CHAPTER III

SELECTION OF JUDGES TO THE HIGHER JUDICIARY AND

THE PROCESS OF CONSULTATION

The mode of selection of judges is of high importance. It has a close
connection with independence of judiciary. The mode of selection and
appointment of judges to the higher judiciary varies from nation to nation. In some
countries people elect them. In others legislature or executive selects them, and
in some other countries the executive and legislative organs together select them.
In election by the people, obviously the popular will prevails. Hence the candidate
would have to get popular support. Such elections may be contested on party
basis with declared policies. This procedure is fraught with the danger that it is
likely to affect the free and independent thinking of the judges. In such a context

1 See, Ajith Kumar, "Appointment of judges of the Supreme Court and High Courts" 7
Ac.L.R. p.137 at p.138 [1983]. He observes that judicial independence depends to a great
extent on the composition of the Court.

2 Constitutions of some States in the U.S. provide for popular election of judges to the
respective State Supreme Courts. See Emmettee S.Redford et.al.,Politics and Government
in the United States (1965), p.530

3 Judges of the erstwhile U.S.S.R. Supreme Court were so selected. See Constitution of
the U.S.S.R. Articles 105 - 106.

4 For instance in the U.K. judicial appointments to the Court of Appeal, House of Lords
and to offices of the Lord Chief Justice and President of the Family Division are made by
the Prime Minister after consultation with the Lord Chancellor who himself is an executive
nominee. See S.A.de Smith, Constitutional and Administrative Law (1973), p.365. See

5 Appointments to the U.S. Supreme Court, for instance, are done so. Constitution of the
United States, Article II Section 2 para 2 "He (the President) shall have the Power...and he
shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... 
Judges of the Supreme Court,...". There, on arisal of a vacancy to the post of judges to the
Supreme Court, names would be proposed by the President and that would be scrutinised
while exercising the adjudicatory functions judges may be persuaded more by considerations of popularity than by principles. The same defect may be there to some extent even if selection is made by the legislative or executive body since in a democracy both reflect the political will of the people. Hence, there also political will than judicial quality will count.6

It is in this context that a deep look into the significant role played by the Supreme Court of India towards securing independence of judiciary by a creative interpretation of the constitutional provisions dealing with selection of judges to the higher judiciary becomes highly relevant. Elaborate provisions relating to appointments of judges to the Supreme Court7 and High Courts8 are contained in the Constitution of India.

The Chief Justice of India, it is clear, shall always be consulted before appointing judges to the Supreme Court and High Courts9. For appointment of

by the Senate i.e. the legislature, see Rocco J. Tresolini and Martin Shapiro, American Constitutional Law (1970), p. 44

6 Though nomination is a good method there also political eminence than judicial quality will be counted. See Harold J. Laski, A Grammar of Politics (1979), p. 545

7 Constitution of India, Article 124 (2) "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and the High Courts in the State as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty - five years:

Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted:"

8 Article 217 (1) "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court,..."

9 The only exception to this rule is the appointment of the Chief Justice of India himself. See Constitution of India, proviso to Article 124 (2).
judges to High Courts, the Chief Justice of the respective High Courts and the Governor are also be consulted. The significant feature of this system is the involvement of the Head of the Union Judiciary in the appointment of judges to the Supreme Court and Head of the State judiciary concerned in the matter of appointment of judges to High Courts.

Appointment of judges is an executive function. As the Head of the Union Executive, the President acts on the aid and advice of the Council of Ministers. Is there not a chance then, that judicial appointments may be influenced by political affinity? Is it not then a serious threat to judicial independence? Undoubtedly there has to be some control on the executive in the matter of appointment of judges to ensure that the persons with right calibre, integrity and craftsmanship alone are appointed. Obviously, the quality and quantity of the output is proportionate to the quality of the judge. Such qualities could be assessed and extraneous considerations avoided only by a competent

---


12 The mode of appointment of judges to the U.S. Supreme Courts involves a process of control on the executive by the legislative body and hence prevents the possibility of executive arbitrariness in selection. See supra, n.5, see also Lorry C. Berkson, "Judicial Selections in the U.S". 9 J.B.C.I. 424 (1982).

13 The qualities which a judge should possess were succinctly stated by Justice Bhagawati in the following words "... they should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, 'Be you ever so high, the law is above you'" S.P. Gupta v. Union of India 1981 Supp. S.C.C. 87 at p.224

14 Law Commission of India, 80th Report, (1979) p. 6. See also, Subhash Sharma v. Union of India, A.I.R. 1991 S.C. 631 in which the Court observed that "the quality of the judiciary cannot remain unaffected... by the process of selection of judges." (at p. 640).
authority. The best authority, which can assess such judicial quality and competence, is now the judiciary. Though the Constitution provides clearly for a process of consultations in judicial appointments, it is silent on the questions like the nature of consultation, whether the President is bound by the opinion tendered by the consultants and in case of conflict inter se whose opinion is binding.

1. APPOINTMENT OF JUDGES TO HIGH COURTS

Two important questions therefore arise in relation to the appointment of judges to High Courts, namely, the nature and scope of consultation and the question of primacy in case of conflict of opinions. These questions came up for consideration before the Supreme Court on more occasions than one.

What is meant by 'consultation'? The common meaning of the term is to deliberate, or to seek information or advice from persons. A meaningful consultation is not a formal process of eliciting of opinion of another with reference to a matter. Being a prelude to an action there must be a free transfer of ideas between the parties with full disclosure of all the relevant materials. Consultation can be of two types. In the first type the consulting person being the sole beneficiary, has the maximum discretion to accept or reject the opinion. In the

15 Supra, nn. 7 & 8.
16 The Concise Oxford Dictionary.
17 Consultation under Article 143 of the Constitution of India falls under this category. Therefore the Supreme Court on reference by the President determines the validity of the Government policies.
second\textsuperscript{18} where the consultant or a third person is the beneficiary, such discretion would be limited, especially when the consultant is an expert. Appointment of judges to the higher judiciary belongs to the second category.

The question relating to the nature of consultation arose in \textit{Union of India v. Sankalchand Seth.\textsuperscript{19}} in the context of transfer of judges. It was decided by a bench of five judges.\textsuperscript{20} The Court held that consultation should be by obtaining the view of the Chief Justice of India for which full facts and circumstances should be supplied to him, and that deliberation is the quintessence of such consultation,\textsuperscript{21} that the President should communicate to the Chief Justice of India the details and that the Chief Justice of India should provide with the information available with him. They may discuss but may disagree and they may confer but may not concur. Consultation should be real substantial, and effective based on full materials.\textsuperscript{22} Consultation was a condition precedent for transfer, ordinarily the views of the Chief Justice of India should prevail\textsuperscript{23}. In short, the judges agreed as to the content of the term 'consultation'. But it is doubtful whether by such a holding the Court was able to evolve a meaningful concept of consultation as what has actually come out was only a formal concept of consultation rather than a substantive one. For, the decision left much scope for unilateral action by the President even after

\textsuperscript{18} See Constitution of India Articles 124 and 217. Consultation under Article 103 also falls under this category.

\textsuperscript{19} A.I.R. 1977 S.C. 2328. For a discussion on the case see infra, chapter IV nn.91-98.

\textsuperscript{20} Chandrachud C.J., Bhagwati, Krishna Iyer, Fazal Ali and Untwalia JJ.

\textsuperscript{21} \textit{Id} at p. 247 (per Chandrachud J.)

\textsuperscript{22} \textit{Id} at pp. 2379-2380, 2384 (per Krishna Iyer J., for himself and Fazal Ali J.)

\textsuperscript{23} \textit{Id}. at p. 2387 (per Untwalia J.)
second\textsuperscript{18} where the consultant or a third person is the beneficiary, such discretion would be limited, especially when the consultant is an expert. Appointment of judges to the higher judiciary belongs to the second category.

The question relating to the nature of consultation arose in \textit{Union of India v. Sankalchand Seth}\textsuperscript{19} in the context of transfer of judges. It was decided by a bench of five judges.\textsuperscript{20} The Court held that consultation should be by obtaining the view of the Chief Justice of India for which full facts and circumstances should be supplied to him, and that deliberation is the quintessence of such consultation,\textsuperscript{21} that the President should communicate to the Chief Justice of India the details and that the Chief Justice of India should provide with the information available with him. They may discuss but may disagree and they may confer but may not concur. Consultation should be real substantial, and effective based on full materials.\textsuperscript{22} Consultation was a condition precedent for transfer, ordinarily the views of the Chief Justice of India should prevail\textsuperscript{23}. In short, the judges agreed as to the content of the term ‘consultation’. But it is doubtful whether by such a holding the Court was able to evolve a meaningful concept of consultation as what has actually come out was only a formal concept of consultation rather than a substantive one. For, the decision left much scope for unilateral action by the President even after

\begin{itemize}
\item \textsuperscript{18} See Constitution of India Articles 124 and 217. Consultation under Article 103 also falls under this category.
\item \textsuperscript{19} A.I.R. 1977 S.C. 2328. For a discussion on the case see infra, chapter IV nn. 91-98.
\item \textsuperscript{20} Chandrachud C.J., Bhagawati, Krishna Iyer, Fazal Ali and Untwalia JJ.
\item \textsuperscript{21} Id at p.247 (\textit{per Chandrachud J.})
\item \textsuperscript{22} Id at pp. 2379-2380, 2384 (\textit{per Krishna Iyer J., for himself and Fazal Ali J.})
\item \textsuperscript{23} Id. at p. 2387. (\textit{per Untwalia J.})
\end{itemize}
consultation. Hence, it resulted in reducing consultation to a mere formality.\textsuperscript{24} It was reexamined in \textit{S.P. Gupta v. Union of India}\textsuperscript{25}, [popularly known as the \textit{Judges Transfer Case} (Judges Case, for short)] and the \textit{Supreme Court Advocates - on - Record v. Union of India}\textsuperscript{26} in the context of the appointment of judges to the higher judiciary.

The Court in the \textit{Judges Case} unanimously held that though the power of appointment of judges resides in the President, it was not to be exercised arbitrarily,\textsuperscript{27} for that was to be exercised only after consultation with the highest echelons of the judiciary and that consultation was a mandatory one. The Judges said that the power of consultation with the judiciary in the matter of appointment of judges has to be real, and with "full and identical facts"\textsuperscript{28} that the consultation has to be full and effective.\textsuperscript{29} It was also held that all parties should provide all available details\textsuperscript{30}, and that consultation should be “purposeful, result oriented and

\begin{itemize}
  \item[\textsuperscript{24}] It appears that only Justice Untwalia understood the true significance of the expression as he insisted that the opinion of the Chief Justice of India was binding on the President (at p. 2387).
  \item[\textsuperscript{25}] 1981 Supp. S.C.C. 87
  \item[\textsuperscript{26}] (1993) 4 S.C.C. 441.
  \item[\textsuperscript{27}] \textit{Supra}, n.25 \textit{per} Bhagawati J. at pp 224, 226, Gupta J. at pp. 346, 347, Fazl Ali J. at p 322; D.A.Desai J. at pp.709,715; Tulzaparkar J. at p 524; Venkitaramaiah J. at p 785 and R.S.Pathak J. at p 710 The Court thus approved the view that none wields absolute power in this matter. During the discussion in the Constituent Assembly, Ambedkar also held the view that none should hold such absolute power, not even the Chief Justice of India however independent he appears to be. He said “... the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transferred the authority to the Chief Justice which we are not prepared to rest in the President or the Government of the day.” C.A.D. Vol. VIII. p 258. (Emphasis supplied).
  \item[\textsuperscript{28}] \textit{Supra}, n.25 \textit{per} Bhagawati J. at p 227 and \textit{per} Tulzaparkar J. at p 557
  \item[\textsuperscript{29}] \textit{Id. per} Bhagawati J. (at p 253).
  \item[\textsuperscript{30}] \textit{Id. per} Desai J. at p 634
\end{itemize}
of substance\textsuperscript{31} However the Court held that the executive was free to take any decision whatever be the advice tendered by the Chief Justice of India\textsuperscript{32}.

The second question, namely, whose opinion is to be given weight for consideration by the President in case of a conflict was also examined by the Court in the \textit{Judges Case}. Article 217 (1) stipulates that before appointing a High Court judge, President has to consult the Chief Justice of India, Chief Justice of High Court and the Governor. But it does not throw light as what is to be done in case of conflict of opinions of the three consultants. The question therefore was whether the President was free to accept the advice of any of them or whether the opinion of the any of the three consultants deserves precedence. It was argued on behalf of the petitioners that as the Chief Justice of India was the head of the judiciary, his opinion deserved primacy over the other two consultants. Turning down the plea, the majority held that the opinion of the Chief Justice of India merited no primacy over the other two consultants in the matter of appointment of judges to High Courts\textsuperscript{33}. Some of the judges went to the extent of holding that since the Chief Justice of the High Court concerned being the person in touch with the incumbents to the post, his opinion was entitled primacy\textsuperscript{34}. Fortunately no judge opined that Governor’s opinion had priority over that of the other two.

\begin{itemize}
\item \textsuperscript{31} \textit{Ibid.}
\item \textit{Id per} Bhagawati J. at p.226; \textit{per} Desai J. at p.598; \textit{per} Pathak J. at p.709 and Venkitaramiah J. at p.791
\item \textit{Id. per} Bhagawati J. at p. 228, Fazl Ali J at p.439, Desai J. at p. 608, Pathak J. at p. 713 and Venkitaramiah J. at p. 785.
\item \textit{Id. per} Bhagawati J. at p. 229, Fazl Ali J at p 439, Desai J at p 605 and Venkitaramiah J. at p 785.
\end{itemize}
The decisions in the *Judges Case* produced two undesirable results in the issue of appointment of judges. It left the final decision in the selection of judges in the higher judiciary to the executive as the phrase 'after consultation with' was held not to amount to have a binding effect on the consulting person. Further, it gave no primacy to the opinion of the Chief Justice of India.

Though the Court held that consultation by the President with the judiciary was not an empty formality it could not make any useful substance of this discussion due to its ambivalent stand. Some of the judges were cementing the view that judicial appointment was an executive act by emphasising that the President was bound by the advice of the Council of Ministers. The insistence on consultation brought forth no substantial effect since the Court held that the presidential act of appointment of judges was to be done on the basis of the advice of the Council of Ministers as envisaged in Article 74(1). This in effect amounts to depriving consultation in Article 217 (1) of its significance for securing independence of judiciary. Though the Court innovatively brought out the importance of judicial independence from among the various constitutional provisions, it seems, it could not effectively implement the same as the Judges

---

35 "The Story of Judges Case is not a pleasant one to tell. It is here that the majority of the judges performed the so called solemn function of handing over the independence of judiciary to the Executive by acknowledging gracefully the authority of the Council of Ministers (Prime Minister) to appoint High Court judges even against the advice of the Chief Justice of the High Court and the Chief Justice of India. So the judiciary is on trial". See B.R. Sharma, *Judiciary on Trail - Appointment, Transfer and Accountability* (1989), and preface p. x.

36 *Supra*, n.25 per Desai J. at p.598, per Pathak J. at p. 707 and per Venkitaramaih J. at p.791.
found nothing wrong in the executive brushing aside the opinions of the judicial Heads without any objective criteria. Resultantly there may be instances when the judiciary will be forced to function with persons unacceptable to it. The holding clearly forfeited independence of judiciary to the executive fiat.

The Court ought to have examined the question why consultation is provided for in the matter of appointment of Judges. Judiciary knows its requirements better than the executive and also the required qualities and qualifications\(^{37}\) of persons competing for judicial posts. Such qualities could be better assessed by the judiciary than the executive. Therefore consultation can be considered as of substance and not an empty formality only when the Government is not able to ignore the views of consultants in the absence of valid and weighty reasons.\(^{38}\) It implies that the executive should have the freedom to reject the views of the judiciary only if the person recommended by the judiciary is ineligible on other grounds like moral turpitude or involvement in criminal cases which may be known better to the executive.

\(^{37}\) The qualities and qualifications required of a judge have been succinctly stated by a judge of the U.S. Supreme Court thus: "Judicial independence, of course has its corollary of judicial responsibility. The judge must be of the stuff that goes to make a good judiciary. What is the stuff of which I speak? Legal knowledge? Yes, and of sufficient quality to determine the applicable rule of law in a given case together with the wisdom to apply it with clarity and dispatch. Ability to discover the facts? Yes, and an ability to recognise truth and separate it from the chaff. A firm but understanding heart? Yes, and the courage to declare a just decision and enforce it. Integrity? Yes... A conscience? Yes, ... it must be a conscience which at the close of each day's work may whisper softly, 'today you were truly worthy to wear the robe and enjoy the appellation of a judge ...'" Tom C. Clark, "Judicial Self-regulation - The Potential" 35 Law and Contemporary Problems, pp 37-39(1970). This view was quoted with approval by the Law Commission of India, 80th Report (1979), at p.31. See also supra, n.13.

The holding of the Court in relation to the second question also deserves closer examination. Is the view that in the matter of appointment of High Court judges the opinion of the Chief Justice of India has no primacy over the views of the Governor or the Chief Justice of High Court justified?

When there is a conflict between the opinion of the Chief Justice of India and that of the Chief Justice of the High Court, it is unwise to leave the choice to the Government. There is a view that the opinion of the Chief Justice of the High Court has to be preferred on the ground that the Chief Justice of the High Court is in a better position to assess the fitness of the incumbent to the judicial post as he practices in his court. But one has to keep in mind the possibility of the Chief Justice of High Court being an aspirant for the post of judge in the Supreme Court is not absolutely independent in forming his opinion as the Chief Justice of India in this regard. The Chief Justice of the High Court may not be as free as the Chief Justice of India to take an objective decision on another ground also. The candidate being personally known to the Chief Justice of High Court one cannot totally rule out the possibility of personal considerations or prejudices in forming the opinion. On the other hand, the Chief Justice of India can have the advantage of knowing all details before he makes his opinion by calling for necessary information from the Chief Justice of the High Court and the Governor and hence is more competent to take an objective decision on the basis of the known details than the Chief Justice of the High Court. Before forming his view he can have also the advantage of the

39 Supra, n. 34.

40 The absolute independence of the Chief Justice of India is attributable to the absence of a chance for further promotion. See Seervai, Constitutional Law of India Vol. II (1984), P.2444.
views of other judges of the Supreme Court and the High Court so as to form a correct view about the candidate.

There is also a question as to whose opinion is to be preferred in case of a conflict between the Chief Justice of India and the Governor. When there is a conflict of opinions between the Chief Justice of India and Governor of the State it is unwise to leave the choice to the Government. The Chief Justice of India is the head of the judicial institution and is independent of the executive. The Governor on the other hand is a nominee of the Central Government and is always likely to offer views palatable to the Central Government. The post of Governor requires no special qualifications or knowledge. It is purely a political post. The post of the Chief Justice of India is therefore incomparable with that of the Governor of a State. It is not proper to equalize the views of the two authorities that are placed at different pedestals. Needless to say that in case of conflict of views of the Chief Justice of India and the Governor of the State weight has to be given to the opinion of the Chief Justice of India.

While dealing with these questions, it is not wise to draw assistance from the practices prevailing in the U.S. and England. For, the constitutional provisions

---

41 *Supra*, n.25 *per* Pathak J. *at p.714.* See also Seervai, *op. cit.* *at p.2446.*

42 While discussing the incorporation of the provision, Krishna Chandra Sharma and S.L. Saksena observed in the Constituent Assembly that Governor need not be consulted. See, C.A.D. Vol. VIII pp. 661-662.

and conventions in those countries in judicial appointments are different from those of India. In the U.S. judiciary does not participate in the appointment of judges.  

But the Indian Constitution specifically provides for the participation of judiciary in the matter of appointment of judges to High Courts and the Supreme Court. As there is basic difference between the selection of judges in the U.S. and India it may not be proper to compare these two and seek assistance from the U.S.

Likewise, there is basic difference between the English and the Indian Constitutions. The English Constitution is unwritten and unitary while ours is written and federal. As against the English Constitution, we have accepted separation of powers though not in a traditional sense.  

Our Constitution has provided for judicial review even against parliamentary excesses whereas in England judicial review is not available against Parliament. In England the present system of appointment of judges to the higher judiciary has been in existence for quite a long time. Hence, appointment of judges by the executive may not be as stigmatic as it is in India where judiciary also plays the role of arbiter in disputes.

44 See Constitution of the U.S. Article II Sec 2 Para 2. There political affiliations, personal friendship with the President, religious and ethnic affiliations, geographical and sectional factors and above all "caprice of fortune" may play considerable role in judicial appointments since selection is made by the Executive. See Martin Shapiro and Rocco Tresolini, American Constitutional Law (1975), pp.42-49. But the Senate which is part of the Congress operates as check on the executive arbitrariness in this regard. See Constitution of U.S. Article II Sec. 2 Para 2. Supra n.5.


in which state is a party and where the federation or its different constituents may be parties. In England, out of convention Lord Chancellor also participates in the selection of judges to the higher judiciary. In short, in both those countries in the process of appointment of judges, no role is assigned to the judiciary while in India it is otherwise. It is considering these difference that the makers of our Constitution made it clear that India would have a mode of selection of judges different from both England and America.

Further, the practice of appointing judges exclusively by the executive is not suited to modern times. It might have been appropriate in ancient and medieval participation of the legislature or the executive in judicial appointments will be consistent with judicial independence if made after consultation with members of the judiciary. For the text of the declaration, see, Martin Shapiro and Jules Deschesnes, op.cit. at pp. 447 et seq.

47 “If this litigant can select judges suitable to itself that would be the end of judicial system which has till now served admirably as the citizen’s palladium against unconstitutional laws and arbitrary executive action.” Palkhiaiwalla, “A Judiciary Made to Measure”, in Our Constitution Defaced and Defiled (1974), p.100.

48 The Indian Law Commission has observed that where the executive was appointing judges it should be assisted by judicial commission consisting of judges, lawyers, academicians, laymen etc. See Law Commission of India, 80th Report (1979), p.8.

49 “In Great Britain, the appointments are made by the Crown without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States, where, for instance, appointments of the Supreme Court shall be made only with the concurrence of the Senate of the United States. It seems to me, in the circumstances we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United State, it would be dangerous to leave the appointments to be made by President without any kind of reservation or limitations, that is to say that the executive of the day. Similarly, it seems to me that appointments which the executive wishes to make subject to the concurrence of the Legislature involves the possibility of the appointments being influenced by the political pressures and political considerations. The draft articles, therefore, steers a middle course. The provision in the articles is that where should be consultation of persons who are ex-hypothesis well qualified to give proper advice in matters of the sort.” B.R. Ambedkar, C.A.D.Vol VIII p. 258. Such a mode of selection of judges was considered as of great import by Union Consultative Committee. See Alice Jacob and Rajeev Dhawan, “Appointment of Supreme
ages when the judges were considered as the servants of the executive and independence of judiciary was not counted as a virtue. Moreover, the long practice followed hither to in India is that the opinion tendered by the Chief Justice of India is accepted. That crystallised constitutional convention also justifies the view that the opinion of the Chief Justice of India has to prevail. Thus, analyzed from different angles, the decision of the Judges Case on this count is not conducive to judicial independence. Viewed in this light, the words and phrases in the Constitution dealing with appointment of judges to the higher judiciary need a progressive construction. The decisions in the Judges Case were too technical and literal warranting reconsideration. Small wonder that the Judge Case was reconsidered by the Supreme Court after a decade. In Subhash Sharma v. Union of India, the Supreme Court doubted the correctness of the Judges Case on the ground that the decision reduced the primacy of position of the Chief Justice of India in the consultative process and denuded ‘consultation’ its true meaning.

50 The interpretation of law is the work of the Crown in its Courts, done through judges who have been and who are counsellors and representatives of the Crown.” Anson, The Law and Custom of the Constitution Vol. I (1907), p.2.

51 A.I.R. 1991 S.C. 631. This was a writ petition under Article 32 of the Constitution to issue directions to the Central Government to fill up the vacancies of judges of the Supreme Court and the High Courts.

52 The Court doubted the correctness of the Judges Case as to the non-binding nature of the opinion of the Chief Justice of India in the matter of judicial appointments and also the denial of primacy to the opinion of the Chief Justice of India. Observing that the view of exclusive executive privilege in the matter, after consultation with the judicial organ, is an over simplification of a sensitive and subtle constitutional sentience and that judicial independence was of crucial importance and that for it the Chief Justice of India should be given pride of case in the matter of selection of judges, the court referred the matter to a larger bench. The reference was made taking note of the need that, "constitutional phraseology would required to be read and expounded in the context of Constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished value of judicial independence." Id. at p. 641.
The Court criticized re-opening of the recommendation of the Chief Justice of India by the executive as it adversely affected the non-political nature of judiciary.\textsuperscript{53} Hence, the Court referred these questions of consultation to a larger bench. These questions thus arose in a series of writ petitions in the Supreme Court and was heard along with \textit{Supreme Court Advocate on Record v. Union of India}\textsuperscript{54} (S.C. Advocates, for short).

In \textit{S.C. Advocates}, the Court observed that the questions relating to the meaning of 'consultation' with the judiciary in matters of judicial appointments were to be considered in the light of 'independence of judiciary', a basic feature of our Constitution which was essential to secure Rule of Law and preservation of the democratic system.\textsuperscript{55} The Court therefore held in clear terms that 'consultation'\textsuperscript{56} in the matter of appointment of judges envisaged the decision of the President in accordance with the opinion of the consultants and that rejection of such opinions should only be for valid and weighty reasons.\textsuperscript{57}

Justice J.S. Verma\textsuperscript{58} opined that in the matter of judicial appointments the provisions for consultation found a place in the Constitution to avoid political

\textsuperscript{53} Id. at p. 640.
\textsuperscript{54} (1993) 4 S.C.C. 441.
\textsuperscript{55} Id. at p.680.
\textsuperscript{56} Constitution of India, Articles 124 (2) & 217 (1). See supra, n.7
\textsuperscript{57} The decision was rendered by a majority of 8:1. The majority consisted of J.S. Verma, Dayal, Ray, Dr. Anand, Barucha, Rangavel Pandian, Kuldip Singh and Puncchi JJ. Justice Ahmadi however dissented.
\textsuperscript{58} Justice Verma speaking for himself, Dayal, Ray, Dr.Anand and Barucha J.
considerations. He also observed that diversion from the Government of India Act 1935 negates full discretion to the executive in the matter. He said that the process of appointment of judges to the higher judiciary was an "integrated consultative process" to select the best ones. Justice Rangavel Pandian stated that judges alone could assess qualities like professional ability and legal knowledge of the incumbents for judicial posts. He also observed that consultation amounted to a limitation on the power of a President to appoint judges. So consultation is mandatory and should not be "easily brushed aside as an empty formality or futile exercise or a mere casual one attached with no sanctity." Justice Kuldip Singh held that the opinion of the judiciary was binding on the executive, as it knows the character, integrity and ability of the persons. He further explained that the executive could have no knowledge of the fit person to the judicial post and hence consultation in the matter of appointment of judges amounted to one between a layman and a specialist. Therefore the view

59 Section 200 of Government of India Act 1935 provides that appointments to the posts of judges of the Federal Court could be effected by the Crown under her warrant and seal without being advised by the judiciary. But Seervai observes that the judges of the High Court were to initiate proceeding to appoint judges under the Act. See Seervai, Constitutional Law of India Vol III (1996), pp. 2956-2957. However, that seems to be incorrect, as that was not a statutory mandate but only a constitutional convention under the Government of India Act.

60 Supra, n. 54 at pp. 691 - 692.
61 Id. at p.709.
62 Id. at p.558.
63 Id. at p.564.
64 Id. at p 564. He observed that the provision was a *sine qua non* since the State was the biggest litigant. Id. at p.569. Quoting Decimus Junius Juvenalis, a Roman satirist, he poses the question, *quis custodiet ipsos custodes?* (But who is to guard the guards) Id. at pp. 559.
65 Id. at p. 663.
of the specialist, namely, the judiciary should prevail. Justice Puncchi disagreed with the view in the *Judges Case* in so far as it amounted in effect to recognition of arbitrary power in President in appointing judges. He pointed out that to prevent encroachment of the 'executive minded persons' to the judiciary, it was necessary that opinion of the judiciary should carry some weight. In short, the decision in *Judges Case* was overruled.

The above decision in the *S.C. Advocates* is rendered after taking the perspective of the Constituent Assembly in relation to independence of judiciary into account. While enacting the provisions dealing with judiciary the Constituent Assembly had taken utmost care to ensure independence of judiciary. The objective of the Constituent Assembly in enacting those provisions was primarily to secure judicial independence. The Assembly was not ready to confer full and unconditional power on any of the organs of the Government - even in the President - in the matter of appointment of judges. The *Judges Case* interpreted

---

66 To reach his conclusion he drew support from the opinion of Justice Krishna Iyer in *Samsher Singh v. State of Punjab*, A.I.R. 1974. S.C. 2192 (id. at p.665) and also from the intention of the framers of the Constitution to confer only limited powers to the executive. (at p 667).

67 *Id* at pp.721, 725 and 726.

68 Articles 124-139 relating to the Union Judiciary consisting of the Supreme Court, Articles 217-228 dealing with High Courts and Articles 230-237 dealing with the lower judiciary.

69 The Constituent Assembly had a unanimous view that India should have an independent judiciary. For instance, see the opinions of H.V.Kamat, K.M. Munshi and Naziruddin Ahmad in C.A.D. Vol VIII pp.218-227. See also supra, chapter II n. 43.

70 See supra, n 49. In determining the general objective of the legislature, the intention which appears to be in accordance with "convenience, reason, justice and legal principles" should be presumed to be the true one. See P. St. J. Lananglann (Ed). *Maxwell on Interpretation of Statutes* (1976), p.199. It is accepted in judicial process that when the literal interpretation defeats the intention of the legislation and these likely to cause
the provisions relating to appointment of judges keeping in mind the stand of the Constituent Assembly that consultation did not amount to concurrence but narrowly without fully keeping in mind the perspective of the Assembly in relation to judicial independence. The S.C. Advocates, on the other hand, attempted to construe the provisions in a holistic manner with a view to securing judicial independence instead of embarking upon a piece meal analysis of various provisions as was done in the Judges Case. As a consequence, the Court held that the President was bound by the opinion tendered by the Chief justice of India. The question of binding nature of the opinion of the Chief Justice of India indicates the weight it carried in the formation of the view of the President. By the term 'President,' the Indian Constitution denotes the President aided and advised by the Council of Ministers. So in all executive matters the President has to act only in accordance with the advice tendered by the Council of Ministers. Appointment of judges being an executive function is not an exception to this rule. However, the provision for consultation with the judiciary raises a question as to the precedence of the advice tendered by the Council of Ministers under Article 74(1) and the opinion tendered by the judiciary under Article 124 (2) and 217(1). It is in such a context that the Court held that the advice tendered by the Council of Ministers should be in accordance with the primacy of the Chief Justice of India and the unreasonableness "some violence to the words" may be done to achieve a rational construction (at p.199).

71 The issues of the mode of appointment of judges, the person with final say in the matter, the meaning of consultation with Chief Justice of India and other judges of Supreme Court and whether it means concurrence should be considered with emphasis on the independence of judiciary. See S. Sahai, " Role and Status of the Judiciary in Indian Government", 8 J.B.C.1442 at p.444 (1981).

72 Supra, n. 54 at p. 701.
norms indicated there in.\(^7^3\) In other words, the Court held that the requirements of Article 74(1) of the Constitution were circumscribed by the requirement of Articles 124 (2) and 217 (1). Such a construction was justified by the Court on the principle that when there are two provisions of law operating on the same set of facts one of which is special, that would prevail over the general one.\(^7^4\) Absence of provisions for consultation with any authority for appointing Comptroller and Auditor General and Chief Election Commission also underlines the importance of consultation and the weight the opinion of the consultants carry in judicial appointments.\(^7^5\) Thus for the maintenance of independence of judiciary the Court conferred importance to the opinion of the judiciary in the matter of appointment of judges. When with such an objective, precedence is given to the opinion of the judiciary it should be value-packed and should be distinguishable from that of others for the merit it contains.

It is with such a view that the Court held that the opinion of the judiciary was expressed through the Chief Justice of India with whom the President had to hold consultations before appointing judges to High Courts. However, the Chief Justice of India was not supposed to render a personal opinion in the matter. Before conveying his opinion to the President, he has to consult his senior colleagues in the Supreme Court who are likely to be conversant with the affairs of

\(^7^3\) *Ibid.*

\(^7^4\) *Id.* at p. 696. Here the principle applied is *Generalibus specialia derogant*, which means special things derogate from general things. See Roger Bird, *Osborn’s Concise Law Dictionary* (1983).

\(^7^5\) This fact was taken note of by Justice Kuldip Singh (*supra*, n 54 at p.665).
the High Court to which appointment was to be made. The Chief Justice of India has also to ascertain the views of one or more senior judges of the High Court concerned whose opinion according to him is significant in the matter. The opinion of the Chief Justice of the High Court deserves the greatest weight in this regard and it should also be formed after consulting two senior judges of the High Court.\(^\text{76}\) That is why it was held that the opinion of the Chief Justice of India was to be formed after "participative consultative process"\(^\text{77}\) which represented the view of the institution of the judiciary to select the best ones.

Once thus the Court provided a different colour and content to the nature of opinion of the Chief Justice of India that is liable to cause a change in the nature of 'consultation' under Article 217(1). Unlike in the past the President could not brush aside the opinion of the Chief Justice of India in the matter of appointment of High Court judges. Therefore as a normal rule the final opinion of the Chief Justice of India was binding on the President.\(^\text{78}\) But the President could counter his view in exceptional cases and that too only on sound materials.\(^\text{79}\)

The dilemma of determining the primacy of opinion of consultant under Article 217(1) also arose in the S.C. Advocates Case. Dealing with this issue, the Court held\(^\text{80}\) that in the matter of appointment of judges to High Courts, the Chief

\(^{76}\) Supra, n. 54 at p. 702.

\(^{77}\) Id. at p. 693.

\(^{78}\) Id. at p. 700.

\(^{79}\) Ibid.

\(^{80}\) Id. per Verma J. at pp. (701-702) and Pandian J. (at pp. 571-572).
Justice of India should form his view only after consulting his colleagues who are conversant with the affairs of the High Court. He also has to consult one or more judges of the High Court whose views according to him would be significant in forming his view. The opinion of the Chief Justice of the High Court should be given the greatest weight in this regard. The High Court Chief Justice should form his view after consulting at least two Judges of the High Court.

It is clear from the holding that the Court deviated from the holding in the *Judges Case* and refused to recognize any conflict between the views of the Chief Justice of India and the Chief Justice of High Court. The opinion of the Chief Justice of India to which primacy is given in *S.C. Advocates* encompasses within it the opinion of the High Court Chief Justice. By the requirement that before recommending, the Chief Justice of India has to necessarily consult the High Court Chief Justice, the Court was able to give due weightage to the opinion of the latter and avoid any conflict between them. By insisting on the formation of the view of the Chief Justice of India after consulting judges of the Supreme Court and High Courts, the Court was able to give an institutional flavour to his opinion.\(^1\)

The decision of *S.C. Advocates* has been thoroughly criticised by Seervai as one, which paid no attention to the rules of interpretation\(^2\). He opined that the decision was in violation of the "well settled principles of interpretations, namely, that the function of the Court is to ascertain the meaning of any provision of the

\(^1\) *Id. per* Verma J. (at p. 699) and Kulpid Singh J. (at p. 669).

constitutions by referring to the language used, and if the language is unambiguous, to give the provision its plain ordinary meaning. He also alleges that the decision was rendered in favour of the constitutional philosophy and values which are inimical to the interpretation of constitutional provisions. He concludes that the decision was not actually warranted because the only question before the Court was whether consultation with the Chief Justice of India under Articles 124 (2) and 217 (1) amounted to concurrence. He also viewed that it could not amount to concurrence as that may lead to a situation in which the term consultation would always be construed as concurrence.

The criticisms of Seervai seem to be not correct. First of all, the decision does not convert the term consultation to concurrence. It just gave superiority to the opinion of the Chief Justice of India considering his absolute independence. The Court in the case was giving primacy and binding nature to the opinion of the Chief Justice of India not as the individual nor in his personal capacity but as the Head of the judiciary. It was held.

“At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that ... the selection should be made as a result of

---

83 Id. at p.2942.
84 Id. at p.2944.
85 Id. at p.2952
86 Supra, n. at pp. 692-693.
participatory consultative process... It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.”

His criticism that there cannot be constitutional philosophy or value to interpret the constitutional provisions also seems to be incorrect. It is axiomatic that the interpretation of the constitution is different from that of ordinary statutes as constitution stands on a higher pedestal. It is supposed to exist for a longer period. Therefore, interpretation of a Constitution should be to advance its philosophy. Further, when two constructions of the same provision are possible that which does not lead to absurdity should be accepted. For these reasons, avoidance of an interpretation to the term ‘consultation’ conferring unilateral power in executive damaging independence of judiciary cannot be considered as unwarranted.

Thus, the Court has given a go-by to the strict literal interpretation of the constitutional provisions only with the object of maintaining independence of judiciary, taking the values and history of the Indian Constitution into account. While interpreting the term ‘consultation’ assistance of the mischief rule of interpretation can also be sought for 87 In matters of judicial appointments other

87 The Mischief Rule was first applied in the Heydon’s Case, 3 Co Rep 7a. In Re Mayfair Property Co. [1898] 2 Ch 28 Lindley M.R. stated the principle thus, “In order to properly interpret any statute it is necessary now... to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure the mischief.” (at p.35). (Emphasis supplied) See also Maxwell op.cit. at p.40.
Constitutions as well as the predecessors of the Constitution of India like the Government of India Act 1935 do not provide for consultation with members of judiciary. Deviating from them the Indian Constitution specifically provides for such consultation. It is indicative of the intention of the makers to restrict the powers of the executive and to emphasize consultation with the judiciary to appoint judges. Though the Court has not expressly mentioned the relevance of the rule, its impact is clear from the ruling of the majority,'8

"Thus, even under the Government of India Act, 1935, appointments of Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown... when the Constitution was being drafted, there was a general agreement that the appointments of Judges in the superior judiciary should not be left to the absolute discretion of the executive, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of High Court .... This clear departure in the constitutional scheme from the earlier pattern in the Government of India Acts.... is a sure indication that... the constitutional provision cannot be construed to read therein the absolute discretion or primacy of the Government of India to make appointments of its choice, after completing formally the requirement of consultation, even if the opinion given by the consultants of the judiciary is to be contrary."

It appears therefore, that the Court interpreted the constitutional provisions dealing with judicial appointments without sacking the canons of constitutional

8 Supra, n 54 at p.691 (Emphasis supplied)
interpolation. Overruling of the * Judges Case * on this count clearly establishes that the Court learnt a lesson from the flaws of interpretation in the * Judges Case *.

Will not conferment of an absolute discretion to the Chief Justice of India to recommend lead to arbitrariness? To hold that the Chief Justice of India had the full power to control judicial appointments would clearly be against the intention of the Constituent Assembly. And it is true that the Constitution does not confer any veto power on the Chief Justice of India in relation to judicial appointments. Nor could the Court for the same reason go so as to hold that 'consultation' amounted to 'concurrence'. So, the Court held wisely that the President could disagree with the view of the Chief Justice of India and refuse to appoint as according to the opinion of the Chief Justice of India. But such non-appointment of the recommended person would be only for "good reasons," the same should be communicated to the Chief Justice of India for reconsidering his view and also to express the reconsidered view. If the other judges of the Supreme Court with whom the Chief Justice of India held consultation hold the view that the recommendation of the Chief Justice of India should be withdrawn, in public interest the President can refrain from appointing him. Such a restraint on the Chief Justice of India checks arbitrariness and caters independence of judiciary. The holding therefore is a creative one.

91 Supra. n at p. 706.
92 Ibid.
Even after the decision in *S.C. Advocates* certain doubts regarding the nature of the opinion of the Chief Justice of India in the matter of judicial appointments persisted. This came for consideration of the judiciary when the advisory opinion was sought by the President in *Special Reference No. 1 of 1998*. 93

Agreeing with the decision in *S.C. Advocates*, the Court held that the Chief Justice of India had to form his opinion in the matter of appointment of Judges to High Courts after consultation with a collegium consisting of two senior-most judges of the Supreme Court. In making a decision, they would take into account the view of the Chief Justice of the High Court concerned and the views of other Judges of the High Court and views of the Judges in the Supreme Court 'who are conversant with the affairs of the High Court concerned' into account. 94 The Court opined that the best information regarding the appointee would come from the Chief Justice and Judges of the High Court and those of the Supreme Court. 95 The holding is highly creative and can be considered as an extension of *S.C. Advocates Case*. In *S.C. Advocates*, the Court emphasized the necessity of excluding the arbitrariness of the executive. In *Special Reference*, the Court tried to rule out all chances of arbitrariness of the Chief Justice of India in the selection of Judges by holding that he has to recommend a person only after taking into account the views of the collegium of Judges, and other judges of Supreme Court conversant with the affairs of the High Court and of the Chief Justice and other judges of the High Court.

---


94 Id. at p. 767.

95 Id. at p. 768.
Court concerned. The Court held that judicial review would be available if the recommendation is not that of the Chief Justice of India and his colleagues. It is also available if in taking the decision, the views of the Chief Justice and senior judges of the High Court and of the judges of the Supreme Court knowledgeable about the High Courts have not been sought or considered by the Chief Justice of India and his colleagues. Judicial review would also be available when the appointee lacks eligibility. As a result of the decisions in *S.C. Advocates* and *Special Reference*, the Court has ruled out arbitrariness likely to impede judicial independence both on the part of the Executive and/or the Chief Justice of India in this respect. The creative element of the decision in *Special Reference* lies in further developing the expression ‘consultation’ in Article 217(1) from consultation between the President and Chief Justice of India to consultation between the Chief Justice of India and judges of the Supreme Court and High Court including the Chief Justice of that High Court making such consultation mandatory. Now the emerging position appears to be that consultation between the President on the one hand and the Governor and the Chief Justice of High Court on the other envisaged by Article 217 (1) has relevance only in one situation namely, where the President

96 Earlier, the scope of judicial review was extended to cases of violation of the requirements of Article 217. In *Shree Kumar Padma Prasad v. Union of India*, [(1992) 2 S.C.C. 428] the Court struck down an appointment of a judge to the High Court of Assam on the ground that he did not satisfy the required conditions for appointment in Article 217(2) (a). The Court held that the requirements in Article 217 were prescribed for protecting the independence of the judiciary, which according to the Court was a basic structure of the Constitution. In *Special Reference*, (supra, n. 93) the Court went to extent of widening the requirements for appointment by making consultation with the colleagues and other judges mandatory and extending the scope of judicial review so as to cover those aspects also. The Court held thus, “Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court have not been sought or considered by the Chief Justice of India and his two senior most puisne Judges, judicial review is available.” (Id. at p. 768).
considers whether the person recommended by the Chief Justice of India is suitable and whether the Chief Justice of India should reconsider his recommendation.

2. SELECTION AND APPOINTMENT OF JUDGES TO THE SUPREME COURT

The Constitution of India contains provisions for appointment of judges to the Supreme Court. It is mandatory that for appointing judges to the Supreme Court, the President has to consult the Chief Justice of India. He may in addition, consult other judges of the Supreme Court and High Courts. There are a few issues which are common to both the appointment of judges to the Supreme Court and High Courts. The nature of consultation with the Chief Justice of India, and the effect of the opinion of Chief Justice of India are common to both.

Referring incidentally to the appointment of judges to the Supreme Court, some of the Judges held in the Judges Case that consultation with the judicial authorities had been provided for in the Constitution to check executive arbitrariness in this respect. However, the holding of the Court that in appointing Judges to High Courts consultation should be meaningful and of substance and cannot be an empty formality has application mutatis mutandis to appointment of Judges to the Supreme Court also. Specifically dealing with this issue in the S.C. Advocates Case, the Court held that the power of initiation of the name of the

97 Supra, n. 7.
98 Supra, n. 25 per Bhagwati J (at p. 232) and Desai J (at p. 638).
person to be appointed as the judge of the Supreme Court is fully vested with the Chief Justice of India. This means that the proposal of the name is to come from the Chief Justice of India and the President is to consult the Chief Justice of India in case of the disagreement with the proposal. How then is the requirement of consultation with 'such judges of the Supreme Court' satisfied? The Court held that the Chief Justice of India is to form his opinion in consultation with two senior most colleagues and that before sending his final opinion, the Chief Justice of India has to consult two senior-most judges of the Supreme Court. He has also to ascertain the opinion of the senior-most judge of the Supreme Court who has come from the High Court of the recommendee. In the view of the Court, the requirement in Article 124(2) of consultation with 'other judges' stands satisfied by this procedure. In other words, the Chief Justice of India is not supposed to project his personal view in this respect but an institutional view as the head of the judiciary. Therefore, the Court held that his opinion has to carry the greatest weight. It deserved primacy normally and is binding on the President.

In what circumstance then is the view of the Chief Justice of India not binding? The Court identified the exceptional circumstances in which the opinion of the Chief Justice of India was not binding on the President. When the President

---

99 Supra, n.26 at p.705.
100 Id. at p.702.
101 Ibid.
102 Ibid. In the Constituent Assembly itself, a view was canvassed by Rohini Kumar Chowdhury that for appointing Judges to the Supreme Court, a panel of Judges be consulted. See, C.A.D. Vol.VII p.898.
103 Ibid.
feels that the recommendee of the Chief Justice of India was not suitable to the post, he may return the recommendation with reasons for reconsideration. If on such a return, the Chief Justice of India does not agree, but the judges with whom the Chief Justice of India consulted earlier, agree with the President that the recommendee was unsuitable, the President need not appoint the recommendee of the Chief Justice of India. But, if the judges unanimously agree that the recommended person should be appointed, the President has no option but to abide by the opinion of the Chief Justice of India. What are the consequences of the decision?

By the decision in the *S.C. Advocates*, the Court has formulated certain new principles. The Court denied the President the power to initiate the name of the person to be appointed as judge of the Supreme Court. He is also denied the power to appoint a person as the judge without the approval of the Chief Justice of India. The only power conferred on the President is to refrain from appointing a person when there is disagreement between the Chief Justice of India and his consultants. In other words, the Court erected judicial supremacy in the matter of appointment of judges to the Supreme Court. But it did not confer absolute and arbitrary power on the Chief Justice of India also. The Chief Justice of India could invoke his power of recommending the person only after consulting his senior colleagues and by taking their views into account. As a result of such a

---

104 *Id.* at p. 703.
105 *Id.* at p. 704.
procedure of appointment, there is a possibility of non-appointment of suitable persons as judges. But the Court observed that in public interest such a predicament was preferable to the one in which wrong and unsuitable persons are appointed\textsuperscript{107}.

In the wake of the holding two specific issues involved in the matter of appointment of judges to the Supreme Court become relevant. One is whether under Article 124 (2) the President has the discretion to decide whether there has to be any consultation at all with other judges of the Supreme Court and High Courts. The other is whether the President has the discretion to decide the judges to be consulted. These questions arise in the context of the expression “after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose....” in Article 124 (2). In other words, the question is whether the expression “as the President may deem necessary” qualifies the term ‘consultation’ or whether it qualifies the expression “such of the Judges.”

The answer to the first question depends upon the definition, scope and extent of the discretion of the President to consult other judges under Article 124 (2). Is the President duty-bound to consult them? Could he dispense with such consultation in cases he deems fit? These issues have not specifically attracted the attention of the Court since the matter did not come up for adjudication in any case.

\textsuperscript{107} Ibid.
before it. However there is a view that under Article 124(2) the President has the discretion to decide whether there has to be any consultation with other judges. What could then be the parameters of the discretion of the President in the light of the decision of the Supreme Court in the *S.C. Advocates Case*?

The holding of the Court that the initiation of the name of the person should always come from the Chief Justice of India operates as a limitation on the President to initiate the same. When the President is denied the power to initiate the name of the appointee, there is circumspection of his discretion to consult other judges for such initiation. When a power is not vested with an authority, consultation for exercising that power is also meaningless and irrelevant. It is therefore clear from the holding of the *S.C. Advocates* that the President is bereft of the discretion to consult other judges to initiate the name of the person to be appointed to the Supreme Court.

Further, the holding of the Court that the opinion of the Chief Justice of India is binding on the President in normal circumstances significantly reduced his power to appoint judges. It means that the President can appoint only a

108 However in the *S.C. Advocates Case*, Justice Puncchi dealt with the issue without much deliberation on the conflict between the opinion tendered by such judges and the opinion of the Chief Justice of India. Supra, n. 26 at p.721.

109 See Seervai, *Constitutional Law of India* Vol II (1984), p.2188. On a literal interpretation of the provision, he opines that as the first Proviso to Article 124(2) stipulates that the Chief Justice of India should always be consulted in the matter of appointment of judges to the Supreme Court other than the Chief Justice of India, there is an implication that the President had the freedom to decide whether consultation with other judges was necessary. But for a contrary opinion, see, Kashmir Singh, “Appointment of The Judges of the Supreme Court” in B.P Singh Seghal (Ed.), *Law, Judiciary and Justice in India* (1993), p. 112 at 117.
recommendee of the Chief Justice of India and none else. The discretion of the President to consult other judges under Article 124(2) is only a supplementary and ancillary one to streamline his power to appoint judges. Since the power of the President to appoint judges is restricted, it is meaningless to presume that the President enjoys absolute discretion to consult for exercising that power. If the other judges consulted by the President agree with the recommendation of the Chief Justice of India, consultation becomes redundant, as even without that the President could appoint the nominee of the Chief Justice of India. Even if they disagree with the suggestion of the Chief Justice of India, the President is bound by the opinion of the Chief Justice of India as it has precedence over that of other consultants of the President. That is, in either occasion, consultation between the President and other judges is without any consequences.

But, as mentioned above, the President is conferred with the power to refrain from appointing a person though recommended by the Chief Justice of India, if on reference by the President and on further consultation by the Chief Justice of India there is disagreement between the Chief Justice of India and his consultants as to the suitability.\(^ {10} \) Perhaps that is an occasion in which the President could effectively consult ‘other judges’ under Article 124(2). If on consultation, such other judges opined that the recommendee was unsuitable, on its basis the President may form an opinion that the person is unsuitable, and he can return the recommendation to the Chief Justice of India for reconsideration which, as mentioned above may lead to non-appointment of the person recommended by

\(^ {10} \) Supra, n.105.
the Chief Justice of India. In other words, the power being limited to decide that the nominee of the Chief Justice of India is not to be appointed, the discretion to consult under Article 124(2) relates to matters of such non-appointments only. One of the remarkable features of the decision in *S.C. Advocates* is that without expressly referring to the discretion of the President to consult, the Court has effectively restricted its scope by restricting his powers to appoint Judges.

The second question is whether this provision empowers the President to pick and choose the consultants he likes. If he is given such a freedom the chance that the President may select judges who may render views acceptable to him and avoid others cannot be ruled out. In such a context, the very concept of consultation in Article 124 (2) as expounded by the Supreme Court in various decisions including the *Judges Case* and the *S.C. Advocates Case* may lose its content. To be meaningful and of substance, it should not be optional for the President to pick and choose the persons with whom he would hold consultations. The category of persons with whom consultation is to be held should be predetermined. And it should be known to the consulting person, the consultants and the public. In such circumstances only it could be assured that the process of consultation is effected without personal prejudices of the consulting person. Therefore, to construe the discretion of the President to consult Judges of the Supreme Court and High Courts under Article 124 (2) in accordance with the spirit

---

111 *Supra* nn 25 & 26. See also the observation of Justice Subba Rao in *Chandra Mohan v. State of U.P.* A.I.R., 1966 S.C. 1987 that in the matter of appointment of District Judges the constitutional mandate to consult in Article 233 would be vitiated by the Governor in two ways: either by not consulting persons who are necessarily to be consulted or consulting persons who need not be consulted as per the Constitution.
of S.C. Advocates it should be given a restrictive interpretation. The discretion to
hold consultation should be limited to consultation with senior Judges of the
respective courts other than those consulted by the Chief Justice of India. Such a
construction is necessary for upholding judicial independence.\textsuperscript{112} The number of
judges to be consulted may be decided by the President, as that does not affect
judicial independence.

It is clear from the above discussion that the scope of the discretion of the
President to consult such other judges under Article 124 (2) is effectively limited
by the Supreme Court. The discretion of the President to consult other judges
being executive in nature it would come under Article 74 (1). If absolute discretion
is given to the President in this respect a situation would ensue in which Article 74
(1) controls the provisions of Article 124 (2) which the Supreme Court wanted to
avoid\textsuperscript{113} for upholding independence of the judiciary.

The ruling of the S.C. Advocates Case is an improvement on yet another
aspect also. Appointment of judges to the Supreme Court was being effected from
the category of Judges of the High Courts having five years of experience\textsuperscript{114}
without giving due weight to inter-se seniority of judges of the same High Court
and seniority on an all India basis.\textsuperscript{115} The Court in the S.C. Advocates Case held

\textsuperscript{112} There is a view that the President should consult the senior judges of both the Supreme
Court and High Courts. See Kashmir Sing, supra, n. 109 at p. 118.

\textsuperscript{113} Supra, n. 74.

\textsuperscript{114} Constitution of India, Article 124(3) (a).

\textsuperscript{115} Seniority on an all India basis was not considered as a criterion for being appointed as
a judge of the Supreme Court.
that appointment of judges to the Supreme Court should be recommended by the Chief Justice of India only after considering the seniority of the judges of the same High Court and seniority on an all India basis. This rule can be digressed from only in exceptional cases where there is some 'strong cogent reasons to justify a departure'. Such a ruling is sufficient to check arbitrariness of the Chief Justice of India. The decision in *S.C. Advocates* thus on the one hand puts restrictions on the power of the Chief Justice of India to recommend persons to the posts of Judges in the Supreme Court and on the other limits the discretion of the President to appoint the Judges as well as to make consultations with *other Judges* for the purpose. This holding is capable of instilling confidence in the minds of judges and upholding independence of judiciary.

The nature of the opinion of the Chief Justice of India with reference to appointment of Judges to the Supreme Court also was considered by the Court in the *Special Reference*. There were two major issues raised in this respect: (1) Whether the Chief Justice is bound to consult only two senior judges of the Supreme Court before making his recommendation and (2) Whether the Chief Justice was entitled to act solely in his individual capacity when he is required to reconsider his recommendation. The Court affirmed that the opinion of the Chief Justice of India, which commanded primacy, was to be formed only in consultation with a collegium of Judges. Reaffirming faith in the competence of the

---

116 *Supra*, n. 26 at pp. 702-703.
117 *Id.* at p. 702.
118 *Supra*, n. 93.
119 *Id.* at p. 763.
collegium of Judges to select the best person to the highest judicial forum, the Court held that the collegium should consist of the Chief Justice of India and four senior most Judges of the Supreme Court. It was held that the Chief Justice of India was not to tender opinion in his individual capacity. To assure that the recommendation of the Chief Justice of India represented the views of the members of the collegium, the Court held that their views should be in writing. The Court expected that the collegium would make its recommendations in consensus. To check any arbitrariness on the part of the Chief Justice in this respect, the Court further held that if he was in the minority, he should not press for the appointment. Moreover if the recommendation was returned by the President for reconsideration, decision is not to be taken by the Chief Justice individually. In such a case, it is for the collegium to withdraw or reiterate the recommendation. The Court held that the opinion of the Chief Justice of India without consulting his colleagues was not binding on the President. This decision exhibits very high innovation of the judiciary on many counts in construing the consultative procedure for appointment of Judges to the Supreme Court. It is creative in the sense that the Court has transformed the content of consultation in Article 124(2) from one between the President and the Chief Justice of India into one between the Chief

120 Id. at p. 764.
121 Ibid.
122 Id. at p. 765.
123 Id. at p. 766. The Court visualized a situation in which some of the members of the collegium have retired between the initial recommendation and its return for reconsideration by the President, The Court held that in such a context, the collegium should be reconstituted by filling up the vacancies with the senior most Judge to deal with the matter. The Court was particular that the number of Judges who reconsider non-appointment should be as large as those who recommended the appointment.
124 Id. at p. 762.
justice of India and his colleagues in every aspect of recommendation and reconsideration in the processes of appointment of Judges to the Supreme Court. The peculiarity of the consultative process as envisaged by the decision is that by it the Court was able to rule out the possibility of arbitrariness of the Chief Justice of India in two ways. He was denied the power to recommend a person if the majority of the Judges in the collegium was against such appointment. Similarly, if the President returned the recommendation for reconsideration of the Chief Justice, he can recommend the appointment again only if the original recommendation is unanimously reiterated by the collegium. Thus in every sense, the Court tried to see that the view of the Chief Justice of India represented the view of the judiciary. Incorporation of the condition that the views of the collegium should be in writing helps an objective evaluation whether the recommendation of the Chief Justice was made in accordance with their view. Such an extended construction of the expression 'after consultation with the Chief Justice of India' excludes even a distant possibility of arbitrariness and is therefore conducive to judicial independence. While the drive behind the decision in the S.C. Advocates was subjugation of executive prejudice, the thrust of the Special Reference lies in curbing the arbitrariness of the Chief Justice of India. From the point of view of judicial independence, Special Reference undoubtedly is a step forward from S.C. Advocates.
3. SELECTION AND APPOINTMENT OF THE CHIEF JUSTICE OF INDIA

The importance of the office of the Chief Justice of India need not be over emphasised. The office of the Chief justice of India has been specifically mentioned in the Constitution. Being the head of the Apex Court, though primus inter pares, he is pater familias of the judiciary and is highly influential in framing the judicial policies. Apart from judicial functions and powers, he holds administrative powers like the power to constitute the benches of the Supreme Court. He has functions of advising the President in certain important matters. He also wields legislative powers like the power to frame rules to regulate the conditions of service of servants of the Supreme Court.

---

125 Article 124(1).
126 Ibid.
127 Supra, n.26 per Puncchi J. At p.714. See also Baxi, The Indian Supreme Court and Politics (1980), p.41.
128 "On him rests the tone and tradition of the highest Court of the land, the law laid down by which, is the law of the country... as the Head of the judiciary, he would lay down the principles and practices to be followed in the administrations of justice all over the country". See, The Law Commission of India. 14th Report (1958), at pp. 38-39. See also Baxi, op.cit where he opines at pp. 41-42 : "In a sense, the focal points of these relations is the Chief Justice of India, who though primus inter pares has a considerable role in maintaining a cohesive functioning of the Court in normal times. In abnormal times, the responsibilities are ever heavier: the Chief Justice of India has to be anxiously vigilant in defense of the Court and the values of the Constitution."
129 Articles 124 (2), 217 (1) and 217 (3).
130 Article 146 (2).
Article 124 (2) stipulates that judges to the Supreme Court should be appointed by the President after consultation with such of the Judges of the Supreme Court and High Courts he deems fit. The first proviso makes compulsory the requirement of consultation with the Chief Justice of India only in the matter of appointment of Judges other than the Chief Justice of India. In such appointments consultation by the President with other Judges of the Supreme Court is discretionary. The Constitution does not specifically envisage the pre-requisite of consultation with any body in the matter of appointment of the Chief Justice of India. Since the Constitution does not contain any guideline as to a mandatory procedure, appointments of the Chief Justice of India were being effected by the conventional procedure of selecting and appointing the senior most Judge of the Supreme Court though there were some incidents of breaking of the convention.

In 1958, in its attempt to improve the judiciary, the Law Commission of India in its XIV report suggested certain changes in the mode of selection of the Chief Justice of India. It opined that the office of the Chief Justice of India was of

131 Four times the convention was broken. The first was in 1952 when Justice Patanjali Shatri was tried to be superseded. The Government could not implement it as all the Judges of the Supreme Court expressed their willingness to tender resignation. For a discussion, see Kulip Nayar, “The Thirteenth Chief Justice” in Kulip Nayar, Supersession of Judges (1973), p. 9 at 12. For the second time the seniority was overlooked when Justice Imam was super-se ded as the Chief Justice of India by Justice Gajendragadkar in 1968. But that was due to the persistent illness of Justice Imam disabling him to continue as a Judge. See Amiya K. Chaudhuri, “Appointment of a Chief Justice: a Study of a Controversy in a New Perspective” in Verinder Grover (Ed.), Courts and Political Process in India (1989), p. 152 at 174. The convention was again broken in 1973 when Justice A.N. Ray was appointed the Chief Justice of India super-se ding Justices Hegde, Grover and Shelat who were senior to him. As a result all the three Judges resigned. For a detailed discussion of every aspect of the incident see Kulip Nayar, The Supersession of Judges (1973). The fourth incident of such a break was in 1976 when Justice M.H. Beg was appointed the Chief Justice of India superseding Justice H.R. Khanna who was the senior most Judge.
high importance. He has a key role to play in upholding independence of the Judiciary. For effecting changes favourable to the Judiciary it is highly necessary that the person holding the post of Chief Justice of India should remain there for a reasonably long time.\textsuperscript{132} It therefore suggested that the Chief Justice of India should be selected on the basis of merit and competence rather than on the basis of seniority.\textsuperscript{133} But if the required qualifications and qualities are found in the senior most Judge of the Supreme Court, undoubtedly he has to be appointed.\textsuperscript{134}

The above criterion for the selection of the Chief Justice of India was proposed by the Law Commission for upholding judicial independence. Though the Commission referred to the qualities required of the Chief Justice of India,\textsuperscript{135} it did not make clear as to who should determine the merit and competence of the persons to fill the highest office of the judiciary. As per the constitutional provision, the only person necessarily involved in the process of selection and appointment of the Chief Justice of India is the President. If the choice of the Chief Justice of India is unilaterally with the President, the purpose of the Law Commission to effect a shift over to the merit criterion from the seniority rule would stand defeated as the matter may fall solely within the purview of the executive. Even in the matter of the appointment of Judges of the Supreme Court


\textsuperscript{133} "Considering the importance of the office, appointment by seniority may not always be advisable". \textit{Ibid}.

\textsuperscript{134} \textit{Ibid}.

\textsuperscript{135} \textit{Ibid}. It observed, "To perform the duties of the Chief Justice of India, there requires a judge of ability and experience, but also a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities
or High Courts, selection is effected by the President only after consultation with certain constitutional authorities. The case of appointment of Judges to the lower judiciary also is not different. In such a context, it cannot be inferred that a unilateral power is conferred on the President in the matter of appointment of Chief Justice of India. Conferment of such a power on the President has not been envisaged by the makers of the Constitution. 136

However, the proposal of the Commission was not carried out by constitutional or statutory amendments. Later developments proved that the recommendation to appoint Chief Justice of India on merit gave rise to serious consequences. In 1973, when three senior-most Judges of the Supreme Court were superseded and a junior Judge and Justice A.N Ray was appointed the Chief Justice of India, to meet the criticisms against that appointment, justification was sought from the Report of the XIV Law Commission, which prepared the criteria of merit and competence over seniority. 137

Further, initial appointments to the higher judiciary are effected on the basis of merit, integrity and competence of the incumbents. Such merit is determined only after consultation with authorities that could extend impartial opinions to the

and above all, a person of sturdy independence, and covering personality who would on the occasion arising be a watch-dog of the independence of the Judiciary ".

136 Supra, n. 49.
President. The most important among them is the Chief Justice of India. As a result of judicial decisions, in certain cases his opinion now carries considerable weight and in others it is binding on the President. If the Chief Justice of India could be chosen by the President in a unilateral manner, it is likely that one who would agree with the views of the Executive in matters of appointment of judges may be appointed the Chief Justice of India. Consultation in Article 124(2) becomes then a mere meaningless exercise, since the executive can appoint one who would always agree with its views as the consultant. Such a procedure is also hidden with the danger that the merit of a judge to be the Chief Justice of India is likely to be determined by the Executive on the basis of the nature of the decisions rendered by him in the judicial side. Persons who render important judgements in deciding cases against the executive may not be considered for the highest judicial post by the executive. That exactly is what happened in 1973 and in 1976. Such a process of selection of the Chief Justice of India poses therefore a serious

---

138 In matters of judicial appointments, the President is advised by the Chief Justice of India, the Chief Justice of High Courts, and the Governor of the State. But, among them the only absolutely independent person is the Chief Justice of India.

139 See, for instance, Ravichndra Iyyar v. Justice A. M.Bhattcharjea, (1994) 5 S.C.C.457 in which it was held that allegations of misconduct of judges of the High Courts should be looked into by the Chief Justice of India and Veeraswamy v. Union of India, (1991) 3 S.C.C. 655 in which it was held that no criminal action could be registered without consulting the Chief Justice of India.

140 S.C. Advocates, supra, n. 54.

141 See Palkhiwala, op cit at p. 93 where he observes, “But on 25 April 1973, the three senior most judges of the Supreme Court -J.M.Shelat, K.S. Hegde and A.N.Grover who had decided the monumental case against the Government (Kesavananda Bharathi)- were superseded,…”

142 Justice H.R.Khanna has reproduced in his autobiography the following conversation which he had with his wife on the evening of the day in which he wrote the judgement in A.D.M.Jabalpur v. S.Sivakant Sukla, (A.I.R. 1976 S.C. 1276) which he decided against the government: “…I have prepared a judgement which is going to cost me the Chief Justiceship of India.” H.R.Khanna, Neither Roses Nor Thorns, p.80.
threat to judicial independence, as it is likely that judges may try to be in the good books of the government by exercising his administrative and judicial offices in a manner palatable to the executive, with a view to reserve a berth to the post of the Chief Justice of India. Since judges to the higher judiciary -High Courts and the Supreme Court- are appointed after a thorough scanning process after consultation, among other things, as to their integrity, character, knowledge of law and ability to decide cases, one cannot say that merit would stand totally excluded even if the seniority rule is followed in appointing the Chief Justice of India.

It is in this context that one has to examine the holding in the *S.C. Advocates Case*. The Court recognized that there was a convention of appointing the senior-most Judge of the Supreme Court as the Chief Justice of India and that the outgoing Chief Justice of India could make the proposal well in advance. Only if there is any doubt as to the fitness of the senior-most judge of the Court, the convention could be breached. So the Court held that there was no reason to depart from the convention and to evolve any new norm for the appointment of the Chief Justice of India. The Court therefore concluded that there was no need for any other consultative process or norm in the matter of appointment of Chief Justice of India. The creative element of the decision lies in

---

143 (1993)4 S.C.C. 441
144 Id. at p. 706.
145 *ibid.* The Court held, "Apart from the two well-known departures, appointments to the office of Chief Justice of India have, by convention, been of the senior most Judge of the Supreme Court considered fit to hold the office, and the proposal is initiated in advance by the outgoing Chief Justice of India. The provision in Article 124(2) enabling consultation with any other Judge is to provide such consultation, if there be any doubt about the fitness
making independence of the judiciary the norm for placing controls on exercise of executive powers in recognizing the convention of appointing the senior-most judge of the Supreme Court as the Chief Justice of India and in making the opinion of the outgoing Chief Justice of India binding on the President in the normal circumstances. By its holding that when the President entertains any doubt as to the fitness of the recommendee, he has to consult other judges under Article 124(2) before he takes a decision, the Court placed fetters on the arbitrary exercise of power by the Executive in the matter of appointment of the Chief Justice of India. The decision thus places the judiciary in a prominent position in the matters of appointment of the Chief Justice of India also. Such decision is taken by the Court for the purpose of upholding independence of judiciary.

A reading of S.C.Advocates makes it clear that the Court interpreted the provisions for appointment of judges to the higher judiciary in a deductive style drawing the conclusions in relation to them by applying the major premise of independence of judiciary. The major premise applied by the Court is that all constitutional provisions dealing with judiciary should be interpreted in a manner of the senior most Judge to hold the office, which alone may permit and justify a departure from the longstanding convention. For this reason, no other substantive consultative process is involved. There is no reason to depart from the existing convention and, therefore, any further norm for the working of Article 124(2) in the appointment of Chief Justice of India is unnecessary."

Justice Pandian, also observed that the expression 'Judge' in Article 124(2) included Chief Justice of India also and hence the consultative process in appointing Judges in which the opinion of the Chief Justice of India has primacy was applicable in the appointment of the Chief Justice of India also.

146 Id. at p.706.

147 For a discussion on the deductive style of reasoning see I.M.Copie, Introduction to Logic (1996), pp. 205 et.seq.
conducive to judicial independence. The minor premise is that provisions relating to appointment of judges are provisions dealing with the judiciary. The conclusion is that provisions relating to appointment of judges should be interpreted with a tilt in favour of judicial independence. The purpose of incorporating the provisions dealing with judiciary in the Constitution was to uphold and maintain independence of judiciary. That was not lost sight of by the makers of the Constitution also. The interpretation of the provisions dealing with appointment to higher judiciary rendered in the *S.C.Advocaes Case* is in line with this constitutional objective. Therefore, undoubtedly it can be said that the Supreme Court has rightly construed the words in the provisions relating to judicial appointment in the context of judicial independence, instead of interpreting them in a formal manner divorced from its conceptual context which folly it committed in the *Judges Case*.

---

148 *Supra.* n.54 *per* Verma J. "These questions have to be considered in the context of independence of judiciary, as a part of the basic structure of the Constitution; ..." (at p. 680).

*Per Pandian J.* "...the constitutional assurances, relating to the basic service conditions are ... not the be all and end all... More than the above, one other and inseparable vital condition is absolutely necessary for timely securing the independence of the judiciary... that concerns the methodology followed in the matter of sponsoring, selecting an appointing a proper and fit candidate to the ... higher judiciary. (id at p 521).

Justice Kuldip Singh also spoke in the same tone. He said that independence of judiciary was a basic feature of the Indian Constitution and for its maintenance judicial appointments should not be left to the executive will. The Chief Justice of India and Chief justices of High Courts are better equipped to identify suitable persons to the posts of judges of higher judiciary. (*Id.* at pp.649, 663).

149 *Supra.* n. 69.

150 "... the words are images of matter, and except they have a life of reason and invention; to fall in love with them is all one as to fall in love with a picture". Francis Bacon, *Advancement of Learning Book I*, p.25.
Thus a journey from the *Judges Case* through *S.C. Advocates* to the *Special Reference 1998* reveals that the Court has been highly creative in interpreting the concept 'consultation' in the matter of appointing Judges to the higher judiciary. The problem involved in the term 'consultation' was identified in the *Judges Case* in which the concept was considered by the Court as a device for checking arbitrariness of the President. It was given a serious consideration in *Subhash Sharma*. *S.C. Advocates* rendered the term a true content. In *S.C. Advocates*, and *Special Reference* the Court developed consultation as a tool for checking despotism of the judicial authorities also. That is clear from the holding that the President is not bound to appoint if the recommendee is not a fit person. Further, in *Special Reference*, the Court fully developed consultation from as one between the President and the Chief Justice of India to one among the collegium of judges. Such a holding helps avoid arbitrariness of both the executive and the judiciary in the matter of appointment of Judges. In short, the Supreme Court by innovative workmanship in the *S.C. Advocates* and *Special Reference* was able to edify the concept of judicial independence to its modern dynamic functional style as against the traditional cabined one.