

THE HIGH COURT JUDGES (CONDITIONS OF SERVICE) BILL, 1954

THE MINISTER FOR HOME AFFAIRS AND STATES (DR. K. N. KATJU): Sir, I beg to move:

"That the Bill to regulate certain conditions of service of the Judges of High Courts in Part A States, as passed by the House of the People, be taken into consideration."

Hon. Members would find brief reasons for introducing this Bill in the Statement of Objects and Reasons. Till now all matters dealt with in the Bill have been regulated by rules. It was considered proper that all this should be embodied in an Act of Parliament. One substantial thing which is new is a provision for grant of a minimum pension, no matter what may be the length of the service. At present no judge can qualify for any pension at all unless he serves for a period of 7 years. If he does so, for 7 years or more, then hon. Members will find from the various provisions in the Act that he earns a basic pension, as it is called, of Rs. 5,000 for the first 7 years and to that basic pension of Rs. 5,000 is added in the case of a puisne judge of a High Court Rs. 670 for each year of service. Therefore if a person serves 7 years, he will get basic pension of Rs. 5,000 plus nearly Rs. 3,200 added to it. That means altogether Rs. 8,200 which works out to Rs. 700 per mensem. Now it was considered that this is somewhat harsh, the more so because when the Constitution came into operation, the Constitution imposed certain disabilities on judges. Till the Constitution was passed each judge was entitled to practise anywhere he likes. In the earlier days he could even practise in his own High Court but the later procedure was that before his appointment he gave an undertaking that he would not practise before the High Court in which he had presided. But he was

able to practise in any other High Court, in any other State or the Supreme Court. In the Constitution for reasons which appealed to the Constitution-makers, there was an absolute bar against practice. He cannot practise anywhere in India either in the Supreme Court or in any other court or anywhere else or in his own High Court. That clause is considered to be a great hardship because there were many judges who had not filled the period of 7 years, who were not likely to do so, and I know of a few who were inclined to resign but they were asked to carry on and some sort of an assurance was given that their cases would be considered sympathetically. Today therefore, the provision is that if any judge retires after the coming into of the Constitution *viz.*, after the 26th January 1950, then he will be entitled to a minimum pension of Rs. 500 per month. The point may be raised that unless care is taken, the provision may work to the disadvantage of the tax-payer *viz.*, a judge may be appointed today who is only 59 years of age or 58 years of age and the taxpayer may be made to pay him a pension of Rs. 500 per month for the rest of his life. In the other place when this clause was under discussion I said, and I repeat that assurance here, that without laying down an absolutely cast iron rule, Government is now working upon a rule that no appointment shall be made for less than a period of 5 years or something thereabout, so that the High Court and the people of that State may have the benefit of the service of a man of that eminence for a minimum period of 5 years. With that assurance, I imagine that any objection to the generality of this provision would disappear. Of course in the past there have been cases of

judges who have had to retire with 2 years service. They are indeed benefited from this particular rule. That is the one basic thing to which I have drawn prominent attention of hon. Members.

[Dr. K. N. Katju.]

As for the rest, it goes into the details—rather technical details—as to how the leave is to be calculated. The maximum leave which a judge is entitled to is one-fourth of his service, but in calculating that, you have, what is called, leave on half allowance. The payment for one month is full salary. For the next four months, if you are allowed it, full allowance means Rs. 2,200 and odd, and half-allowance would mean Rs. 1,100. That is the way it goes. It is somewhat of a different type from the rules applicable to ordinary government servants and they have been coming on now for the last one Hundred years or so, the main consideration being that the case of the Judges is somewhat different from the ordinary government servants, high or low, because of the hot-weather vacation, the summer vacation which the judges enjoy and which works out roughly to anything between two months to ten weeks in the year. They get full salary for that and if they work during the vacation, then there is some allowance given—some weekly allowance.

SHRI K. S. HEGDE (Madras): Will that also continue if the present Bill is passed?

DR. K. N. KATJU: Which one?

SHRI K. S. HEGDE: Will the present provisions in that respect continue or will they be replaced by the provisions in this Bill?

DR. K. N. KATJU: Which provisions does the hon. Member mean?

SHRI K. S. HEGDE: The provisions regarding the allowance to the judges working during the vacations. Will those provisions still continue?

DR. K. N. KATJU: Which particular rule?

SHRI K. S. HEGDE: Suppose the judges work during the vacation—Then will.....

DR. K. N. KATJU: It is provided by the rules. Anyway, that is a very small matter.

Now, this is the scope of the Bill. There are no amendments. There is one formal amendment which I have given notice of, namely about how the time is to be calculated with reference to the time of commencement of our Republic and all that. There is another amendment, a copy of which I have got, but I am not sure whether it is in order—probably it is not in order—being a financial matter. Therefore, I take it that hon. Members have no objection to any particular clause in the Bill.

SHRI K. S. HEGDE: I have given notice of two amendments.

DR. K. N. KATJU: I have got them,, but they are out of order.

SHRI RAJAGOPAL NAIDU (Madras) : This question whether it is in order or not, is for the Chair to decide, and not for the Minister.

DR. K. N. KATJU: I have only-expressed

SHRI RAJAGOPAL NAIDU: Sir, on a point of order

DR. K. N. KATJU: What is the point of order? I have not given any ruling. After all, as a Member of this House I am entitled to give my opinion.

' SHRI RAJAGOPAL NAIDU: But a Minister cannot assume the role of the Chairman.

DR. K. N. KATJU: I am very sorry. I am not trying to trespass into the jurisdiction of the Chair. I am only expressing my opinion that these amendments seem to be out of order-

Bill

My hon. friend will surely address the Chair and get the ruling of the Chair.

Now, there is just one fact to which I would like to invite attention. I do not know how the discussion here will proceed. In the other place many hours were occupied in an academic discussion about the methods of appointment of judges, who should be the persons approving of the appointment, how the whole procedure should be regulated and so on. But so far as this Bill is concerned, it has nothing to do with all that. Of course, you may permit a discussion, for it may be of great and profound academic interest. But it is all laid down there in the Constitution, namely, that whenever there is a vacancy, who is to initiate the proposals for filling up that vacancy. There is the procedure that the Chief Justice should address the Chief Minister. The Chief Minister should consult the Governor and it comes up here, the Chief Justice of India, who should be consulted and so the whole procedure is there to be gone through. But this Bill does not deal with that. It cannot, because it is a matter provided for in the Constitution itself, and if anybody wants to amend the procedure, then the procedure is to come up with an amendment of the Constitution. This is the position as it is. So far as this Bill is concerned, in the Statement of Objects and Reasons, I have already referred to article 221 which says that Parliament can enact suitable legislation for the purpose of providing for leave and pension and any other facilities. In this Bill, under the head "Miscellaneous" we have provided for travelling allowance and medical facilities and many other things.

With this short preamble, I move.

MR. DEPUTY CHAIRMAN: Motion moved:

"That the Bill to regulate certain conditions of service of the Judges

of High Courts in Part A States, as passed by the House of the People, be taken into consideration."

SHRI S. MAHANTY (Orissa): Sir, before I proceed to consider the Bill proper, it may be worthwhile if I first of all invite your attention to the very title of this Bill—The High Court Judges (Conditions of Service) Bill, 1954. The hon. Home Minister, an experienced man of affairs that he is, has anticipated the scope of the debate that might ensue, and has also tried to influence decisions in higher quarters to rule it out of order if any discussion goes beyond some of the specific provisions, that is to say, provisions regarding leave, salary, medical facilities etc. Most respectfully, I beg to submit, Sir, conditions of service mean not only leave, salaries or medical facilities but some fundamental questions are also involved there. It is true that what has been already laid down in the Constitution should be our guide, that within that ambit we have to guide ourselves. But we have accepted the Indian Constitution **not** as the last words, but also to change it constitutionally. Therefore, I would like to submit that if we touch over any of those articles of the Indian Constitution which relate to the conditions of service of High Court Judges, it may not be ruled out of order.

MR. DEPUTY CHAIRMAN: It all depends on what you say.

SHRI S. MAHANTY: Coming to the Bill itself, by and large, our High Court Judges have maintained a very high standard of judicial integrity and independence. There is no gain saying that fact.....

SHRI B. K. P. SINHA (Bihar): Agreed.

SHRI S. MAHANTY: in spite of the allurements held out to them by the executive from time to time

SHRI B. K. P. SINHA: Question.

SHRI S. MAHANTY: Sir, since it has been questioned.....

KAZI KARIMUDDIN (Madhya Pradesh): What are the allurements offered to the judiciary?

SHRI S. MAHANTY: Yes, I am coming to it.

SHRI RAJAGOPAL NAIDU: Jobs after retirement.

SHRI S. MAHANTY: I would like to invite the attention of the House to the report of the Public Accounts Committee for 1949. There the Committee has referred to a case where a High Court Judge was paid Rs. 10,000 in the shape of fees for arbitrating a labour dispute. Sir, the Public Accounts Committee were of the opinion that such a procedure goes a long way towards influencing the integrity and independence of the judiciary. The second instance is—I have been provoked to it and though I had no mind to touch on that, since I have been provoked, in fairness to the House, I may also cite that illustration. Now, let us take the case of a particular High Court. And let us take a State somewhere in India, it may be a Part A State or a Part B State, whatever it isay be. There the opposition was overpowering. A vote of no-confidence was brought against the party in power and the party in power could survive only with two votes. What did the executive do there? They brought in the Deputy Leader of Opposition and made him a Judge of the High Court. It was in Rajasthan.

This becomes all the more obnoxious when one remembers the background that when the particular gentleman was recommended to sit as a Judge on that High Court, the Chief Minister held otherwise; he was not in favour of the proposition. Number three is this, the House has

just now heard what Dr. Katju said; he said that some High Court Judges came to him and told in confidence that they were going to resign but he advised them—if I have taken down correctly—that, their cases would be considered with sympathy and they need not resign. So, now a pall of doubt has been lowered on some High Court Judges or on some hon. High Court Judge and, in all fairness to them, that pall of doubt should be lifted by the hon. Minister. If he could kindly let us know the Judges of which High Court approached him and to whom he gave this piece of advice

DR. K. N. KATJU: May I interrupt, Sir? I did not give any advice. I am only telling you what was reported to have happened. This was before the Constitution was framed and I may also add, Sir, that today's procedure is that as a normal matter, the person who is a Judge of the High Court is not allowed to accept any sum over and above his salary for doing any duty.

SHRI S. MAHANTY: Sir, I am very glad for the correction but only the reports would show whether it was an advice or a suggestion or whatever it was but the little point that I was trying to make was that such things go a long way in influencing the independence and integrity of the judiciary. I do not dispute the proposition that the judiciary in India has a very high and noble tradition and, there is no gainsaying the fact also that a new entrant is always imbibed with the high and noble traditions of the judiciary but the human element being what it is, one has to take into consideration the fact that such things are not conducive to the maintenance of independence of the judiciary.

Now, Sir, as you know, according to article 217(1) every Judge appointed by the President can be so appointed after consultation with the

Governor of a State and under article 163, the Governor again exercises this function not at his own discretion but he has to abide by the advice of his Council of Ministers. Now, when the Council of Ministers comes in, well, it is all a question of a party affair. We know, Sir, instances—I am not going to divulge the instances on the floor of this House because that will not be fair, but I know, Sir, of instances—when

SHRI B. K. P. SINHA: Mr. Deputy Chairman, is he not going much beyond the confines of this Bill? We are not discussing the Constitution. We take the Constitution as it is and proceed on that basis to discuss this measure.

SHRI S. MAHANTY: I am very glad, Sir, that the hon. Member has pointed my attention to it. It may be too deep for him but we have taken oath to change this Constitution constitutionally also. Do you want to change it by unconstitutional means?

MR. DEPUTY CHAIRMAN: But so long as the Constitution is there, you are governed by the provisions of the Constitution. (*Interruption.*) Order, order. Please proceed, Mr. Mahanty.

SHRI S. MAHANTY: Mr. Deputy Chairman, I have clarified my position at the beginning that conditions of service do not only mean pay, pension and medical benefits, etc.

MR. DEPUTY CHAIRMAN: Please proceed.

SHRI S. MAHANTY: Yes, Sir, I shall proceed.

MR. DEPUTY CHAIRMAN: Do not mention any names.

SHRI S. MAHANTY: I am not mentioning any names. I know my friends are scared about it.

MR. DEPUTY CHAIRMAN: As long as the Constitution is what it is, you have to accept it. You please remember that.

SHRI S. MAHANTY: Yes, Sir, I am not disputing the validity of these provisions but I am simply pointing out the consequences that flow out of these provisions. If you rule it out of order, well I am perfectly willing to abide by your rulings.

Therefore, when the Governor exercises his function and abides by the advice of his Council of Ministers, the influence on the independence of the judiciary comes in. Therefore, I congratulated the judiciary, for in spite of the allurements of the executive, by and large, they maintained a very high and noble record, with exceptions of course.

Now, Sir, the provisions in this Bill for pension, leave and all that proceeds from the basic assumption that no person who has held office as a Judge of any High Court in India can act in any manner in any court of India, that means, he must practise in any court of India. Well, I am not going to dispute the validity of that provision in the Indian Constitution but what I am trying to suggest is that there is no justification why the tax payers of India should be made to pay something if they could avoid it when the Judges were allowed to practise. I do not believe in the proposition that the independence of the judiciary will be impaired if the

MR. DEPUTY CHAIRMAN: You must get the Constitution changed for that purpose.

SHRI S. MAHANTY: I am not suggesting any change in the Constitution. I am only raising the proposition why the tax-payers of India should be committed to pay something if they could easily avoid it. Now, the hon. Home Minister has referred to it; if he had not referred to that, I would not have spoken about it but since to?

[Shri S. Mahanty.]

! referred to that, I am simply presenting the other side of the picture. Now, the question is that before the Indian Constitution was framed¹, the High Court Judges were allowed to practise. This is a queer proposition that the President of India, after he retires from his office, can practise in any district court even; the Prime Minister of India can practise; the Home Minister of India can practise; the Law Minister of India can practise after retirement from office. So, these high dignitaries are allowed to practise, dignitaries who hold¹ a much more responsible position where also independence, impartiality and a sense of justice come into play much more than in the case of a High Court Judge. Therefore, if the course of justice is not going to be impaired by the above named dignitaries practising in any court after their retirement there is no reason why the High Court Judges should be debarred from practising.

KAZI KARIMUDDIN: That is in the Constitution,

SHRI S. MAHANTY: The Constitution has to be changed. I am trying to form public opinion; I am trying first to educate the hon. Members here who are objecting to it before I undertake that larger task.

SHRI RAJAGOPAL NAIDU: Then why mention it.

MR. DEPUTY CHAIRMAN: You have to move a Bill to amend the Constitution. It will not be relevant here.

SHRI S. MAHANTY: I am sorry I am misunderstood.

MR. DEPUTY CHAIRMAN: You cannot use this as a forum for creating public opinion.

SHRI S. MAHANTY: The remaining thing that I want to say is that in this Bill there is no provision for the transferability High Court Judges.

Bill

THE DEPUTY MINISTER FOR HOME AFFAIRS (SHRI B. N. DATAR) : It is there in the Constitution.

SHRI S. MAHANTY: I am coming to it. In most cases we find¹ that in the case of the new entrants who come to the Benches in this manner, on the recommendation of a State Governor who acts upon the advice of his Council of Ministers, namely, the party in power, there have been instances where their integrity or independence has been in serious doubt. Therefore, this Bill could have provided that every new entrant to a particular High Court should be allowed to function first in an older High Court in the company of more experienced and learned Judges till the principles of an independent judiciary are imbibed by him and then, after a period of two years or three years, he could have reverted to his High Court. That would have gone a long way in ensuring the independence and integrity of our judiciary.

Sir, before I was interrupted, I was trying to make out that this Bill makes a stipulation that no High Court Judge should practise. This is according to the Indian Constitution. So, before I take my seat, I am simply posing this question for such consideration as it may deserve. Sir, the President or the Governor are the supreme authorities in appointing High Court Judges.

Now if the President and the Governor can practise after their retirement, if they who appoint these Judges can practise after their retirement, if that is not going to impair the independence and integrity of the judiciary, I cannot understand how allowing a High Court Judge to practise after his retirement will impair the

KAZI KARIMUDDIN: There should be a ruling on this point that there can be no discussion about this. It is embodied in the Constitution that the High Court Judges cannot practise after retirement. Now questioning all that in this House

SHRI S. MAHANTY: I am not questioning it.....

SHRI H. N. KUNZRU (Uttar Pradesh) : I think a discussion of this kind is perfectly relevant. When you have brought in a Bill the object of which is to ensure respect for 'lie position of Judges by making provision for their salaries, leave of absence, etc., it is perfectly relevant for any hon. Member to get up and point out the conditions that militate against the achievement of these purposes. Of course it may be that those things to which the hon. Member may have to refer in this connection may be embodied in the Constitution. But I do not think that it is irrelevant on an occasion like this to point out that the purposes that this Bill has in view will not be fully achieved unless certain other changes are also made.

MR. DEPUTY CHAIRMAN; The hon. Member has not been prevented from making those remarks. But this is the third time he is repeating these things.

SHRI S. MAHANTY: I am trying to point out that there is a provision in this Bill which will go a long way in influencing the integrity and independence of the judiciary. I invite your attention to clause 16 which is:

"Power of President to add to the service for pension.—The President of India may for special reasons direct that any period not exceeding three months shall be added to the service for pension of a Judge."

So under this clause the President can add a period not exceeding three months to the service of any Judge for pension purposes. Now I know that it is a very small period and there is no gainsaying that fact; but here the President is certainly going to extend this favour to a particular Judge of course on the advice of his Ministers and so herein comes my complaint. I say: You change this Constitution if necessary. After all this Constitution is not the last word of Indian genius. Constitutions are changed according

to circumstances in the normal way unless they are changed by violent means. What I am saying is that this clause 16 throws open the flood gates of corruption, of trying to influence the judiciary by the executive. So let us think of changing the Constitution so as to allow the High Court Judges to practise after their retirement. There has been a loud complaint that talented persons are not induced to come to work as High Court Judges because of the limitations imposed on them. If we do away with those limitations we may get better persons to work. The second thing is that our High Court Judges should be free from all sorts of interference. It is not merely that that the judiciary should be independent. They should also create the impression that they are truly independent and that makes a large difference. With these words I commend this Bill to the House.

SHRI K. S. HEGDE (Madras): Mr. Deputy Chairman, the present Bill before the House has been brought by the Government in pursuance of article 221 of the Indian Constitution. I have very attentively heard the speech of my hon. friend from Orissa. I am not convinced that any provision of the Constitution relating to the appointment of the High Court Judges needs any revision. In fact to my mind they are in line with the best traditions that are prevailing in countries similarly situated as ours or having jurisprudence quite in common with that of ours. Now the one question that has been placed before the House is: Should the Judges of a High Court, after their retirement, be allowed to practise? This question has been agitating the mind of the members of the Bar and the members of the Bench for quite a long time. In fact under the Constitutions of 1919 and 1935 the Judges were allowed to practise after their retirement

SHRI RAJAGOPAL NAIDU: Only a certain period was fixed.

SHRI K. S. HEGDE: Many complaints were made at that time be-

Now the question as to how far the provisions of this Bill contribute to the ideologies that are enunciated in the Indian Constitution is a major point for our consideration. Sir, we have accepted the rule of law as the supreme objective and democracy will be a farce if you in any way impair this rule of law. To have the best efficacies of the rule of the law, separation of the powers of the judiciary and the executive is an absolute necessity, and the Indian Constitution, has provided many rules and regulations for the appointment of Judges, and for their conduct, and several other privileges. Undoubtedly the Constitution-makers left certain room for provision for leave and allowances, and in certain other respects, under article 221, to the Parliament of India. Sir, I agree with my hon. friend who preceded me that the Judges of a High Court have behaved in an extremely good manner. They have set up very high traditions and the judiciary in this country is not inferior to the judiciary in any other country. When we are thinking of any legislative measures we, the weakest link in the chain and not the strongest link. Any law must be such as to provide for the weakest link in the chain and it is with that point of view I am recommending the measure before the House. You will permit me to confess that I am not happy with all the provisions in this Bill. I am not one of those who will subscribe to the view of my hon. friend Mr. Mahanty and accept the position that the executive either in the recent past or in the distant past have behaved in such a manner as to deliberately tempt a Judge or to affect his integrity. But then there are several things which are done unconsciously, which are not done with a view to do it in a particular manner but which may indirectly result in that particular position. There are several things which tempt him consciously or unconsciously. You will find in clause 13 of this Bill that leave is to be granted by the Governor of the State which, read along with the

Constitution, means that the leave is granted by the Ministry concerned and the provisions of leave are, to say the least, on the generous side.

Now, let us take, for example, this power in the hands of the Ministry which could be dexterously utilised if occasion arose, if there is such a mentality, to bring to senses the judges concerned¹ or to put them in an accommodating spirit. I am really speaking of exceptions and not the rule. Now, you will find in clause 4 and in clauses 6 to 13 several of the privileges that could be conferred upon a judge. Different types of leave can be granted—extraordinary leave, special leave and so on. It looks, on a reading of the Bill, as if the judges are appointed more to have leave than to work. That is the first impression that a person gets on reading the Bill. I do not mean to say that the judges are not entitled to a reasonable amount of leave. But if considered cumulatively, I am afraid they are given more leave than probably required by the duties that they are discharging. I am not actually concerned on the quantum of leave that they are getting but having the quantum of leave in view, what would be the effect of entrusting the power to the Governor of the State to give or refuse to grant this leave not on all members of the judiciary, but may I repeat myself—on the weakest link in the chain? I have great confidence that the present set-up will not utilise that position for that purpose but you are enacting a legislative measure not only for this Government but for the Governments to come. You are entrusting a power in the hands of the executive which may be correctly exercised or which may be exercised in a manner in which that should not be exercised, and it is for this reason that I have given notice of an amendment to clause 13 that instead of the Governor it should be the President of India. In fact, you will find in several other clauses relating to pension, etc. the power entrusted to the President and not to the Governor. I know that just

as the Governor is advised by the Council of Ministers the President is also advised by the Council of Ministers but somewhere the power must be given.

SHRI RAJAGOPAL NAIDU: Why not the Chief Justice?

SHRI K. S. HEGDE: What actually happens is that oftentimes the conflict is between the judiciary at the level of the High Court and the executive at the level of the State. There is personal contact. There are personal animosities. There are personal differences and bickerings between the members of the executive and between the members of the judiciary. Any body who has read the proceedings of the High Courts, will find oftentimes the individual Minister comes in for criticism and oftentimes an individual officer also comes in for criticism. If you put a fear in the mind of the High Court judge that if he came out in a bold manner it would affect his rights and that it would be safer to toe the line rather than come out in a bold and independent manner, that will prejudice the course of justice. It may be argued that suppose the Government of the State influences the Government at the Centre and thus affect the leave rights of judges, well, that would be more indirect rather than if the Governor were to have this right. In fact, I had in mind that it would be as well to entrust the power to the Governor in his individual discretion but a glance at the provisions of the Constitution will show that the Governors cannot have any individual discretion excepting what is provided in the Constitution itself. My hon. friend Mr. Rajagopal Naidu suggested that the Chief Justice might be entrusted with this power. But in fact one of the applicants for leave will be the Chief Justice himself and it would not be proper that the very person who is going to have the benefit should be the person to decide.....

SHRI RAJAGOPAL NAIDU: My suggestion was that in the case of puisne judges it may be the Chief Justice and

[Shri Rajagopal Naidu.] for the Chief Justice it may be the Governor.

SHRI K. S. HEGDE: Even here I for one would not agree that the Chief Justice should be entrusted with the power of granting or refusing leave, because invariably when we work together a community of interest always develops. If you only examine the working of the High Courts, however admirable they may be on the judicial side, you will hear many complaints when you come to the administrative side. Judges who are generous in their criticism of the administrative set-up or the discharging of the executive functions by the executive, if only they will turn the telescope to themselves will find that they discharge their own administrative functions in a manner that is not beyond criticism. That is why I say that in matters relating to these, it is better to have some authority other than themselves and the only authority I could conceive of under the Constitution who could discharge this function satisfactorily would be the President of India.

Now, apart from that, I have a few other objections and a few other remarks to offer, especially relating to clause 4. Recently a tendency has arisen to appoint High Court judges for purposes which cannot be strictly judicial. I appreciate the judge may have to discharge certain quasi-judicial functions as for instance in the case of a high Government servant against whom charges have been framed either of corruption or other irregularities. In such cases, it is evidently a judicial function that he is discharging and it might probably be better to appoint a judge of the High Court to go into such matters. But what pains me most is when we appoint High Court judges for functions which are mostly administrative in character. Now in this context what has happened is this. If you read sub-clause (ii) of clause 4(2)(a), you will find it says, "where the Judge,

by reason of his having been detained" — may I pause for a minute — the word used is 'detained'. It is not a term of law; it is an ordinary dictionary term and we always associate the word 'detain' with something forcibly done. And see how respectfully the language is used in the Constitution — "when a Judge is requested by the President of the Union of India..." I am shocked at the phraseology or the terminology used by the draftsman. I am a lawyer who has been practising for the last 17 years and I will never use this type of word with reference to a judge. And the reason is that in the High Court Judges Order of 1937 the word used was 'detained'. I thought we were for improvement and progress. I think the Minister in charge of the Bill who himself is a very eminent lawyer and jurist of repute would like to refer to the judiciary in more respectful terms than has been done now, but there it is. I would therefore respectfully suggest whether we can not usefully borrow the phraseology that is used in the Constitution

SHRI B. K. P. SINHA: Not preventive detention

SHRI K. S. HEGDE: As my hon. friend says it is not preventive detention. It is unlawful detention. After all, when you refer to certain authorities and certain functionaries there is always a code of honour and you have to refer to them in most respectable terms. Let us go further and see 'detained' by whom. You must have read the clause, Sir. There is nothing in it. "Where the Judge, by reason of his having been detained for the performance of duties not connected with the High Court....." Detained by whom, we do not know. Now a judge is appointed to the Music Academy — whether it is right or wrong it is a different matter but to my mind I feel shocked when a judge is appointed for such purposes. Supposing a judge is appointed as a Member of the Music Academy. He goes and spends his time in a music festival in the cool climate of either Simla

or Ooty. Could it be said that he has been detained for functions other than those of judges? Who is the person who is to order his detention, preventive or otherwise? Now, I had a little discussion about this behind the scenes and I was told that this subclause is related to clause 2(1)(c). To my mind I do not find¹ how subclause (c) of clause 2(1) controls subclause (ii) of clause 4(2)(a). They deal with entirely different matters. Sub-clause (c) in section 2(i) relates to actual service. The sub-clause to which I am making a reference relates to a case where the judge performs other duties. We have to remember that the judge is not engaged *on* functions as referred to in the Constitution, not on functions which he was asked to do by the President. Here, you are providing clause 4(2)(a):

"In the leave account of a Judge there shall be credited to him—

(i) one-fourth of the time spent by him on actual service; and

(ii) where the Judge, by reason of his having been detained for the performance of duties not connected with the High Court, cannot enjoy any vacation which he would otherwise have been entitled to enjoy had he not been so detained, as compensation for the vacation not enjoyed, a period equal to double the period by which the vacation enjoyed by him in any year falls short of one month."

Really the effect is this. The month of May is the vacation period for High Court Judges. A particular High Court Judge goes and enjoys his vacation during a music festival. He spends 29 days of the vacation of one month at this festival; in return he is compensated with 58 days as holidays which he can afterwards take. That is why, Sir, I have given notice of an amendment to delete this entire clause for very good reasons. My first reason is that the judge should¹ not be appointed for any purposes other than the purposes enjoined by the Constitution!

secondly, a judge when he does this work should not have any advantage because it will tempt them to curry favour with the Government more and more.

To the extent we allow that, probably we are acting against the spirit of the Constitution which aims at the separation of functions.

Another aspect is the transfer of the judges. The hon. the Deputy Minister for Home Affairs who is himself a very eminent lawyer.....

AN HON. MEMBER: The transfer of the judges is provided for in the Constitution.

SHRI K. S. HEGDE: Yes, Sir; may I draw the attention of my hon. friend to the provision in the Constitution which says that when a judge is transferred, he shall during the period he serves as a judge of the other court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law. I fail to see why the compensation clause is not provided in the Bill. Is it the general desire of the Government that one judge should not be transferred from one High Court to another?

[THE VICE-CHAIRMAN (SHRI B. C. GHOSE) in the chair.]

A reading of the Bill shows that the Government have not come to any final conclusion as regards the transfer of the Judges from one High Court to another.

AN HON. MEMBER: It is there; please refer to clause 2(c) (iii).

SHRI K. S. HEGDE: This refers to joining time, no doubt. This refers to another matter. Supposing a High Court Judge is appointed as a Judge of the Supreme Court, when he is promoted, then this clause will apply.

[Shri K. S. Hegde.]

Sir, you will find in the Constitution compensation being provided when a Judge is transferred from one High Court to another, he shall be entitled to receive a compensation; this is in addition to his salary, travelling allowance, etc. The scale of compensation, the method of giving compensation and the quantum of compensation is left to the discretion of Parliament. Nothing is provided for in this Bill. So it is that we are forced to come to the conclusion that the Government has come to the conclusion that they shall not avail themselves of the opportunity of transferring the Judges from one High Court to another.

SHRI RAJAGOPAL NAIDU: That is the secret.

SHRI K. S. HEGDE: 'If this is the conclusion of Government, I must enter a caveat against it. It is extremely improper for Government to come to that conclusion. Let me again repeat myself, Sir, that by and large our High Court Judges have behaved in a magnanimous manner. While it can be denied¹ that there is any direct type of favouritism, they cannot deny that there is an indirect type of favouritism existing in the High Courts. Will they kindly examine how many sons and sons-in-law of the High Court Judges are practising in the same High Court if not under the same Judge? And their rise and success at the Bar have, in no small measure, been attributable to this cause. I want you to give an impression to the public that Caesar's wife is above suspicion. I know that the vacation Judges are sitting in different centres. Often we are told that a particular lawyer will be able to get a first order earlier than others. Examine how many of the administrative posts in the High Courts have been occupied; these good berths in the administrative posts have been secured by the kindness of the High Court Judges to their juniors. You can turn a blind eye to all these. In the interests of the High Court Judges themselves, we must avail ourselves of the opportunity of transferring Judges from one

High Court to another. When a particular Judge stays in a particular place or locality for a number of years, he would acquire several friends and naturally made a few enemies as well. It is not possible for him to forget his environment. Though such cases **may** be rare, it is necessary to root out such indirect corruption, and it will be a good principle if the Government can avail itself of the opportunity given in the Constitution to transfer a judge from one High Court to another. It will bring in a kind of judicial uniformity.

Now, there is conflict of decisions many of which are ironed out by the Supreme Court. There is a possibility of attaining uniformity in these matters if the Judges were to be transferred from one Court to another. As a lawyer myself I am aware that the laws that we enact here are one-tenth of the laws of the land and nine-tenths are enacted by the Judges in the various High Courts. A transfer will help towards the unity of the judiciary. If you want to build up a magnificent judicial system and avoid reasonable criticism, it is necessary not only to improve the mode of recruitment and conditions of service, but they should be constantly interchangeable for the sake of attaining judicial uniformity and for keeping them away from the environment which might influence them to some extent. I am extremely sorry that the Government have not availed themselves of the opportunity given in the Constitution for making provisions for the transfer of the Judges which they should have done under the provisions of the Bill.

Barring that, I am not one of those who think that the taking up of the job of judgeship of a High Court should mean that one must become a mendicant. I do not subscribe to that view. I do commend the provisions of the Bill as regards leave and pension; **but** my submission is only that these provisions of the Bill, beneficial as they are, be allowed to be exercised by an

authority which will not be easily made the subject of criticism.

SHRI H. N. KUNZRU: Mr. Vice-Chairman, the provisions of the Bill, generally speaking, resemble or are identical with the provisions contained in the Order-in-Council made in 1937, with regard¹ to the salaries, leave of absence due to the judges, etc. Some changes have been made to which I need not refer. But one of the changes, for instance, is that no High Court is treated in a special manner as the Calcutta High Court was formerly. All High Courts, whether big or small, are treated in *this* same way in this Bill.

SHRI RAJAGOPAL NAIDU: Only Part A.

SHRI H. N. KUNZRU: Yes, that is quite true. But what I have said relates to the High Courts in the Part A States. The only new and important provision in the Bill relates to the grant of a minimum pension to a person who has served as a Judge of a High Court. I think the minimum pension is to be Rs. 6,000. Ordinarily, the scheme of the Bill with regard to the pensions to be given to the Judges is based on the requirement that the minimum period that a Judge should have served, in order to be entitled to get a pension, should be seven years. But Government have recognised that it is not fair to debar a Judge from practising as a lawyer in any court, and at the same time, to give him no pension even though he may have served for no more than a year. This Bill therefore provides that even if a Judge has served for less than seven years, he should get a minimum pension of Rs. 6,000 a year. Now, Sir, let us consider whether the provision in the Constitution debarring Judges from practising in any High Court, which was to maintain the dignity of the office of a Judge, is being realised in practice. Has this provision, to which I have referred, proved enough in order to maintain the independence of *a* Judge and his position in the eyes

of the public? I venture *to* think, Sir, that it has not served the purpose for which it was included in the Constitution. And consequently, nor will the provision made for giving a pension to a person who has served as a Judge of the High Court for even less than seven years achieve the purpose for which it is intended. There were very few cases before the Constitution was passed when retired Judges of High Courts resumed their legal practice. It was therefore not clear why the Constitution debarred the Judges of High Courts from resuming their legal practice. But what we have now to consider is this question. Which of the two affects the independence of the Judges or the Administration of Justice more—the appointment of retired High Court Judges as Members or Chairmen of Tribunals, the number of which I think nobody here knows, or the resumption of legal practice by such a Judge? I think there are few people who will deny that if a Judge of a High Court knows that after retirement he can work as a lawyer again, that will not affect his independence while he is on the Bench; that will not enable the executive to tempt him with any offer. But the appointment of retired Judges as, say, Chairmen of various tribunals has such an unfortunate effect. If, therefore, I have to choose between these two alternatives, I should prefer to revert to the previous practice rather than accept the provision contained in the Constitution.

SHRI RAJAGOPAL NAIDU: This will be dangerous.

SHRI H. N. KUNZRU: My hon. friend. Shri Rajagopal Naidu, says this will be dangerous. I do not know what he refers to when he says this will be dangerous.

SHRI RAJAGOPAL NAIDU: Allowing the Judges to practise after retirement.

SHRI H. N. KUNZRU: Well, he thinks that it will be a dangerous thing *to*

[Shri H. N. Kunzru.] allow retired Judges to practise again in any court. But we have either to find out some way which will enable us to achieve fully the purpose that we have in view or choose the lesser evil.

SHRI RAJAGOPAL NAIDU: That is why the Bill provides for pension.

SHRI H. N. KUNZRU: Well, I will come to that. You have to choose the lesser evil, and I think that if retired Judges are to continue to be appointed to various offices in the gift of the Government, then it is far better that they should be allowed to resume their practice than that they should be appointed to important offices, which, I venture to think, may not seldom have a very undesirable effect on their sense of independence. They may not actually do any injustice to any litigant appearing before them, but the very fact that in the opinion of the public they will be liable to be tempted by the executive is likely to impair their position. Sir, if it is desired that such steps should be taken as would maintain the dignity of the Judges in the public estimation, and prevent them from being influenced in any manner by the executive, then I venture to think that it will be better to raise the pensions and to refrain, as a rule, from appointing a retired Judge of a High Court even to a judicial or a quasi-judicial post. It will mean a little increase in expenditure, but I think that in view of the importance of maintaining the esteem in which a Judge should be held by the public, it is far better that we should incur the expenditure that will be involved in raising the pensions rather than continue the practice of appointing retired Judges to posts in the gift of the executive.

I should like to say one word more of a general character before I sit down. The object of the Government as much as that of the Members of this House is, I am sure, to do nothing that would make the public feel that the Government enjoys oppor-

tunities of impairing the independence of the judges by placing temptations in their way. Unfortunately things are happening at present which, are not within the control of the Government but which are making the public uneasy with regard to the position of the Judges of the High Courts. Formerly when a certain proportion of the Judges of the High Courts was British, as a rule the Judges did not come into contact with the executive. They were very jealous of maintaining the dignity of the High Court and their own position, but from what I hear of a number of High Court Judges, it seems to me that the Judges are not as jealous of their reputation as their predecessors were. They not infrequently come into contact with the executive, and the result is that the public suspects that their decisions in important cases in which the Government is interested, are influenced by this contact between the Judges and the executive. No law can be made on this subject, but a sound public opinion can be created which will prevent so undesirable a development. I think Government itself, instead of being happy at this growing touch between the Judges and the executive, should make it clear that it does not view this with favour.

SHRI GOVINDA REDDY (Mysore): What does the hon. Member think of the various Acts of the Legislatures which have been declared *ultra vires* by the High Courts?

SHRI H. N. KUNZRU: I am not accusing the judges as a class in discharging their duty honourably. Everyone here will recognise that the Judges of the High Courts on the whole have discharged their duties in a very honourable and independent way, but even if one or two per cent, of the Judges are suspected by the public — they may be wrongfully suspected—of being influenced by the executive, I think it is time for us to take note of it lest the rot should set in on a much larger scale. If my hon. friend, the Home Minister, thinks that this is a point worthy of his consideration, I

am sure that he can. And many ways of giving expression to his opinion, and this, I am sure, will help in the maintenance of the healthy old tradition to which I have already referred. As a lawyer, he must be aware of the paramount importance of making the public feel that the judges are completely out of all temptation and that the executive has no power of influencing their views even indirectly. I hope, therefore, that he will do what he can while he is Home Minister of the Central Government to see that this tradition is maintained. I am sure that he is aware of the fact that there is a complaint in many States that things are changing for the worse and that some corrective ought to be applied. We shall all be very happy if he, and on his advice, the other executive authorities apply this much-needed corrective in this respect.

SHRI RAJAGOPAL NAIDU: Mr. Vice-Chairman, I am in entire agreement with the two previous speakers, Pandit' Kunzru and Mr. Hegde about the various observations made by them with regard to the functioning of the judiciary in our country. Sir, there is one redeeming feature in this Bill, *viz.*, that, if a Judge retires after putting less than seven years' service, he will be entitled to a minimum pension of Rs. 6,000. When this provision was not there before, the judiciary was not able to attract the best from the Bar. A member of the Bar is at his best between the ages of 55 and 60. It is then only that he has mature knowledge of the law. When this provision was not there, the Bench never attracted the best from the Bar, because if one has to draw pension according to the previous rules, he should become a Judge by his 53rd year, so that he will be in a position to draw pension when he retires at 60. Now, I am sure that this provision will attract very many members of the Bar, to the Bench because they will be assured of a certain amount of pension after the 60th year, though, of course as my hon. friend, Pandit, Kunzru, pointed out, this sum of Rs. 6,000 is not sufficient for a member of the Bar or a Judge draw-

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ing a salary of Rs. 4,000 per month. On this occasion I would like to remind the House of what recently Justice Chandrasekhara Iyer said—now he has retired—that the mounting arrears in all the High Courts were due to the incapacity of the Judges because the best mettle from the Bar never chose to become Judges. Now, I am sure the leading practitioners of the Bar would take advantage of this provision and try to give their best to the Bench if and when they are called upon to assume the office of High Court judgeship.

Sir, I don't want to repeat what the previous speakers have said. Mr. Mahanty has stated that a High Court Judge, after retirement, should be allowed to practise. It is a very unhealthy principle, in my opinion, and hon. Mr. Hegde stated that he should not be allowed to practise and hon. Dr. Kunzru has given a *via media* between the two. It is very unhealthy and dangerous for a judge after retirement to be allowed to practise in the very same High Court where he was presiding for several number of years. I have the greatest admiration and greatest respect for the judiciary in our country but with all that, we have got to see and we have got to clear the fear from the minds of the litigant public that if a retired judge is allowed to practise in the same High Court where he was presiding, it may not be that he would influence in any manner the presiding officers, that so and so will be in a better position to influence the judge. Sir, I had seen in very many High Courts immediately after the judge retires, the very day, I would see him donning the black coat and going about canvassing for work and in one or two years I had seen that he had a very lucrative practice. Secondly it is a bad principle that a judge is allowed to remain in the same High Court for any number of years. You find in the subordinate judiciary a judge is never kept for more than 3 years, *e.g.*, a district judge in a district court is never allowed to remain for more than 3 years. What for? The principle is that he should

[Shri Rajagopal Naidu.] not develop certain like Sand dislikes— *by* that I mean we have seen invariably several High Court judges liking certain lawyers because it may be that the arguments will be according to their taste or for several other reasons. It is only for that simple reason that a judge is not kept for more than 3 years. In a similar way the officer also. Why not that principle be applied to the High Courts? Why not the principle that is applied to the subordinate judiciary be not applied¹ to the supreme judiciary in our country? The Constitution provides that a judge could be transferred from one High Court to another, from one State to another and the Constitution at the same time provides under article 222 that in the event of his transfer from one High Court to another, he will be entitled to compensatory allowance. I ask the hon. Home Minister as to why no provision has been made for a compensatory allowance, as to how much compensatory allowance is to be paid to a judge if he is transferred from one State to another, in this Bill before us. I have my own suspicion that it is not the intention of this Government to transfer a High Court judge from one State to another. That is why this Bill is completely silent about that particular point. It is not that by the rule-making power you can fix certain compensatory allowance. But what the Constitution says is that Parliament, by law, should enact and should fix the compensation which may have to be paid. May I read for the benefit of the House that particular provision of article 222 sub-clause (2) which says:

"When a Judge is so transferred, he shall, during the period he serves as a judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined¹ by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix."

I am sure that the President has by order not fixed any compensatory allowance so far.

Sir, hon. friend Mr. Hegde said that there is a very unhealthy convention of the relatives of the various judges practising before the same High Court. It is becoming a very bad precedent in our country. There are several instances in the various High Courts in our country of close relatives—sons-in-law, brothers-in-law, own sons—though they may not appear before the very relative who sits as the Presiding Officer in that court, but they appear in other courts. It may be that they would not influence the other judges but the very fact that they happen to be the relatives of a particular judge, a colleague on the Bench, that itself is sufficient to create a certain amount of suspicion among the litigant public in the country. It is high time that either we say that a particular judge who has got a particular relative practising in the same High Court should not be allowed to remain in the same High Court and he should be forthwith, transferred or the relative should, not be allowed to practise in the same High Court. I would suggest the former because we cannot prevent anybody from practising in the High Court which, is presided over by a relative and it will be a very easy and simple process to transfer that particular judge from the High Court to another High Court. Sir, there is an analogous provision in the Co-operative Societies Act of Madras. For instance, if there is a relative of a Director employed in the society, either the Director should cease to be a Director or the relative would be sent out from employment. That healthy principle should be followed by the judiciary in our country.

With regard to the appointment of High Court Judges, no doubt the Constitution provides that before appointing a Judge, the President will have to consult the Chief Justice of India, the Chief Justice of the High Court and the Governor of the State. As the previous speakers had already mentioned I wish and I feel that the Constitution should be so amended so as to completely eliminate the executive from the selection of such judges in

our country. It is a very healthy principle and the Constitution also provides that the judiciary should be completely separated from the executive and the executive should have absolutely nothing to do in the matter of selection of High Court Judges.

Coming to the other important points, it is high time that we follow the golden rule, viz., that when once a judge, he should always be a judge. Even after his retirement he should remain as a retired judge. The practice of judges being appointed to the various executive posts is leading to several office-hunting businesses. As a result of it we find that there is a lot of frustration in the mind's of the public that so and so would not be very judicious in the discharge of his duties. We have seen the judges after retirement being appointed to some important posts as in the Arbitrations, Tribunals, etc. When a judge after retirement at 60 years is capable of doing such responsible work, may I ask the hon. Minister why his age should not be raised from 60 to 65? A judge is made to retire in his 60th year for the simple reason that after 60 years of age he is expected to be not having that much of stamina and strength and that much of mental alertness as possessed till his 60th year. When he can be given a responsible work after 60 years of age, more responsible than High Court judgeship, may I ask the question why the retiring age should not be raised to 65 years so that he need not think of any other job after he retires? So, my suggestion would be to raise the age of retirement of High Court Judge from 60 to 65. A High Court Judge, if he is promoted as a Supreme Court Judge, retires in his 65th year. Why this disparity in the age of retirement between a High Court Judge and a Supreme Court Judge? This distinction should vanish. Even on the point of repetition I would say if a High Court Judge becomes a Supreme Court Judge, he can retire at 65 years. I ask why the same principle should not be applied to High Court Judges and why **not**

I they be allowed to retire at 65 years. | of age?

Then I would like to ask this further question why our Constitution should make a distinction between a judge presiding in a High Court belonging to a Part A State and a High Court Judge presiding in a High Court belonging to Part B State? The justice that they administer is the same in both the Part A and in the Part B States. Then why should the Judges in the Part B States be paid lesser salary? Why should there be difference in the service cadres for the judges of Part A and Part B States? Sir, it is high time we had a uniform judiciary cadre throughout the country and a judge should be in a position to be transferred from the High Court of a Part A State to a High Court belonging to a Part B State.

SHRI GOVINDA REDDY: It is just possible that the Part B State is not able to pay as much salary as the Part A State.

SHRI RAJAGOPAL NAIDU: That may be true, but if we want judges to be above suspicion we should pay them Rs. 3,500. It is not enough if we pay them Rs. 1,500 because we want to put them above suspicion, we want them to be incorruptible. If Judges are paid Rs. 1,000 in Part B States, then I am sure there will come a day when every judge of a Part B State will be suspected. It is for that simple reason that they are being paid well, so that they may be above suspicion.

Sir, I would like to make one more remark before sitting down. Why should not officers belonging to the ICS cadre who are in the districts as judges be transferred from one State to another in the same way as District Judges? I can give you a particular case. After the separation of Andhra, several senior district judges remained in Madras, and that was because they happened to be Tamilians, and several junior ICS officers opted for Andhra and they have got every chance of becoming High Court judges though

[Shri Rajagopal Naidu.] they happen to be far junior to the ICS officers who are serving as District Judges in Madras. Sir, that is why I say you should have a uniform service cadre throughout the country.

With these observations, I resume my seat.

[MR. DEPUTY CHAIRMAN in the Chair.]

SHRI KISHEN CHAND (Hyderabad). Mr. Deputy Chairman, I would like to invite the attention of the House to the fact that we are for the first time making laws about pensions. So far pensions were governed by orders in force before 1947. And when we are making laws, for the first time, governing pensions, we should consider our capacity to pay the amounts involved. The hon. Member who preceded me pointed out that judges are generally appointed at the age of 57 or 58, they serve in the High Court for about two or three years and now according to this law, they will be entitled to receive Rs. 6,000 as pension. If every second or third year four or five High Court Judges retire, and* there are about 9 Part A States—then nearly 80 Judges will retire every two or three years and we will be paying Rs. 6,000 a year to every one of them. Can our country afford to pay that much? We are setting up a big liability on the States' exchequers and the Central exchequer for the payment of pensions to these officers. And with the tendency at present of longevity increasing, these judges may live up to the age of 90 years. So we will go on paying at the rate of Rs. 6,000 a year to all these persons for several years, for their service in the High Court of one or two years.

SHRI RAJAGOPAL NAIDU: But active work makes a man shortlived.

SHRI KISHEN CHAND: But after they retire and when they get a settled income, then it is quite possible that they may live for a long time. For two or three years' service in the High Court we guarantee all of them this much payment for such, a long time. And what is more, with so many people available in the market, naturally

they try for additional employment from the executive. There are all sorts of tribunals, so many wage-boards and so on coming-up nowadays. The Government of Hyderabad¹ set up four or five wage-boards in which retired High Court Judges are being paid Rs. 1,000 per month. Naturally, with so many retired Judges who get a pension of only Rs. 6,000, they will not be satisfied with that only and they will try to get some sort of additional work from the executive so as to earn some more money. This is very bad.

Further, I beg to point out that the maximum pension guaranteed for the Chief Justice of the High Court is Rs. 20,000 per year, that is about Rs. 1,700 per month. It is quite possible that most of the Judges act as Chief Justice for at least one year and the moment they do that, they are entitled to a maximum pension of Rs. 20,000. In this way we are increasing the money required for the payment of pensions. I may here point out, Sir, that in most countries, the experience has been that from year to year the expenditure on pensions is increasing as percentage of the total expenditure on salaries. Most countries in Europe and in America, are seriously considering the question of enhancing the age of retirement. We have prescribed the age of 60 for High Court Judges and 55 for other government servants as the age of retirement. In the case of the Supreme Court we have got it as 65 years of age. You know in England¹ the age of retirement is 70 and I do not think the longevity in England is more than what it is in India. (*Interruption.*) No, those days are gone when longevity in England was greater than in India. Now the difference is much lower than what it was before and after the age of 50 for anyone who has attained the age of 50, the longevity is the same in England¹ and in India. I know that quite firmly and I know it on very good grounds that to a person who has lived up to the age of 50, there is no difference in the expectation of life in Europe and in India. Therefore, I

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would submit that as was suggested by Mr. Naidu just now, the age of retirement should be raised from 60 to 65 years so that Judges may be in service for at least seven years before qualifying for pension. Even if he enters the service at the age of 55, he will be able to serve in the High Court for over seven years. I would go even a step further and say that in the Supreme Court the age of retirement should be 70. In America, in the Federal Court no judge retires. A judge is appointed for life and he continues there till death.

SHRI J. S. BISHT (Uttar Pradesh): It is a matter of amending the Constitution.

SHRI KISHEN CHAND: The hon. Home Minister has now brought forward this Bill. Till now the High Court Judges were getting some pensions according to the previous rules. But he is now formulating a new set of rules before the nation. High Court Judges had realised that their pensions were settled on the basis of an order and that the rules are going to be revised. This is the first law on the subject. If this is done in case of judges, the expenditure on the pensions of all other government servants also will have to be fixed on a higher scale and this will be a great drain on the finances of our country. Therefore, I submit to the hon. Minister that he should withdraw this Bill and he should first of all raise the age of retirement of judges of High Courts by bringing forward¹ an amendment of the Constitution, raising the age of retirement to 65. He should delete this clause about minimum pension irrespective of the length of service and he should insist that the High Court Judges should be entitled to pension only after they have put in seven years service. I have already remarked that it is highly unfair to give a pension of Rs. 6,000 per year especially when we are trying to economise and our country cannot afford it.

SHRI B. K. P. SINHA (Bihar): Sir, this Bill has been rather remark-

able for most conspicuous contradictions. In one breath hon. Members have patted the judiciary on the back and paid them encomiums, urged that they have behaved remarkably well, and in the same breath they have also said that they are allowing themselves to be influenced by the executive, that their sons, daughters, nephews and cousins are having a good time in their courts.

SHRI RAJAGOPAL NAIDU: They are all bare facts.

SHRI B. K. P. SINHA: Facts, but facts not very palatable. I do not want to address myself to this question because it is a matter of observation and it all depends on the approach that one has to these questions. However, one very important issue has been raised in this debate, the issue of the relationship between the judiciary and the executive. Well I feel that that is not very relevant to the discussion of this measure. All the same, since so much has been said, I would like to address myself shortly on this issue. Sir, our Constitution does not declare expressly that the three branches of Government, that is, the judiciary, the executive and the legislature shall be independent or separate. The legislative powers are vested in the Legislatures or Parliament of which the President, the Head of the Executive, is a part. The judicial powers are vested in the Supreme Court and the High Courts and the subordinate judiciary and the appointments to these posts are made by the executive. The executive power vests in the President who is always advised in whatever he does by an executive which is responsible to the Legislature. Judges are sought to be made independent by the Constitution but that independence is secured by providing for them a fixed, age tenure that they will retire at such an age and not before; the second way in which their independence is secured is by providing that their emoluments or salaries shall not be reduced to their disadvantage while they continue in office.

[Shri B. K. P. Sinha.] Complete independence and separation was neither desired by the Constitution makers nor was it attained and embodied in the Constitution. Sir, I have already said that the Judges are appointed by the executive. Judges are removeable by the executive, the President, acting in concert with the Legislature. The executive could pardon offenders sentenced to imprisonment or otherwise by the judiciary. The Legislature could withhold all appropriations and make it impossible for the machinery of the State to move at all; the Judges in turn could¹ pass judgement on the Acts passed by the Legislature. The independence of each of the other, therefore, is qualified and restricted.

SHRI K. S. HEGDE: It is so even in places where there is the worst separation. Even in America where the functions are separate these anomalies are there.

SHRI B. K. P. SINHA: Exactly; you are supporting me.

SHRI K. S. HEGDE: No, I am not.

SHRI B. K. P. SINHA: Even in America where they are supposed to be entirely separate, union at the highest rung is there. That is my point. I am obliged to you.

SHRI RAJAGOPAL NAIDU: Why should we follow other countries? Why should we not set up a precedent?

MR. DEPUTY CHAIRMAN: Order, order, let him continue.

SHRI B. K. P. SINHA: The division of functions laid down in our Constitution aims at the most effective and harmonious working of the whole system. To disturb that balance is to disturb the effectiveness of our whole system. To invent the judiciary with greater independence than what the Constitution contemplates is to create in this democratic system an irresponsible power and irresponsible power, Sir. I need not tell you, in course of time, arrogates to itself autocratic, despotic and tyrannical powers.

I would refer in this connection to the provisions in democratic countries. My hon. friend has already referred to U.S.A. There, the Constitution is based more or less on the principle of division and greater division than what we envisage in our Constitution but then all the same appointments of the Judges are made by the executive, the President, who is not responsible to any elected body. In the United Kingdom also, the head of the judiciary is the Lord Chancellor who is a Member of the Cabinet. The appointments of the Judges are made by the executive and very often, even in the United Kingdom, appointments are made on a party basis. The question is not whether there shall be separation or not; separation is there, limited separation shall be there but the question is who shall be the dominant partner in the scheme of government. The elected representatives of the people or the judiciary? To agree to all that my friend, especially Mr. Naidu, has urged is to give the dominant position in this scheme of government to the judiciary and that is bound completely to destroy the democratic character of our Constitution.

Sir, my hon. friend Mr. Mahanty raised the question of practice after retirement. I do not think it is relevant but if this question of relevancy were to be discussed in this connection, I would be more inclined to agree with him than with my hon. friend Mr. Hegde. I have already dealt with the issue of the separation of the judiciary and the executive raised by Mr. Hegde. He has referred to the rule of law and I do not think the balance between the judiciary and the executive is disturbed by any provision in this measure. He has specifically objected to leave being granted by the Governor. I do not see what objection he could possibly have. As I read the Bill, as a whole to me it appears that leave for the period to which a Judge is entitled, he would have at his option. The word used is no doubt 'may' but reading the Bill as a whole, I am inclined

to think that when leave is due to a Judge and he asks for it, there shall be no option to the executive but to grant him that leave. In that sense, his fears and apprehensions are not justified in my opinion. 'May', I know, does not mean 'shall' but in some circumstances, 'may' means 'shall' and in this Bill the word 'may' used in the one particular clause as I read it means 'shall'. If Mr. Hegde has some doubts I will refer him to two books, 'Maxwell and Grey's Interpretation of Statutes' and he will find scores of cases quoted there he will find

SHRI K. S. HEGDE: On a different principle that has been laid down I agree with you, but how do you bring in this clause and interpret 'may' as 'shall'?

SHRI B. K. P. SINHA: Reading the Bill as a whole.

SHRI K. S. HEGDE: The very clause uses the word 'shall' also.

M'R. DEPUTY CHAIRMAN: Order, order.

SHRI B. K. P. SINHA: If it is 'shall' then your objections fall to the ground. Your objections are valid only if it is 'may' and 'may' does not imply compulsion or obligation.

Sir, somebody has to give the leave and Mr. Hegde thinks that it should be the President. The Bill says that it shall be the Governor. I think the Bill is fairer in this respect because it takes into account the quasi-federal character of our Constitution. The States have their own rights, certain rights, and certain duties. It is not proper to deprive them of this small measure of power. Moreover, our Constitution is effective just because it visualises that in the higher rungs of the ladder, both of the executive and of the judiciary, matters shall be arranged by consultation, by agreement and by the mutual respect that one has for the other. If you go on providing on the basis that the executive and the judiciary are two

giaiaiors ngnting a outer ngnt in a Roman arena, if we were to visualize such a state of affairs and if that state of affairs were to come true, provide what we may, our whole Constitution would collapse like a house of card's. He objects to the word "detained" but I cannot find a more suitable word for the purpose. Of course my knowledge of English is very limited and very poor. He may supply a better word if he can. As for myself I cannot see that there can be a substitute for the word "detained" in that context. He says "detained by whom" is not provided. I think it well that it should not be provided because a Judge can be detained by a resolution of the Legislature. The Legislature by a resolution can give certain powers to a certain Judge, or by an executive order.....

SHRI K. S. HEGDE: Under what provision?

SHRI B. K. P. SINHA: Under the general powers vested in the Legislature and the executive.

SHRI K. S. HEGDE: Something extraordinary.

SHRI B. K. P. SINHA: In some cases it may be the Governor who may enjoin upon him certain duties other than that of a High Court Judge; in some cases it may be the Legislature or the Parliament and in some cases the President.

SHRI K. S. HEGDE: My friend seems to be unaware of the provisions in the Second Schedule.

SHRI B. K. P. SINHA: I have found so many things. So many things are happening. Recently one ex-Judge has been appointed as the head of some Investigation Commission. So many Judges by so many State Governments are appointed to discharge so many specific duties. They may be happening all in violation of the Constitution, but they are happening all the same

SHRI K. S. HEGDE: But they are not happening as a rule. There may be one individual case.

MB. DEPUTY CHAIRMAN: You are disturbing him too much. You have had your say.

SHRI B. K. P. SINHA: So many State Governments are doing that. I am not prepared to disbelieve the evidence of my eyes and my senses. My friend.....

SHRI RAJAGOPAL NAIDU: On a point of order, Sir. When an hon. Member is making an erroneous statement, is it not right for the other Members to correct him? He says that the President is not the only authority and that the State Governments also can appoint a High Court Judge whereas the Constitution says that the President alone can do it. The State Governments under the instructions of the President or *on* the authority of the President may appoint him to perform other functions.

SHRI K. S. HEGDE: I would make an observation with your permission. The Andhra Government appointed one of the Judges of the Madras High Court to serve in what is known as the Ramamurthi Committee. They later noticed that it was illegal to appoint a Judge like that without the permission of the President. Later on the matter was referred to the President and the President gave *ex post facto* sanction to it. So it is the President.

SHRI AKBAR ALI KHAN (Hyderabad) : I don't think there can be any doubt on that point.

SHRI B. K. P. SINHA: Mr. Rajagopal Naidu misunderstood me completely. I never said that any Governor can appoint a person as a High Court Judge. A Governor can ask a Judge to perform certain duties.....

SHRI K. S. HEGDE: He cannot do it.

SHRI B. K. P. SINHA: If he cannot do it and if according to Mr. Hegde the President is the only person who can do that what is the use of providing for it? Those words should be redundant then. Therefore I do not see there is much point in the objection raised by my hon. friend.

Then Dr. Kunzru raised another important issue, the appointment of Judges to bodies like tribunals, etc. I have found two contradictory tendencies working in Parliament during the course of the last four years. Whenever a measure is brought and that measure has to deal with some work of a judicial nature or quasi-judicial nature, the demand goes forth from the Members that a High Court Judge or a retired High Court Judge should be appointed. Now when Government have respected that demand, have accepted that suggestion for deputation of a High Court Judge, it seems after four years experience changes and the line of reasoning changes. Hon. Members begin to urge that the independence of the judiciary is being tampered with. There is much to be said for the point of view of Dr. Kunzru also, but then we should make a choice. We should elect: What do we want? If the new trend is the better trend I do not think the* Government will not respect this suggestion or will not accept this. But what Government have been doing, they have been doing not with a view to tamper with the independence of the judiciary but just out of respect for the wishes expressed by the Members of the Legislature. If they change their mind, I do not think Government will stick to the old practice. I think it is a beneficial measure. It is an improvement on the old state of affairs and I think we should all support it.

KAZI KARIMUDDIN (Madhya Pradesh): Mr. Deputy Chairman, I would not take much time, Sir, because I would refer only to the principles underlying this Bill. It had been stated by Mr. Hegde that the Government probably has decided that the Judges

would not be transferred and therefore they have not put in the compensation clause in this Bill. I want to tell him that under article 222 it is not necessary that it should be put in this Bill because the President can grant compensation. Article 222(2) says: "When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix." Therefore he cannot infer from the absence of any provision regarding compensation that the Government has made up its mind not to grant compensation. On the contrary it is there in the Definitions itself. In (c) it says, "actual service includes joining time on transfer from a High Court to the Supreme Court or from one High Court to another or from the Supreme Court to a High Court".

Another point which has been raised by him is that the Governor should not be Invested with these powers and that it should be the President who should grant leave and other things. In my opinion the objection is only technical in view of clause 24, because 24(3) says, "All rules made under the provisions of this Act shall be laid as soon as may be, before each House of Parliament." The Governor will have to be guided by the rules to be framed and laid before the Parliament. So all the discussion on this point, in my opinion, is only technical since the Governor will have to be guided by the rules framed and submitted before the Parliament.

Another thing which has been urged is that where relations of a High Court Judge are practising before his court, the High Court Judge should either be transferred or his relation should be asked to go to some other court. In my opinion there is no law that a relation of a High Court Judge can be asked to go to some other State where

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he is not at all acquainted and if you transfer that Judge to any other State and suppose in that State also his relations are found then it means that he should be sent to England or some other place. So my submission is that this is an untenable position which has been taken by some of my friends on the other side.

Sir, I want to urge two points although probably on some technical ground I am not allowed to move my amendment. In clause 9 in Part I of the First Schedule it is provided: "Where a Judge to whom this Part applies retires or has retired at any time after the 26th January 1950, without being eligible for a pension under any other provision of this Part, then, notwithstanding anything contained in the foregoing provisions, a pension of Rs. 6,000 per annum shall be payable to such a Judge." The very mention of the words "at any time after the 26th January 1950" in regard to retirement in my opinion shows that this Bill will have retrospective effect.

Those judges who have retired after 26th January 1950 should be entitled to pension from that date till the passing of this Bill. But there is another difficult position which has not been contemplated' by the framers of this Bill, and it is this. Some of those judges who have retired after 26th January 1950 may be dead before the passing of this Bill and they would have been entitled to pension after 26th January till they died. Therefore, in my opinion, there should be a provision which should be inserted by the framers of the Bill that those who had retired after 26th January 1950 and those who died before the passing of this Bill should also be entitled to the advantages, that is, their heirs should be entitled to the pension as contemplated in para. 9.

There is another thing, and that is in regard to Part II. Those members of the Civil Service who have very

[Kazi Karimuddin.] attractive scale of pay and other conditions of service should not be granted additional pension as contemplated in Part II. From the very beginning they have been persons with a silver spoon in their mouth. Their salary is very attractive and their conditions of service have also been very attractive and when they become High Court judges additional pension should not be given to them.

One more point I would like to bring to the notice of the hon. Minister. Suppose a High Court judge has served for seven years and then he dies within two years of his attaining the age of 60. If he dies two years before he reaches the age of 60 there is no provision though he has already served for seven years as a High Court judge. That will be a very great hardship and this case should also have been contemplated in the Bill and a gratuity or consolidated pension should have been granted to his heirs. With these observations, Sir, I would conclude.

SHRI H. C. MATHUR (Rajasthan): Sir, I do not propose to cover a wide ground and go to the provisions of the Constitution, nor do I propose to cite any ugly instances though I know quite a few of them. But I wish to put a very straight question to the hon. the Home Minister as to why he fights shy of Parliament so far as Part B States are concerned. As you know, there is almost an identical provision in the Constitution so far as Part A and Part B States are concerned. In respect of Part A States all these terms and conditions of service are to be governed by a particular schedule and when the Government takes a decision and when they revise the rules, they have to come out to Parliament and get those rules approved by Parliament. Similarly, Sir, for a temporary and tentative measure there is provision so far as Part B States are concerned that orders might be issued by the President, but after the Government has come to some final decision it is necessary for the Govern-

ment to come to Parliament and get those rules and terms and conditions of service approved by Parliament. I know of the provision under which the President can pass orders but if I put a correct interpretation on it, I think that provision is meant entirely for temporary and tentative measures. I have got before me the Gazette Notification which was issued by the President on the 26th December covering Part B States but I would like to know whether this Notification is only to be treated as a temporary and tentative measure and whether the Government of India is considering these rules which are to be adopted¹ as final rules and which are to be brought before us here. What I feel is, as the Government of India has already taken more than three years to frame these rules, I do not see why it was not possible for them to frame them in their final shape and submit a regular Bill before this House, as they have done in respect of Part A States. Sir, it is my painful duty here to have to stress and to emphasize for the consideration of the hon. the Home Minister that these invidious distinctions between Part A and Part B States should be eliminated as early as possible. I think that is the intention of the Constitution itself and I think that is the policy of the Government too. If it is the intention of the Government, we should know here and now very clearly whether they want to perpetuate this discriminatory treatment between Part A and Part B States. I see no reason. Sir, why the High Courts in Part B States should be treated differently and why the terms and conditions of service should be more to the disadvantage of the judges serving in Part B States. There is all the more reason that we should have a very high tradition in these Part B States and it is very necessary that we must have the best of judges in Part B States. It has been argued and I was really¹ amused when the hon. the Home Minister in reply to a question of mine told me yesterday that he had left it to the resources of these Part B States to take care of themselves and to pro-

Bill,

vide for their salaries. I wish to make a special point particularly in respect of the High Court and I wish to >3k the hon. the Home Minister whether he thinks that all Part A States have the same sort of resources to pay to their judges. Does he consider that Orissa and Assam have the same resources and they are in a similar happy financial position to pay their judges as Madras, Bombay or Uttar Pradesh are? But what we find is that the salary of the judges in Bombay, Uttar Pradesh and Madras is exactly the same as that of the judges in Orissa and Assam. That is very correct and appropriate and >or the same reason I wish to stress this point and plead with the Home Minister that at least in the case of the High Court judges there should be no discrimination. Sir, if we examine the argument of the hon. the Home Minister we will find that it is not at all tenable. No#, let us see what has happened in the case of the Administrative Services in the executive side. These Part B States have got to pay through their nose for the I.A.S. and I.P.S. Officers. This argument was raised by Part B States that they cannot afford to pay the salaries which have been fixed by the Centre for I.A.S. and I.P.S. officers and that they must have their own Services but it was not thought to be in the interests of the country. Now, the position is that a District Magistrate under the I.A.S. rules can go up to Rs. 2,250. Now, consider, Sir, the position of the District Magistrates. Under the I.A.S. regulations, a District Magistrate can come up to Rs. 2,250. The District Magistrate will be drawing that salary whether he is posted in a Part B or Part C State. But the Judge of a High Court of these States cannot

draw more than Rs. 1,500 salary unless that State takes it into its head to make an exception. The Chief Judges of all these Part B States have been representing to these Governments of the Part B States about the salaries not of the High Court Judges but about the District and Sessions Judges. The position is this. Here is a District Magistrate, an I.A.S. man, whose salary is something Rs. 2,250 and here is the District and Sessions Judge who is in the grade of Rs. 600 to 850, these District and Sessions Judges who are now sitting in appeal over the judgments passed by the District Magistrate.

MR. DEPUTY CHAIRMAN: We are not concerned with the District Magistrates here.

SHRI H. C. MATHUR: We are not. But I am arguing that you cannot leave it to the resources of the States, so far as Judges of the High Courts are concerned. We cannot in decency do so. It will be discriminating between the Part A and the Part B States. I wish very much to stress that the Judges in Part B States may be put on uniform and same conditions of service as those in the Part A States. And, it is only in furtherance of my arguments that I have given these instances.

MR. DEPUTY CHAIRMAN: The hon. Member will continue tomorrow. The House stands adjourned till 8-15 A.M. tomorrow.

The Council then adjourned till a quarter past eight of the clock on Wednesday, the 12th May 1954.