivolous or unimportant. If every case must be taken up by the High Court merely because there is a contention that an interpretation of the Constitution is involved some way, it will be flooded with all sorts of petty cases. It will again paralyse the administration of justice in the *mofussil*. I submit therefore that the best thing to do would be to delete the clause altogether. The clause will lead to endless complications. I may also mention that the High Court has already got unfettered power to transfer to itself or to any other Court any case pending in a subordinate Court under section 24 of the Civil Procedure Code and also under section 528 of the Criminal Procedure Code. Of course the question of interpretation of the Constitution may sometimes be important and may concern the interests of the territory of India as a whole. In such cases the High Court may in its discretion transfer the case to itself or to any other Court without difficulty. As all questions of law are ordinarily interpreted by the lower Courts the question of interpretation of the Constitution in ordinary cases may likewise be left to be dealt with by them. This sort of artificial division of labour will otherwise lead to difficulties. There is a section in the existing Government of India Act 1935, from which I think this idea has been taken. But many important features of that section have been departed from and I think it would be better to refer to that section now. That is section 225 of that Act. That section says :

> "225. (1) If on an application made in accordance with the provisions of this section High Court is satisfied that a case pending in an inferior Court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power.
>
> (2) An application for the purposes of this section shall not be made except in relation to Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province."

One can understand a provision of this kind, namely, a decision which involves the declaration of the validity of an Act. Such question would involve questions of general importance affecting the public at large. In such circumstances the High Court must transfer the case to itself on the application of the Advocate-General of India or the Advocate-General of a province. That is a thing which is necessary and desirable. The application of the Advocate-General of India or of a province is a guarantee of its importance. Such cases would be rare. But the present clause gives the High Court no discretion whatever. It is bound to withdraw the case. It is going too far to say that even petty cases involving the pettiest interpretation of the Constitution should be transferred to, and decided by, the High Court. I need not go into these matters in greater detail. I submit that the clause should be withdrawn and if any provision is found necessary it

[Mr. Naziruddin Ahmad]

should be made on the lines of section, 225, of the Government of India Act, 1935. That is something which can be accepted. Even if we have this clause in this amended from complications will arise. It may be that in some cases the parties may be poor and if the High Court withdraws such cases to itself, it may have to give a decision *ex parte*. It will be extremely unfair, even in cases of interpretation of the Constitution, that decision should be given *ex parte* and the party put in an embarrassing position. As I have submitted, an application of a law or its interpretation may depend on questions of fact. If it is a question of fact, first of all the decision on facts should be given before taking up the question of the interpretation of the Constitution. Otherwise it will be like putting the cart before the horse. I submit that in these circumstances the clause should be withdrawn.

Pandit Thakur Das Bhargava (East Punjab : General) : Sir, I have given notice of two amendments, one of which was in respect of the substitution of the word 'may' for the word 'shall' and the other was about the deletion of the clause. Now, Sir, I am convinced that this clause ought not to be passed at all, and knowing as I do the merits of the amendment which has been moved, I still stick to the opinion that it will not be fair to pass the article. The clause, reads :

> "If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case....."

In fact, the Supreme Court is the final authority in matters like these. Logically therefore if the interpretation of the Constitution is the sole monopoly of any court, it is that of the Supreme Court. The High Court does not come in at all. In my humble submission, so far as the administration of law in this country for the last one hundred years or more is concerned, all courts have possessed the right of interpreting the Constitution and I do not think that there is any question of principle involved in withdrawing this jurisdiction from the ordinary courts. On the contrary I think that our entire Constitution is based upon the idea that every court is competent to decide this question. I know that in certain countries, there are different courts for dealing with the constitution, for dealing with the administration etc. In France, for example, there are *droit* administrative courts and other courts. In India, we have courts which are competent to decide each and every question. In fact, my complaint is that we are seeking to depart from the fundamental principles of the administration of justice as it has been and will be vogue till this proposed amendment will come into force. I deprecate the principle of pecuniary jurisdiction and special jurisdiction courts. How can one justify the wrong principle that if the dispute involves greater amounts, then the court dealing with it should have greater jurisdiction and should be more competent? I think this is a very pernicious principle. We have guaranteed equal opportunities and equality before the law to every person in this country and it is but meet that we should see that every litigant in this country gets full justice in the most competent court. It is said that the subordinate courts are not competent to interpret this Constitution, but we have started with the guarantee, with the postulate, that every court should be competent, and we have guaranteed that every person should have the fullest opportunity, of getting justice. When such is the case, it is unfair to say that the High Court and the High Court alone is the appropriate place where this Constitution should be interpreted. Now, Sir, apart from this, this question of interpretation will arise in two classes of cases. One class is between Government and Government, where both parties to the dispute can engage the best of counsels and incur any amount of expenses and the case may be decided by the High Court or by the Supreme Court. The second class of cases is between private parties. If it is a small

case involving hundred rupees or less, the parties will go to the court little knowing what the Constitution is, little knowing what a substantial question of law is. A party to the dispute may be met by the other party with the plea that the case involves an interpretation of the Constitution, involves a substantial question of law. In that case, the court will have no option but to refer the case to the High Court. Supposing the other party does not raise this question, then the Court itself may raise this question and send it on to the High Court, even though both the parties to the dispute may not desire to take the case to the High Court. In that case they shall have to go to the High Court which will involve them in more expenses by way of engaging counsels, etc., than in ordinary courts. Looking at the question from all these points I consider that this compulsory reference to the High Court is certainly not calculated to bring about the administration of justice in a less expensive manner to the ordinary litigant.

Apart from this, Sir, I think that cases may involves many points. First of all, two questions have to be decided, substantial question of law and the question of interpretation of the Constitution. Now, Sir, I do not think that these questions are of such a nature that they can be divorced from facts. After all, the question of law will not ordinary be such that it can be determined without reference to facts. Facts have to be gone into. Absolute questions of law will never arise. Then again, even if it is a question of law, it is not sufficient; it must be a substantial question of law. This will be another difficulty. In section 225 of the Government of India Act 1935, the words used are "involves or is likely to involve the question of the validity of any Dominion or Provincial Act". Here, the words used are "the interpretation of this Constitution" which have got very extensive meaning as compared with the words "validity of any Dominion or Provincial Act". Apart from this, Sir, even today the High Court are competent to withdraw any case, to transfer any case they choose. When there are, say, five hundred cases involving interpretation of any statue, I can understand the High Court withdrawing all these cases and then deciding on them. But in individual cases, one or two cases, there is no occasion for calling up these cases. I cannot repress my feeling and I cannot desist from expressing it that those who are at the helm, who want this Constitution enacted in this form, they are not fully conversant with the difficulties of the poor man. I feel that they are putting an obstacle in the way of the poor man getting justice. Why, Sir, may I ask, this question of interpretation of the Constitution is so sacrosanct that an ordinary court cannot be entrusted with it? When those ordinary courts can give justice in regard to civil claims, I cannot see any reason why they cannot decide the question of interpretation of the Constitution? Why compel the poor man, the villager, to go to the expense of going to the High Court? We are taking away from the dignity of the ordinary courts which is a characteristic of Anglo-Saxon institutions. Sir we are making a very dangerous experiment and tampering with the prestige and utility of subordinate courts and making the dispensation of justice more dilatory, onerous and expensive.

Shri Alladi Krishnaswami Ayyar (Madras : General) : Sir, I should like to make a few observations on the article as is now proposed. I feel considerable misgiving as to the utility and the appropriateness of the article and as to the advisability of departing from the existing provision. If a case raise a clear constitutional issue, which is sufficient to dispose of the case there is no difficulty. The case can be withdrawn to the High Court and from any decision of the High Court there will be an appeal to the Supreme Court as is already provided in the article relating to appeals to the Supreme Court. The real difficulty arises in cases where the constitutional issue that is raised, though a material point, is one of several issue that are raised in the case. In such cases, if the case is to be withdrawn to the High Court, though the power to send it back to the sub-

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ordinate court for the taking of evidence and for the disposal of the other points in the case is there, the question arises : is an appeal to be provided for the Supreme Court at this stage, though it may turn out that in spite of the decision on the constitutional question one way or the other, the ultimate decision in the case may not be affected at all and the party who loses on the constitutional question in the final court may ultimately win on other facts and other evidence in the case? Supposing you provide for an appeal on the constitutional question to the Supreme Court, is the case to be hung up in me meantime until you have the decision on the constitutional question one way of the other? The jurisdiction of the Supreme Court in respect of constitutional matters is very wide under our Constitution; it may raise the question of the Construction of an order, it may raise the Construction of any article of the Constitution; it may relate to the distribution of powers between the Centre and the units. Therefore, all and sundry constitutional questions might be raised in the court in the first instance; they may ultimately turn out to be material or not material for the disposal of the case. Even if material, the party who loses the case on the constitutional question may ultimately win in that case. Is the High Court to be a battle-ground for the fighting of lawyers on constitutional questions? That is the point which the House will have to take into consideration and decide.

Again a constitutional question may arise in a civil case or may arise in a criminal case. The decision on the constitutional question may be in favour of the accused or may be in favour of the Crown. What is to be happen in regard to those criminal cases? There is also the further point to be considered. It is not as if every constitutional question can be considered in vacuum without reference to the facts of a particular case. That is one of the reasons, for example, the Supreme Court of the United States never entertains what is called "consultative jurisdiction" though we have departed from that principle to some extent. In effect, this amendment practically resolves into enlarging the consultative jurisdiction on a point of law, which is one of the several points that may arise in the case. Withdrawal of the case for the decision of a particular point is a very novel procedure. In the Australian Constitution, for example, there is a provision that if a question arises as to the *inter se* powers between the Commonwealth and the States, the case itself may be withdrawn to the High Court of Australia. Therefore, it is not the withdrawal of any particular point or the decision on a particular point that is contemplated; it is the withdrawal of the whole case. Therefore, I should think it is much better that there is a general provision that the High Court can withdraw a case if on a perusal of the pleadings and material records in the case it is of the opinion that a substantial question of constitutional law arises which is enough to dispose of the case. The Court will not then direct a withdrawal of a case if it is satisfied that the constitutional question is one of the several questions that arise in the case, even if it be a material question. I ask the House, whether in the larger interests of the litigant public, leaving alone any other consideration, and in the interests of even sound constitutional jurisprudence and securing as far as possible, the ultimate decision of the ultimate tribunal at as early a stage as possible, this kind of procedure is calculated to further the ends of justice. I have considerable doubts in regard to the new proposal and I place before the House my ideas for what they are worth, for your careful consideration : "I am not wedded to any particular theory; I am not against the disposal of constitutional question as early as possible, but there must be a finality. If the constitutional question will ultimately determine the case, by all means, have a decision as early as possible. If, on the other hand, it hinges on other facts or other considerations, if it is one of the several issues in the case, the whole case must be taken up by the High Court. If the constitutional question alone is to be decided,

is there to be an appeal or is there not to be an appeal? If there is to be an appeal, the case will be hung up. As it is, I am quite clear that there can be no appeal at all because we have already provided an order is a final order only when, if it is decided in one way, it completely disposes of the case". That is that definition which we have given to the words "final order" in the chapter on Supreme Court.

With these words, Sir, I trust that Dr. Ambedkar will take these facts into consideration and after a fuller consideration will place the necessary amendment before the House. I may at once state that I am not wedded to any particular theory; I am quite open to conviction, but I do feel that this is calculated to delay proceedings, prolong litigation, and lead to unnecessary expenditure. I might mention similar things have happened already, that is in regard to cases where there was no definition of 'final order'. Every case was brought up before the Federal Court and the Federal Court decided at this stage "it is no use deciding this; we must have further facts before deciding the case". I trust that these considerations will be borne in mind by my honourable Friend, Dr. Ambedkar and other friends of the House before this clause is proceeded with.

Shri Rohini Kumar Chaudhuri (Assam : General) : *Mr. President, Sir, my honourable Friend, Mr. Alladi Krishnaswami Ayyar has asked us to consider this article taking into account the larger interests of the litigant public, and I have no hesitation in saying that if you take into account the larger interests of the litigant public, there should be no doubt that this article must be dropped. This is one of the few articles which have not been taken from the Government of India Act. There is no such provision in the previous law and I would most earnestly request the authors of this article to explain to the House the utility of this article, the circumstances which have led to the framing of this article, what were the difficulties before and what are those difficulties which this article is going to remove.

Sir, as matters stand at present, any one who is affected by the Constitution may bring a suit in the lowest court which has jurisdiction to try that suit. Sometimes, the parties may compromise in the very initial stages and the case may not at all go to the High Court. A lot of expenses will be saved. A large number of cases are disposed of in the lower court by compromise and settlement. Every one is afraid of going to the High Court because of the expenses which it involves and the delay which it involves. Suppose a party has got some grievance arising out of the interpretation of the Constitution, he files a suit against a particular party from whom he claims damage. If the matter is settled then and there in the *moufussil* court, why should you drag him to the High Court at all? There is no necessity for him to go to the High Court. After all, what is the object of filing a suit? If the quarrel involved is settled without going to the High Court, why should we have a provision which would compel the party to go to the High Court? That is the first question which strikes me.

Again, even now if an erroneous decision is giving by the Munsiff or the subordinate Judge, the party affected may always go to the High Court and there have the matter settled. Under the present arrangement every case shall necessarily go to the High Court. As far as I can foresee, the State will be one of the parties to suits of this nature. When this provision is there, the Government who has not got to fear either for the expenses or the delay,— in almost all such cases, the Government will be the defendant—will at once take the case to the High Court. If that is the position that in every case the party must, by virtue of this article 204, necessarily go to the High Court, I say, why not give to the High Court the exclusive jurisdiction to entertain the suit itself? In that case, you at least avoid filing a suit in the lower court first and after some time to take it to the High

*Uncorrected speech.

[Shri Rohini Kumar Chaudhuri]

Court. That is to say, such cases, if at all, must first be instituted in the High Court. The High Court can dispose of the case if it likes or it can send back the case to the lower court in order to assess the damage, or in order to find out the relief to be granted. I ask why have this lengthy procedure of filing a suit in the lower court? Every plaintiff must know that it is a case which will involve an interpretation of the Constitution. Even if he does not know, every case of this nature in which the Government will be a party will be taken to the High Court. In order to avoid double expenses to the litigant, it should be laid down in the Constitution, if you want this article at all, that the High Court shall have exclusive jurisdiction in such cases. Personally speaking, I do not see any utility of this article. No one has suffered by the absence of this article for so many years in the Government of India Act. I have not found any complaint in the press or in the platform that on account of the absence of such an article, injustice has been done or that parties have been seriously affected. After all, everybody knows that the number of such cases will be limited. If such cases are limited, why not give the High Court exclusive jurisdiction to entertain such suits? After deciding the question of interpretation of the Constitution, the High Court may either dispose of the case or send it back to the lower court for the purpose of adjudication of damage or to find out what is the relief that should be granted. I particularly request my honourable Friend to take this aspect of the matter into consideration. I tried to place this aspect of this matter before him outside the House; but I failed. I am at my wit's end to get clarification from that quarter, but I have always been ignored and sometimes ignored with contempt. I believe in a small piece of poetry which I read in my school days:

> "Once or twice though we may fail,
> Try, try, try again."

In my case, I have tried several times and failed. I always say, "try, try again" and this is one of my attempts. I shall also make future attempts.

Shri K. M. Munshi (Bombay : General) : Mr. President, Sir, no doubt this question is fraught with difficulties and the House has to consider as to the best method of solving the difficulties.

I find that three points are raised against either this particular article or the wording of the amendment as moved by my honourable Friend Dr. Ambedkar.

The first is that there should be no such section. The second is that if there is to be such a power in the High Court, the whole case should be disposed of by it and not merely the point of constitutional law. The last position is that if a constitutional issue is a preliminary issue, it may be referred to or withdrawn to the High Court; but where it is a mixed question of law and fact, it would not be proper to do so. These are the three positions that have been taken up in the debate so far.

In this connection, it is necessary to remember the position of a constitutional issue. A law is passed affecting, say the liberty of a citizen, which contravenes the Fundamental Rights. In that case, he has the constitutional right straightaway to go either to the Supreme Court or to the High Court. Therefore, in most criminal cases, the citizen has a right to go to either of the two courts with a view to have a constitutional question determined. That is the first position.

The second position is that by articles 110 and 112, the Supreme Court is invested with the jurisdiction of deciding constitutional questions from any judgment or decree or final order from any court or tribunal by way of appeal, or where special leave is granted. Therefore, is all matters relating to constitutional questions there is a final resort to the Supreme Court.

There are certain classes of cases which do not fall within the one category or the other, and the question is whether a special method should be devised by which the constitutional question is decided before going into other unrelated questions of fact or law in a case or whether it should be left to be decided in the ordinary course till after a first and second appeal, the case reaches the High Court. We have to consider two sets of difficulties. One difficulty has been placed before the House by my honourable Friend Shri Alladi Krishnaswami Ayyar and other honourable Members of this House. But the more important set of difficulties which we have to consider is this. A constitutional issue goes to the root of the matter and if that is not taken up and decided at the earliest stage, there will be considerable doubt as to the position in law. Take, for instance, the question whether a particular law falls within the ambit of the legislative power of a State or the Centre. That question may be so important that if not decided as early as possible, it would lead to transfer of interests; to extinction of rights or to divesting vested rights. After all this is done for a number of years, say four or five years, the Supreme Court or the High Court declares the legislation to be *ultra vires*. Is it not much better therefore that the constitutional provision should be construed at the earliest possible opportunity to avoid such difficulties?

This article is intended to provide against such difficulties. What has happened in the past is this. One subordinate judge decides a question of law in one way; in another district another view is taken; and this diversity persists till the matter is decided by the High Court. It is desirable that this kind of diversity of judicial interpretation should prevail as regards a constitutional point? If not, a method has to be devised which would enable a litigant, if he so desires, to have such a point decided as early as possible.

This is nothing new. The House will remember that even under the C.P.C. Order 46 there is a power in the subordinate courts to refer a question of law to the High Court on reference if the question of law becomes important. Again as already mentioned to the House by my honourable Friend Mr. Naziruddin Ahmad, under Section 225 of the Government of India Act, it is competent to the High Court or rather it is incumbent on it to transfer to itself all cases in which a constitutional point has been raised. There is already precedent for deciding certain issues of law or constitutional issues by the High Court by taking it out of the hands of the subordinate courts. The amendment which is now moved, therefore, makes a provision that if in a subordinate court a question dealing with constitutional propriety is raised, one or the other party could go to the High Court and satisfy the High Court as to two things : first, that there is a substantial question of law as to the interpretation of this Constitution; and secondly it is necessary for the disposal of the case, not any issue which has no bearing on the disposal of the case. If these two conditions are fulfilled, then only will the High Court withdraw the case. In withdrawing it, the High Court will do exactly what it can under Section 225 of the Government of India Act, but without the limitation that the High Court must dispose of the whole case. We have two alternatives in this article, one is that the High Court can dispose of the case itself or if it thinks proper, it shall determine the question of law only. In the latter case it will decide the particular question of law and send the case back to the subordinate court for the decision of further issues. In mixed questions of law and fact the High Court will consider the question whether it is possible to isolate the constitutional question and of course if it is not possible to do so, it will dispose of the case itself as it could do under the present Section 225 or ask the first court to determine the question of fact necessary for the determination of the legal issue. There is no clear-cut way out of the inconvenience involved but on a balance of convenience it is much better that there should be uniformity in the construction of the constitutional provisions rather than it should be left to the subordinate courts to take divergent views.

[Shri K. M. Munshi]

I am surprised at the opposition to this article for this reason that vast powers of issuing constitutional writs which the House has vested in the Supreme Court are such that a very large number of cases relating to constitutional propriety will be determined by the Supreme Court or the High Court before anything else is done in a case. My Friend Pandit Bhargava raised two objections, one of the cost of litigation and the other of delay. If the whole position is analysed neither of these arguments will be found to be valid. As regards cost, is it not much cheaper that a constitutional issue which goes more or less to the very foundation of the case should be decided at an early stage rather than evidence which will be useless is led in the case before the party comes in appeal to have the constitutional issue decided? The latter course is bound to be more costly. Most cases would practically be decided one way or the other by the decision of the constitutional issues. Then as regards the delay, it is common knowledge that in subordinate courts it takes a long time before a case is disposed of and the party which wants to raise a constitutional issue is sure to go to High Court at an earlier stage of the case and there will be no additional delay so far as the progress of the case in the lower court is concerned. Long before a case ordinarily reaches the hearing stage in the subordinate court such an issue would have been decided by the High Court.

The next point is this that such a decision at an early stage would be of an all India application. Clause (b) of the new amendment says:

> "(2) determine the said question of law and return the case to the Court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment."

The word used is 'Judgment'—the same as in article 110. Therefore on this question of law if necessary parties can straightaway go to the Supreme Court in appeal so that there may be uniformity of decision throughout the country. It is in the nature of consultative jurisdiction—though not quite—but the way in which the Constitution has set up the Judiciary as the arbiter of constitutional propriety it is absolutely essential that at the earliest possibility there should be one decision, one definite binding decision throughout the province if not throughout the whole country on constitutional provisions. The whole machinery devised in article 25, 120, 112 is to facilitate such uniformity and this article only adds to the scope of this constitutional forum. I therefore submit that this is the best way out of the difficulties and I hope the House will accept it.

Shri T. T. Krishnamachari : Mr. President, Sir, as a layman who has been listening to the dissertations on law by the lawyer Members of this House for a number of days past, I feel that the time has come when a word of warning has to be uttered against the manner in which amendments are moved, changes are made, jurisdiction is being extended to cover cases which are purely based on conjectures and on hypothesis with all the uncertainty that goes with such procedure as one hypothesis is as good as another. Today we have heard a number of lawyers one contradicting the other, one visualizing instances where contingencies which we seek to incorporate in an article, are not likely to occur or are likely to be controverted. In fairness to all these speakers it is perhaps safe to assume that everybody is right up to a point. After all if the whole thing is going to be based on hypothesis there is certainly nothing sacrosanct about what occurs to Mr. Munshi as against what occurs to Mr. Alladi Krishnaswami Ayyar.

Sir, I have no desire to controvert the utility or otherwise of the article before the House and the amendment proposed by my honourable Friend Dr. Ambedkar. But I would like to say this that in matters like this it is best to leave it to Parliament to make laws or allow the matter to be regulated by rules that

might be made by the Supreme Court or by the Supreme Court in conjunction with the High Courts, which will have the approval of Parliament, if necessary. The whole point really is, are we here in a position to visualise all possible contingencies that are likely to arise? I do not think it is possible. Much as I respect the legal wisdom of those concerned with the drafting of this amendment or the amendments that have been agreed to and approved by the House in regard to the previous articles, I feel a certain amount of hesitancy in controverting the allegation made by some Members of this House that this will tend to increase the possibilities of litigation in the country.

Attempts have been made right through the discussions in regard to the judicial provisions to extend the scope of the work of the Supreme Court. It has been said that that is the only way in which we could guarantee the liberties of the individual. On a subsequent occasion probably an opportunity will occur, when I would like to deal with the point whether liberties can best be defended by a multiplication of appeals. In the present instance regarding this particular amendment in regard to article 204 and those that preceded it, Mr. Munshi says that we want one binding decision which will cover all possible cases in future. Is it possible? If one decision were binding would there be so much case law in the world? Mr. Munshi is undoubtedly familiar with the history of judicial procedure in America, where the country has suffered a great deal of uncertainty by the constitutional provisions being terse instead of being elongated to fit into it all manner of contingencies that are likely to arise which the human brain can visualise in the manner in which we are considering the article before the House.

At the same time, I feel that there is no particular magic attached to Mr. Munshi's interpretation as against Mr. Alladi Krishnaswami Ayyar's interpretation. A friend has asked me what happens if article 110 operates and the question involves a matter of interpretation of the Constitution. Does it go to the Supreme Court? We do not know, but there is no use Mr. Munshi saying "this and this will happen and everything will ultimately be all right". Every thing cannot be all right. We are dealing not merely with all contingencies such as we think are likely to arise but we are also dealing with the human material. One judge may hold one opinion and give a decision in a particular manner and another might give another decision. The decision of one set of Judges cannot be binding on those that decide similar questions later on. There is always the possibility of one decision being over-ruled by another.

While this amendment might go through for the time being I do feel that right in this Constitution there must be some provision by which most of these lacunae can be covered by parliamentary legislation. I am not one of those who believe that we must defend the country, the litigant the lawyer and everybody else as against the vagaries of Parliament. I would rather trust five hundred people with less than even mediocre abilities than four or five people with perhaps some claim for superior abilities but at the same time having their own personal prejudices. And in this matter I am undoubtedly right in view of what is happening in the United States, where the judges are influenced by political considerations and a whole series of judgments given by them until 1936 had been changed after 1936 as in some instances even the same Judges have been interpreting the provisions of the Constitution in a different way. Therefore it seems to me that somewhere in this Constitution there must be a provision so that most of these difficulties can be removed by parliamentary legislation, even though it might mean that you are allowing Parliament to arrogate to itself a certain amount of jurisdiction over the Courts as a relative quantum of jurisdiction will thereby be taken away from the Supreme Court and the High Courts. That seems to be the only way in which we can prevent increase of litigation in the Courts.

[Shri T.T. Krishnamachari]

I would like before I resume my seat to tell the House that all that we are doing today is we are running right counter to popular opinion, which does not want multiplication of litigation, and we are merely providing opportunities for more and more litigation. I do not want to claim any particular type of wisdom for having uttered on a previous occasion that this Constitution might well prove a paradise for lawyers. Whether I was right then or not, I do feel that I am more than right today in view of the provisions that we have introduced both in regard to the Supreme Court and the High Courts. We are multiplying the possibilities of litigation increasing tremendously. My honourable Friend Mr. Munshi said in a different context that the opportunities for employment of High Court judges will increase tremendously. If that were to be so litigation must increase. Who will pay for it? It will be an unnecessary waste of the wealth of the people, who in most cases cannot afford to pay. Ultimately when two litigants begin to quarrel it ends up like the proverbial fight between the Kilkenny cats; what is left is only the tails. This might profit the lawyers, this might profit the judges and also provide revenue for the State. But the people of the country will suffer. I therefore feel that unless the House or those who are responsible are guided by considerations purely of the immediacies of the situation or whether a particular case they have in mind can be covered or not, they should provide, in the interest of the country, a saving clause somewhere by which most of these matters will be dealt with either by Parliamentary legislation or by rules made by the Courts with the approval of the Parliament, so that possibilities of any phenomenal increase in litigation might be avoided.

I do not know anything about the present amendment except that it looks simpler than other amendments that have been suggested, since the House adjourned yesterday, which were longer and therefore more difficult to understand. Therefore, perhaps, there is something in this amendment to commend itself to the consideration of the House. I would only submit that this should not be treated as the last word on the subject and the House must empower the Drafting Committee or those responsible to go through the whole series of articles passed in this connection and provide some kind of safety valve, by which parliamentary interference can avoid an increase in litigation.

With these reservations, Sir, I support the amendment moved by Dr. Ambedkar.

The Honourable Dr. B. R. Ambedkar : Sir, I do not think any very long discussion is necessary to come to a decision on the amendment I have moved. The House will remember when we were dealing yesterday with article 204 my Friend Mr. Bharathi raised a question which related to the last sentence in article 204, *viz*., that the High Court shall withdraw the case to itself and dispose of the same. The question which Mr. Bharathi put, which I thought was a very relevant one, was this. Why should the High Court be required to withdraw the whole case and dispose of it, when all that the main part of article 204 required was that it should deal with a substantial question of law as to the interpretation of the Constitution? His position was that in a suit many questions might be involved. One of them might be a question involving a substantial question of law as to be interpretation of this Constitution. The other question may be questions as to the interpretation of ordinary law made by Parliament. If there was a case of this sort which was a mixed case, containing an issue relating to the interpretation of the Constitution and other issues relating to the interpretation of the ordinary law while it may be right for the High Court to possess the power to decide and pronounce upon the question relating to the interpretation of law, why should the High Court be required to withdraw the whole case and decide not merely on the issue relating to the interpretation of the Constitution but also upon other issue relating to the inter-

pretation of ordinary law? As I said, that was a very pertinent question the force of which I did feel when I heard his argument and I therefore asked your permission to allow this article to be kept back.

Now, if I may say so, a similar question was raised by my Friend Shri Alladi Krishnaswami Ayyar when we were dealing with article 121, which also dealt with appeals to the Supreme Court in cases which were of a mixed type, namely, cases where there was a question of constitutional law along with questions of the interpretation of ordinary law made by Parliament. According to the original draft it was provided that in all cases where there was an issue relating to the interpretation of the constitutional law, such an appeal should be decided by a Bench of five Judges. The question that was raised by Shri Alladi Krishnaswami Ayyar was that a party may, quite wickedly so to say-for the purpose of getting the benefit of a Bench of five-raise in his grounds of appeal a question relating to the interpretation of constitutional law which ultimately might be found to be a bogus one having no substance in it. Why should five Judges of the Supreme Court waste their time in dealing with an appeal where as a matter of fact there was no question of the interpretation of constitutional law? The House will remember that his argument was accepted and accordingly, if the House has got papers containing the Fourth Week's Amendment, List No. I, Amendment 43, they will find that we then introduced a proviso which said that in a case of this sort where an appeal comes from a High Court involving not necessarily the question of the interpretation of law but involving other questions, the appeal should go to an ordinary Bench constituted under the rules made by the Supreme Court which may, I do not know, be a Bench of either two Judges or three Judges. If after hearing the appeal that particular Bench certifies that there is as a matter of fact a substantial question of the interpretation of the Constitution, then and then alone the appeal may be referred to a Bench of five Judges. Even then Bench of the five Judges to which such an appeal would be referred would decide only the constitutional issue and not the other issues. After deciding constitutional issues the Judges would direct that the case be sent back to the original Bench of the Supreme Court consisting either of two or three Judges to dispose of the same.

My first submission is this, that in making this amendment to article 204 which I have moved this morning we are doing no more than carrying out the substance of the proviso to clause (2a) of article 121 contained in amendment No. 42. Here also what we say is this : that the High Court, if satisfied, may take the case to itself, decide the issue on constitutional law and send back the case to the subordinate Judge for the disposal of other issues involving the interpretation of ordinary law made by Parliament. I do not think we are making anything new, novel, strange or extraordinary as compared to what we have done with regard to the Supreme Court. Therefore my submission is this that if we accept, as we have accepted, the proviso to clause (2a) of article 121, the House cannot be making any very grave mistake or any very grave departure...

Shri Alladi Krishnaswami Ayyar : On a point of explanation, Sir, I shall feel obliged if it is your view that there is no distinction between a point arising in the appellate stage and a point arising when the case is pending in the court of first instance.

The Honourable Dr. B. R. Ambedkar : I am only dealing with the general framework of the amendment. My submission is that the amendment, I have moved is exactly on a par with the proviso that we have added to clause (2a) of article 121. Therefore my submission is that there is no very grave departure from what we have already done.

[The Honourable Dr. B.R. Ambedkar]

Then two questions have been raised. One is with regard to the use of the word 'judgment'. It has been said that the word 'judgment' has been differently interpreted and that the party whose case has been withdrawn by the High Court for the purposes of determining the constitutional issue may not be in a position to approach the Supreme Court, because under article 110 we have said that an appeal to the Supreme Court shall lie only from the judgment or the final order of the High Court. The contention is that the judgment may not be regarded as a judgment within the meaning of articles 110 or may not be regarded as a final order. Well, having used the word 'judgment' in article 110 in that particular sense, namely a decision from which an appeal would lie to the Supreme Court, I do not personally understood why the use of the word 'judgment' in this amendment should not be capable of the same interpretation. But if the contention is correct I think the matter could be easily rectified by using the word 'decision' instead of 'judgment' and adding an explanation such as this that "the decision shall be regarded as a final order for the purpose of article 110". I do not think that that difficulty is insuperable.

With regard to the question of appeal it would certainly be open to the party whose case has been withdrawn to do what it likes. Once the judgment has been delivered by the High Court, in a case which has been withdrawn for the purpose of decision of the issue regarding the interpretation of the Constitution, it may straightaway go to the Supreme Court and have that question finally decided, or it may wait until all issues have been decided by the subordinate Judge, an appeal has gone through the High Court on findings of fact with regard to those particular issues and thereafter take the matter to the Supreme Court. We do not bind the party to any of the procedure if the issue regarding the interpretation of the Constitution is on the same footing as what we may call a preliminary issue so that when a decision is taken it will be a decision of the whole case. I have no doubt about it that the party affected will, rather than proceed with the rest of the case before the subordinate judge, go immediately to the Supreme Court and have an interpretation of the Constitution. I see no difficulty at all in this.

Now, the other question that was raised was this : my Friend Shri Alladi Krishnaswami Ayyar said something sitting there. I could not hear him. But in private conversation he mentioned that it may be very difficult for a High Court to make a severance between an issue relating to the interpretation of the Constitution and the other issues and it may be that for the interpretation of the other issues and for the interpretation of the issue relating to the interpretation of the Constitution the High Court may have to consider other issues as well. It was also suggested that supposing the case was really a small one, but did involve the question of interpretation of law, why should the High Court be not permitted to dispose of such a small case rather than have it sent back to the subordinate court? Well, in order to meet both these contingencies, the amendment gives the power to the High Court to dispose of the case itself. I do not think that that would not be found sufficient for the difficulties which have been pointed out. I therefore submit that the amendment does carry out the intentions we have, namely, that the High Court should not be encumbered with a decision of all the issues when it considers the whole case; it may be left free to decide a particular issue with regard to the specific question of the interpretation of the Constitution.

May I say one more thing? There is no doubt a power under the Civil Procedure Code contained in section 24 permitting the High Court to withdraw any case to itself and determine it. But the difficulty with section 24 is that if the High Court decides upon withdrawal it shall have to withdraw the whole

case. It has no power of partial withdrawal, while our object is that the High Court should be permitted to withdraw that part of the case which refers to the interpretation of the Constitution. My submission, therefore, is that unless you provide specifically as we are doing now under article 204, the High Court will have to withdraw the whole case to itself if it wants to decide the question of the interpretation of this Constitution.

I would like to say one thing more. You will remember that there was no time between yesterday and this morning to apply all that close attention to the wording of this particular amendment which I have moved. I am therefore moving this amendment because I think it is very wrong to keep on holding up article after article because of certain minor defects or discrepancies. I should like to say that while I move this amendment I would like to have an opportunity given to the Drafting Committee to make such changes as it may deem necessary in order to remove the defects that have been mentioned if there are any, and bring it into line with the other articles which the Assembly has passed.

Mr. President : I will now put the amendment of Professor Shah No. 2674 to vote.

Mr. H. V. Kamath : I thought Dr. Ambedkar's amendment superseded this amendment.

The Honourable Dr. B. R. Ambedkar : I am substituting the entire article. You may withdraw amendment No. 2674.

Mr. President : Your amendment is for substituting the whole article. I will then put your amendment to vote.

The question is :

"That for article 204 the following article be substituted :

'204. Transfer of certain cases to High Courts. If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.' "

The amendment was adopted.

Mr. President : Now this becomes the original article. It disposes of all the amendment moved.

The question is :

"That article 204, as amended, stand part of the Constitution."

The motion was adopted.

Article 204, as amended, was added to the Constitution.

Article 205

Mr. President : The House will now consider article 205. There is an amendment to this by Dr. Ambedkar, No. 2676.