# LAW COMMISSION OF INDIA

## SEVENTY-SECOND REPORT

ON

## RESTRICTION ON PRACTICE AFTER BEING A PERMANENT JUDGE

*Article 220 of the Constitution*

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
April 10, 1978

My dear Minister,

I forward herewith the seventy-second report of the Law Commission of India concerning the question whether article 220 of the Constitution should be amended so as to permit retired High Court Judges to practise in their own State after lapse of certain period.

As mentioned in the first paragraph of the report, the subject was taken up for consideration by the Law Commission at the instance of the Government. The Law Commission does not favour any such amendment for reasons set out in the report.

The report, it may be stated, deals only with one specific point and as such is mor eor less in the nature of a note. As however the matter is of considerable importance, we thought it better to put it despite its brevity in the form of a report.

With kind regards,

Yours sincerely,
Sd/-
(H. R. Khanna)

Hon'ble Shri Shanti Bhushan
Minister of Law, Justice and Company Affairs,
New Delhi-110001

## CONTENTS



## APPENDICES

Genesis of the Report and Commision's view.

1. The Minister for Law, Tamil Nadu, in a communication to the Minister for Law, Justice and Company Affairs has referred to lectures delivered by Justice P. B. Mukharji, the then Chief Justice of Calcutta High Court, in the course of which the learned Chief Justice had stated[1]:

> "A more serious threat to the judiciary in India is the confiscation of the Judge's right to practise in his own High Court, a professional right for which he has qualified in his life. Today the price of a seat on the Bench is the confiscation of that professional right to practise in the High Court of his home, in the High Court where he was enrolled and where he practised before being elevated to the Bench."

It was further observed in the course of the lectures :

> "This constitutional bar and restriction of Judges preventing them from coming down from the Bench to practise at the Bar strikes at the very root of the independence of the judiciary."

The Tamil Nadu Minister for Law has accordingly suggested that the following proviso be added to Article 220 of the Constitution :

> "Provided that the restriction on a person who has held office as a permanent Judge of a High Court to plead or act in the same High Court or before any authority in India shall not operate in the following cases, namely :—
>
> (i) if the person has, at his option or otherwise, been transferred as a Judge to any other High Court and held office in that High Court for a period of not less than three years immediately before the date of his retirement ; or
>
> (ii) if a total period of four years has expired from the date of his retirement ; and accordingly every such person shall be entitled to plead or act in any High Court or before any authority in India and in the Supreme Court."

---

[1] P.B. Mukharji, Critical Problems of the Indian Constitution (1967), pages 113-115.

The Minister for law, Justice and Company Affairs in a note has directed that the Law Commission might be consulted[1] regarding the proposed amendment in article 220.

The Law Commission is not in favour of making the amendment in article 220 of the Constitution as suggested by the Minister for Law, State of Tamil Nadu.

Debates in the Constituent Assembly.

2. The question as to whether a person who has held office as a Judge of the High Court should, after ceasing to hold that office, be entitled to practise in any court was the subject of considerable controversy at the time the Constitution was drafted. Draft Article 196 (which ultimately took the shape of Article 220), as drafted by the Drafting Committee, was as follows[2] :—

> "196. No person who has held office—
>
> (a) as a judge of a High Court, or
>
> (b) as an additional judge or temporary judge of a High Court on having been recruited from the Bar,
>
> shall plead or act in any Court or before any authority within the territory of India."

After discussion, the draft Article 196 was amended according to the amendment moved by Dr. Ambedkar. The Article as adopted was as follows[3]:—

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

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

---

[1] Note of the Minister for Law, Justice and Company Affairs, dated the 23rd March, 1978, Department of Legal Affairs U.O. No. 1507/78, Advice A Section, dated 23rd March, 1978.

[2] Shiva Rao, the Framing of India's Constitution (1967), Vol. 3, page 591, Draft Article 196 (Draft Constitution prepared by the Drafting Committee, 21st February, 1948).

[3] C.A. Debates, Vol. 8, page 685 (7th June, 1949).

The Constituent Assembly rejected an amendment moved by Mr. Hukam Singh[1], according to which the ban on practice would have operated only within the jurisdiction of that High Court in which the person concerned has held the office of Judge.

Dr. Sapru's view.

3. A factor which weighed with the Drafting Committee in putting a ban upon practice was the view expressed by Dr. Tej Bahadur Sapru, the doyen of the legal profession in India. According to Dr. Sapru, once a man accepted a judicial position he should on no account revert to the Bar. He referred, in this connection, to the English practice of never allowing a man to go back to the Bar once he had accepted a judicial appointment[2]. Dr. Sapru accordingly observed :

> "I think the rule in future should be that any barrister or advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement..... I am also of the opinion that temporary or acting Judges do greater harm than permanent Judges, when after their seat[3] on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a pre-eminence over their colleagues and embarrasses the subordinate Judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice..... It is however said that the true remedy lies in increasing the pension of the Judges and allowing the Judges to secure some pension after short periods of office. I agree that this would be a very good ground for not permitting them to resume practice, but pension or no pension there is a long standing convention in England to the effect that no member of the Bar should do anything which gives rise to the impression that he has a pull over his opponent by reason of having held a judicial post."

Amendment of article 220 in 1956.

4. Article 220 was amended by section 13 of the Constitution (Seventh Amendment) Act, 1956. Instead of the old article, the new article came to read :

> "220. No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any Court or before any authority

[1] C.A. Debates, Vol. 8, page 680 (7th June, 1949).

[2] Shiva Rao, The Framing of India's Constitution (1967), Vol. 4, pages 172-173.

[3] The word as quoted in Shiva Rao, Main Volume, page 502 is "term".

in India except the Supreme Court and the other High Courts.

*Explanation.*—In this Article, the expression 'High court' does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956."

Present provision salutary.

5. The position, as it emerges in the light of the new article, is that a person who, after the commencement of the Constitution, has held office as a permanent Judge of a High Court is debarred from practising in any court or before any authority in India except the Supreme Court and the other High Courts. The provision as it stands, in our opinion, is of a salutary nature. There is no bar to a person practising in the Supreme Court and the other High Courts after having held the office of a permanent Judge of a High Court. To allow a person after he has been a permanent Judge of a High Court to practise in that very court or in a court subordinate to that court is bound to result in embarrassing and undesirable situations. There are immense potentialities of abuse and also, possibly, of mischief in permitting such a course. It is also bound to detract from the dignity which attaches to the office of Judgeship. The imposition of a time lag between the date on which a person ceases to hold office of High Court Judge and the date on which he resumes practice would not confer propriety on a course which is inherently undesirable.

Independence of the judiciary.

6. The Commission is unable to subscribe to the view that Article 220 as it stands in any way affects the independence of the judiciary. On the contrary, in the view of the Commission, the ban on practice in a High Court by a person who has been a permanent Judge of that very High Court is a step towards securing the independence of the judiciary. Independence of the judiciary can be threatened not only by external pressures; it can equally be jeopardised by inner pressures. It cannot be disputed that the prospect of starting or resuming practice in a court of which one has been a Judge can sometimes generate mental pressures and colour one's approach even unconsciously.

appointment goes back to the Bar. Reference in this context may be made to The Machinery of Justice in England by R. M. Jackson[1], wherein it is stated :

> "A judgeship means the end of a career at the Bar or in politics, there is no recent instance of a Judge resigning and going back to practice or to politics, although it can hardly be said that he may not do so."

View expressed in the Fourteenth Report of the Law Commission

8. The Law Commission presided over by Mr. M. C. Setalvad in its Fourteenth Report[2] expressed its view against permitting retired Judges to start practice. The Commission also expressed its unhappiness even on the change made in Article 220 as a result of which the Judges of the High Court were granted a limited right to practise. In the opinion of the Commission, such practice greatly detracted from the dignity of the courts and the administration of justice generally.

Conclusion

9. The Law Commission is, therefore, opposed to the idea of making any amendment in Article 220, as suggested.

Sd/-

H. R. Khanna .....Chairman

Sd/-

P. M. Bakshi .....Member-Secretary

New Delhi,

Dated the 10th April, 1978.

---

[1] R.M. Jackson, The Machinery of Justice in England (6th Edition), page 378.

[2] Law Commission of India, 14th Report (Reform of Judicial Administration), Vol. 1, page 88, para 50.

## APPENDIX 1

### Gist of debates in the Constituent Assembly relevant to article 220 of the Constitution.

The debate on draft article 196, which took shape ultimately as article 220 of the Constitution, took place in the Constituent Assembly on the 7th June, 1949[1]. Dr. Ambedkar moved an amendment to draft article 196, proposing that for that article, the following article should be substituted :—

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

He described it merely as a rewording of the draft article.

Sardar Hukam Singh moved that in draft article 196, for the words "within the territory of India", the words "within the jurisdiction of that High Court" should be substituted. He said that it was not necessary for him to make a speech, as the amendment was self-explanatory.

Shri H. V. Kamath was inclined to support the amendment of Sardar Hukam Singh, as he felt that the sweeping constitutional prohibition, as proposed in the draft article, was unwarranted and, "may I say, undemocratic".

Professor Shibban Lal Saksena referred to the English practice and was of the view that everybody who has been a Judge should be debarred from practising. He would extend the bar even to those who had been judges before the commencement of the Constitution.

Shri Mahavir Tyagi said that if lawyers were appointed as judges and, after retirement, they were also permitted to carry on their legal practice in courts, the result would be that they would stultify the great office of 'justice'; "they would use these

[1] C.A. Debates, Vol. 8, pages 680 to 687 (7th June, 1949).

offices as spring-boards or ladders to build much more lucrative practice after retirement".

Shri B. M. Gupte was of the view that a retired High Court judge should not be barred from practising in the Supreme Court or in other High Courts.

After some discussion, Article 196, as amended, was added to the Constitution according to the amendment moved by Dr. Ambedkar. The article as adopted was as follows[1] :—

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

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

To complete this discussion it may be mentioned that in the debate on draft Article 193 relating to the age of retirement of Judges[2], Shri K. M. Munshi, while defending the view that the age of retirement ought to be 60 years in the case of High Court Judges, also observed[3] :

> "The judges are not alowed to practise after retirement ; otherwise during the last years of his tenure there may be temptation to so behave as to attract practice after retirement."

---

[1] C.A. Debates, Vol. 8, page 685 (7th June, 1949).

[2] C.A. Debates, Vol. 8, pages 668 to 675 (7th June, 1949).

[3] C.A. Debates, Vol. 8, page 670 (7th June, 1949).

## APPENDIX 2

Gist of debates in the Lok Sabha relevant to the amendment of article 220 by Constitution (Seventh Amendment) Act, 1956.

Original article.

The Constitution as originally enacted provided as follows[1] :—

> "220. No person who has held office as a Judge of a High Court after the commencement of this Constitution shall plead or act in any court or before any authority within the territory of India."

Amendment Bill and Objects and Reasons.

The question whether judges should be allowed to practise after retirement came up for consideration before Parliament when the Constitution (Ninth Amendment) Bill, 1956, which was ultimately passed as the Constitution (Seventh Amendment) Act, 1956, came up for consideration. The Statement of Objects and Reasons annexed to the Bill explained the object underlying clause 12 as follows[2] :—

> "*Clause* 12.—An important factor affecting the selection of High Court judges from the bar is the total prohibition contained in article 220 on practice after their retirement from the bench. It is proposed to revise the article so as to relax this complete ban and permit a retired judge to practise in the Supreme Court and in any High Court other than the one in which he was a permanent judge."

It may be noted that clause 12 of the bill was in these terms[3] :—

> "12. For article 220 of the Constitution, the following article shall be substituted, namely :—
>
> "220. No person who, after the commencement of this Constitution, has held office as a permanent

[1] Shiva Rao, Select Documents, Vol. 4, page 826, Revised draft Constitution, clause 220.

[2] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 19. (14th April, 1956).

[3] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 7.

> Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts."

Joint committee.

The Minister of Home Affairs (the late Pandit G. B. Pant) moved for a reference of the Bill to a Joint Committee of the Houses[1], and in the debate on this motion a number of points were raised. The Joint Committee[2] did not suggest any change in the relevant clause of the Bill. When the Report of the Joint Committee was taken up for discussion alongwith the Bill, further points were raised in the debates[3].

Some of the important points made by the leading speakers may be briefly mentioned.

Shri Tek Chand's view.

Shri Tek Chand, after emphasising the importance of the consideration that it is very necessary that the High Court Judge's conduct should conform to the "proverbial standards of Caesar's wife", expressed doubts with reference to the proposed amendment of article 220, in these terms[4] :

> "But, it does not add to the dignity of a particular Judge and we think it does not add to the dignity of the institution, when a Judge who adorned the bench of a High Court stands at the bar of another High Court as a counsellor, making his petitions and prayers on behalf of a particular litigant."

Shri P.N. Sapru and Shri B. K. Ray.

Shri P. N. Sapru[5] agreed that it is not right that a Judge should practise in a court of which he has been a member; however, he failed to see what advantage can a Judge of a High Court get if he were to practise in any other State. He supported the proposed amendment.

---

[1] Parliamentay Proceedings on the Constitution (Ninth Amendment Bill, 1956, Vol. I, page 39, left-hand column.

[2] Report of the Joint Committee on the Constitution (Ninth Amendment) Bill, 1956; Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, pages 161, 173, 179 (15th July, 1956).

[3] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill 1956, Vol. I, page 215, left-hand column (4th September, 1956).

[4] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 80, right-hand column (27th April, 1956).

[5] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 114, right-hand column (4th September, 1956).

Shri B. K. Ray[1] from Cuttak, supporting the proposed amendment, referred to the speeches made in the Constituent Assembly. In his view, a retired High Court Judge should be debarred from practising in that High Court only and courts subordinate thereto.

Shri C.C. Shah.

Shri C. C. Shah[2] from Bombay opposed the proposed amendment, stating that the ban had been put in the Constitution though it was not in the Government of India Act "after great controversy and great deliberation". He further added that if the ban was at all to be relaxed, the relaxation should be limited to practice in the Supreme Court.

Shri N.C. Chatterjee.

Shri N. C. Chatterjee[3], supporting the proposed amendment, stated that from his personal experience he could say that a High Court Judge would not be influenced by another retired High Court Judge appearing before him. He further wanted the ban to be relaxed in respect of practice before other tribunals. According to the amendment[4] moved by him, article 220 would have read as follows :—

> "No person who after the commencement of this Constitution, has held office as a permanent judge of the High Court shall plead or act in that High Court and the courts subordinate thereto or shall hold any office other than a judicial or quasi judicial appointment."

He also emphasised the need for increasing the age of retirement of High Court Judges to 65 and giving them a decent pension[5]. If that is not done, he would favour the removal of the "embargo".

---

[1] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. I, pages 244-245, (4th September, 1956).

[2] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. I, pages 320-321 (5th September, 1956).

[3] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. I, pages 324-326. (5th September, 1956).

[4] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. I, page 322, right-hand column. (5th September, 1956).

[5] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. I, page 323, right-hand column. (5th September, 1956).

Opposing the amendment, Shri Frank Anthony said[1]: Shri Frank Anthony

"There is another reason and it is a greater risk. I say that, if you are going to invest your judiciary with the necessary reputation and respect, you must maintain your Judges on a pedestal and you will not maintain them on a pedestal if you allow them to come down, after they have retired, and take part in the hurly-burly of ordinary practice. In this tremendous competition which we have at the bar, the ex-Judges are sometimes compelled "to fall from their high standards. You may say that such cases may be exceptions but, they are ex-Judges and there may be one or two exceptions which will bring them to contempt and which will bring the whole judiciary into contempt. That is my greatest objection. Even if one ex-Judge or two ex-Judges have, after retirement, to enter the hurly-burly of practice, and begin to resort to devious and dubious practices under the compulsions of this excessive competition in the bar, they bring the whole judiciary into contempt. Once you do that, you expose your judiciary to criticism and attacks."

Shri H. N. Mukherjee said[2]: Shri Hiren Mukherjee

"I wish also to point out that it is better that Judges do not become advocates at all. In the provision in the Bill before us. Judges who have retired or have resigned like my friend Shri Chatterjee did, are precluded only from practising in the courts where they have functioned as Judges. But I feel those who have been Judges should not in the latter phase of their career work as advocates at all. As I told you earlier, Shri "Chatterjee in my own habeas corpus application behaved in a manner which would make me beholden to him, which I am in various ways personally speaking, but on the other hand—and I think many of my friends in this House will agree—Shri Chatterjee, for example (I speak with very great respect) rejoices and delights in advocacy. It is very necessary that we have people who delight in advocacy, and because they delight in the art of

[1] Parliamentary Proceedings on the Constitution (Seventh Amendment) Act, 1956, page 337, right-hand column, page 338, left-hand column (5th September, 1956).

[2] Parliamentary Proceedings on the Constitution (Seventh Amendment) Act, 1956, page 349, (5th September, 1956).

advocacy, they can advocate their case with effect, but at the same time perhaps for judicial determination it is necessary that we have a set of people who do not take sides in the way in which many people do. Shri Chatterjee quoted a book by Sir Ivor Jennings on the Constitution of this country. I also happened to look at it because it was lying on the table so very near me, and I find that Sir Ivor Jennings makes a remark in one place. He says in India perhaps the lawyer-politician has played a larger role in public affairs than the lawyer-politician in any part of the world. He says : 'As a lawyer I ought to be happy about it, but my experience is that as a rule lawyer-politicians are neither good lawyers nor good politicians'.

"I do not want lawyer-Judges to be there all the time. I want a Judge who at an early stage of his career when he made good as a lawyer is appointed as a Judge because he made good as a lawyer. After that he should begin to cultivate a judicial temper. That is why for posts like the Election Commissioner or the Comptroller and Auditor-General I want people with a judicial temper. And Judges, once they are Judges, should decide that they are not going to be advocating cases before one tribunal or the other. And that is why I support the amendment of my friend Shri K. K. Basu which says that Judges after retirement should not be allowed to practise and also that they should not accept any other job but judicial or quasi-judicial jobs to which appointments are made only by the Chief Justice of India or by the Chief Justice of the relevant High Courts. Apart from that, the other kinds of jobs should not be the kinds of jobs which would be looked forward to by our judiciary."

Shri B. N. Datar, Minister of State in the Ministry of Home Affairs, speaking in reply to the Debate[1] on the Bill as reported by the Joint Committee made a reference to the fact that the rigid provision in article 220 (as it then stood) had "created a certain amount of disinclination or reluctance on the part of leading or senior advocates to accept the office of High Court Judges". He referred to the high professional income of lawyers, and added that "in order to satisfy a human desire, namely, the desire to practise, if any, after retirement, from service,

[1] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, pages 351, 352.

that is after the age of 60.....We have to make some exceptions" and "we had to make some concession to what I might call this understandable human weakness. That is the reason why we have made a change only so far as the High Court Judges are concerned, and not so far as the Supreme Court Judges are concerned". He referred to the two "extremes of opinion" that had been expressed on the subject—that there ought to be an absolute ban and, at the other extreme, that retired Judges ought to be allowed to practise before other tribunals as well.

Explaining the point of view adopted in the Bill, Shri Datar said[1] :

> "We do not desire that our retired High Court Judges should go and practise before a "District or Session Judge or even a first-class Magistrate. It is quite likely that in some cases a tendency may be there to do it. But we have confined their practice only to the other High Courts and the Supreme Court. Therefore, I would submit that so far as the question of practice is concerned, some concessions had to be made and we have made this concession. If after 60 years, a man desires to practise, then he should not work in the sphere of influence in which he had officiated as a High Court Judge and must have officiated as a District Judge and must also have practised. Therefore, he is taken to other and safer limits and he is allowed, if he can take advantage of it, the right to practice in other High Courts, and if he thinks it proper or available, even in the Supreme Court. This is for the purpose of appreciating the best amongst the advocates."

The relevant clause of the Bill was ultimately passed as reported by the Joint Committee[2].

---

[1] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 353.

[2] Parliamentary Proceedings on the Constitution (Ninth Amendment) Bill, 1956, Vol. 1, page 358.

MGIPRRND—Sec—IV (N)—22 M of Law/78—23-1-79