

Brief note on

Constitutional Provisions relating to appointment and transfer of Judges of the higher judiciary

Source- Department of Justice, Ministry of Law & Justice

The Judges of the Supreme Court are appointed by the President under Article 124 (2), while the Judges of the High Courts are appointed by the President under Article 217 (1) of the Constitution. Art 124 (2) provides that the President shall hold consultation with such of the Judges of the Supreme Court and of the High Courts in the State as he/she may deem necessary for the purpose. Art 217 (1) provides that the President shall hold consultation with the Chief Justice of India, the Governor of the State, and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The transfer of Judges from one High Court to another High Court is made by the President after consultations with the Chief Justice of India under Article 222 (1) of the Constitution. The appointment of retired judges in Supreme Court is made under Article 128 and the appointment of retired Judges as sitting Judges of the High Courts can be made under Article 224-A of the Constitution.

2. After commencement of the Constitution of India, a fresh Memorandum of Procedure (MoP) for appointment of Judges to the Supreme Court and High Courts were framed. The MoP was revised in 1971 and 1983. This was further revised in 1994 and 1998 after the Judgments in the Second and Third Judges cases respectively with approval of Chief Justice of India and Prime Minister. Currently, all appointments to the Supreme Court and the High Courts are made as per the MoP framed pursuant to the Supreme Court Judgment of 6.10.1993 read with the advisory opinion of 28.10.1998.

3. *Judicial Interpretations:* Prior to 1990, there was a consensus that 'consultation' under Article 124(2) and Article 217 (1), did not necessarily mean 'concurrence'. In the S.P. Gupta Vs. Union of India [1981 (Supp) SCC 87], majority took the view that the opinion of Chief Justice of India does not have primacy in the matter of appointment of Judges of the Supreme Court and the High Courts, and that the primacy lay with the Central Government. However, this view was revised in 1993 by another decision of the Supreme Court in the Second (II) Judges Case [(1993) 4 SCC 441], which held that though the appointment is ultimately an executive act, the constitutional doctrine of judicial review did not justify the primacy of the executive and that primacy of the opinion of the Chief Justice of India was essential, in view of the constitutional obligation of consultation with the Chief Justice of India. The judgment held that such a view safeguarded the independence of the judiciary even in the appointment of Judges. The ascertainment of the views of other Judges of the Supreme Court which is an essential requirement under Article 124 (2) of the Constitution was sought to be

met by the Chief Justice by consulting two senior most Judges of the Supreme Court. For appointments to the High Courts, the Chief Justice of India would elicit the views of his colleagues who are conversant with the affairs of the concerned High Court. In the case of transfer of Judges of High Courts and Chief Justices of High Courts, the opinion of the Chief Justice of India was held to be determinative.

4. In the Presidential reference made under Article 143 of the Constitution seeking clarification with respect to the meaning of 'consultation' as in Article 124 laid down by the Supreme Court by a majority judgment in Second Judges case, the Supreme Court gave its Advisory Opinion on October 28, 1998 in Third (III) Judges Case [(1998) 7 SCC 739], clarifying the scope and extent of the size of the Collegium as well as the manner in which the Chief Justice of India will hold consultations with other Judges. It clarified that the Chief Justice of India will form a 'Collegium' of senior most Judges for consultation regarding the appointment of Judges or transfer of Chief Justice or Judge of High Court. It also held that the opinion of the Chief Justice of India would have primacy. This judgment resulted in a Memorandum of Procedure laying down the detailed process and procedure of appointment of Judges to High Courts and the Supreme Court, which is being presently followed.

5. The Government, with a view to broad base the appointment process and make it more participatory to ensure greater transparency and objectivity in the appointments to higher judiciary, proposed to set up the National Judicial Appointments Commission (NJAC) with enactment of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 w.e.f. 13th April, 2015. However, the Constitutional validity of both the Acts was challenged in the Supreme Court. The Supreme Court vide its order dated 16.10.2015 has inter-alia struck down these two enactments and has simultaneously revived the 'Collegium System'. Subsequently, Supreme Court vide its order dated 16.12.2015 directed Government to supplement the Memorandum of Procedure for appointment of Judges of Supreme Court and High Courts (MoPs) taking into account factors like eligibility, transparency in the appointment process, establishment of Secretariat and Complaint mechanism in consultation with Supreme Court Collegium/Chief Justice of India. The MoPs are under finalisation in consultation with the Chief Justice of India.
