

25.06.2021

NOTICE

It has been decided to convene an Extra Ordinary General Body meeting of the Association on **29.06.2021 (Tuesday)** at **6.00 p.m.** through **Zoom Video Conference platform** to discuss the following;

- 1.To discuss the resolution moved by Adv. Surya Binoy and 114 others to discuss the issues arising out of the proposal to select Advocates practicing before Supreme Court as Judges of High Courts.
- 2.It has also been decided to place the resolution dated 16.06.2021 passed by the Executive Committee on the same issue before the General Body.
- 3.Such other matter with the permission of the chair.



Adv. T. R. Renjith
Secretary

Before the General Body of the Kerala High Court Advocates Association
Resolution against the proposal by Supreme Court Bar Association and Supreme
Court Advocates-on-Record Association to have their members considered for
appointment as Judges of the High Courts

Moved by Surya Binoy&114 Others

Background

The Executive Committee of Supreme Court Bar Association ("SCBA") issued a communication to its members on 08.06.2021 claiming that Hon'ble Mr. Justice N.V. Ramana, Chief Justice of India ("CJI"), has agreed to its proposal contained in a representation dated 31.05.2021. The proposal recommends that lawyers practising before the Supreme Court of India shall be considered for appointment as Judges of High Courts by respective collegia of the High Courts across the country ("the Proposal"). The Supreme Court Advocates-On-Record Association ("SCORA") has also issued a letter dated 12.06.2021 to the CJI endorsing the Proposal.

SCBA claims that the CJI has agreed to the Proposal and has written to the Chief Justices of the High Courts to facilitate its implementation. Its Executive Committee has already constituted a search committee whose function is to identify 'deserving and meritorious Supreme Court practitioners' who are fit for elevation to High Courts.

For a forum that claims to represent the most meritorious of lawyers in the country, any reference to specific constitutional provisions or conventions in support of the Proposal is conspicuously absent from SCBA's communication. SCORA on its part has requested the CJI to place an institutionalized mechanism without locating the CJI's authority in constitutional law to unilaterally alter the process of judicial appointments. While the response of the CJI to the proposal remains unconfirmed, it is important that bar associations of High Courts take active part in this crucial constitutional discourse and contest at least some of the SCBA's assertions. The Delhi

High Court Bar Association, Bar Association High Court Calcutta and Andhra Pradesh Advocates' Association have already conveyed their objections to the CJI.

Objections

- 1) Art. 217(2) of the Constitution of India prescribes the qualifications of judges of the High Court. From the bar, only a person who has, for at least ten years, been an advocate of a High Court or of two or more such Courts in succession can be considered (Article 217(2)(b)) for appointment. In computing this period, any period during which the person has held judicial office or any post requiring special knowledge of law after she became an advocate can be considered. In other words, years spent practicing at the Supreme Court do not count. As is evident from the SCBA's letter, the beneficiaries of the Proposal are lawyers who do not have regular practice before any High Court and are thus outside the permissible zone of consideration. Neither the SCBA nor the SCORA have advanced any argument that supports any other application of these provisions.
- 2) The Memorandum of Procedure for Appointment of High Court Judges¹ ("the MoP") crystallizes constitutional conventions that have evolved over half a century, through the First², Second³ and Third⁴ Judges cases and finally the NJAC case.⁵ The Second and Third Judges cases and the NJAC case upheld judicial primacy in the matter of judicial appointments. An attempt to do away with the collegium system by way of the Constitution (99th Amendment) Act), and the National Judicial Appointments Commission Act, 2014 was thwarted by the Supreme Court as altering the basic structure of the Constitution in the NJAC case. Strangely, the SCBA has failed to refer to these dicta or even the MoP in the Proposal, much less derive any support from them.

¹ Available at: <https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-high-court-judges>

² S.P. Gupta v. Union of India, (1981) 1 SCC 87

³ Advocates-on-Record Ass'n v. Union of India, AIR 1994 SC 268

⁴ In Re: Special Reference No.1 of 1998, AIR 1999 SC 1

⁵ Supreme Court Advocates-on-Record Association Vs. Union of India, AIR 2016 SC 117

- 3) In paragraph 65 of the NJAC case, the Supreme Court reiterated the participatory role of the executive as well as the judiciary in the matter of judicial appointments. The CJI has no special powers to the exclusion of the executive in this regard or it would lead to an insular judiciary, not amenable to checks and balances. Communication or action, if any, by the CJI on these representations is therefore unconstitutional. The notion that lobbying with the CJI through representations can virtually amend the MoP is undemocratic and elitist.
- 4) In Clause 14, the MoP lays down that the proposal for appointment of a Judge of a High Court shall be initiated by the Chief Justice of the said High Court. This implies that other modes of initiation of the appointment process such as application by the individual members, nomination by other lawyers or selection by a commission in the nature of NJAC etc. are precluded. Members of the SCBA, howsoever eminent they may be, cannot have any role in initiating the process of appointment of judges of the High Court.
- 5) It is the collegium of the High Court who must nominate the lawyers practising before it for appointment as judges, as they alone have the occasion to assess their professional ability. This role for the High Court collegium had been consistently reiterated by the Supreme Court, from the First Judges case to the NJAC's case. What the SCBA and the SCORA propose to do is to substitute the assessment of the collegium by that of its members. This is impermissible, not to mention presumptuous.
- 6) As per Clause 15 of the MoP, the role of many constitutional authorities is specified and therefore limited. Involvement of bar associations is not envisaged. In NJAC's case, the Supreme Court has frowned upon the provision that enabled 'eminent persons' to have their say in the appointment of judicial appointments *inter alia* on the ground that they were not accountable under law. The SCBA and the SCORA, both non-statutory, extra-constitutional and extra-legal entities, are not accountable under public law, and therefore cannot have their inputs placed before any High Court collegium.

- 7) To assert that the lawyers of the Supreme Court can influence and can be considered for appointment as judges at the High Court, but not vice-versa, is a serious disservice to the idea of federalism. The Union Judiciary and the State Judiciary are paramount in their own spheres of jurisdiction and one is not subordinate to the other.
- 8) The SCBA asserts that lawyers practicing at the Supreme Court are more meritorious than their counter-parts at the High Court. The Kerala High Court Advocates Association must record its strongest objection to this claim that has no backing other than the SCBA's delusion of grandeur.
- 9) The SCBA laments the disproportionate presence of women on High Court benches and locates its reason in the alleged absence of competent women among the bar in the High Courts. The Kerala High Court Advocates Association must assert its objection to this irresponsible and disparaging remark in the strongest terms.
- 10) The letter does not delineate what principles or procedure has been put forth in the Proposal to ensure that the Search Committee will only identify those with integrity, honesty, merit and independence for the purpose of elevation. It also has no ideas to ensure adequate representation of women and other underrepresented sections among the nominees furnished by the search committee.

In the circumstances, it is proposed that the Kerala High Court Advocates Association passes a resolution opposing the Proposal in the following terms:

Resolution

We, the members of the Kerala High Court Advocates Association (KHCAA), strongly oppose the proposal allegedly put forth by the Supreme Court Bar Association (SCBA) and the Supreme Court Advocates-on-Record Association (SCORA) before the Chief Justice of India (CJI) to request High Court collegia to consider lawyers at the Supreme Court who do not have sufficient practice before any High Court for

appointment as judges of High Courts. While the CJI has no power to alter the extant method of judicial appointments, the proposal does not boast of any backing in constitutional provisions or conventions. On the contrary, it undermines judicial primacy in the matter of appointments by permitting a search committee constituted by the SCBA to initiate the process of appointment bypassing the Chief Justice of the respective High Court and by substituting the committee's assessment of professional ability for that by the High Court collegium. Non-statutory, extra-constitutional, extra-legal entities such as the SCBA or the SCORA, which are not accountable under public law, cannot have their inputs placed before a High Court collegium to the exclusion of other bar associations. We, the members of the KHCAA, record our strongest objection to the assertion that lawyers practising at the Supreme Court are more meritorious than their counter-parts at the High Courts and in particular, take exception to the insinuation that women lawyers at the High Court are not fit for elevation to the bench.

We, members of the KHCAA, hereby call upon the CJI not to initiate any action in furtherance of the proposals put forth by the SCBA or the SCORA. In furtherance of his obligation to uphold the Constitution of India and constitutional conventions, we urge the CJI to protect the role of the collegia of the High Courts in judicial appointments to the High Court. We further request the collegium headed by the Chief Justice, High Court of Kerala, to disregard any inputs put forth by the SCBA or the SCORA or the search committee in the matter of appointments of judges of the High Court of Kerala. We further resolve and authorize the office bearers of the KHCAA to write to the CJI recording our objections in these terms.

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6/14/2021 9:05:04	Ramola Nayanpally	ramola.nayanpally@gmail.com		9539272389	7
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