

C O N F I D E N T I A L

March 21, 2018

To

Hon'ble Mr. Justice Dipak Misra
Chief Justice of India

Lord Bingham in his book *'The Rule of Law'* said that "there are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live". Let us also not live where Bingham loathed to live.

We, the judges of the Supreme Court of India, are being accused of ceding our independence and our institutional integrity to the Executive's incremental encroachment. The Executive is always impatient, and brooks no disobedience even of the judiciary if it can. Attempts were always made to treat the Chief Justices as the Departmental Heads in the Secretariat. So much for our "independence and preeminence" as a distinct State organ.

Someone from Bangalore has already beaten us in the race to the bottom. The Chief Justice of the Karnataka High Court has been more than willing to do the Executive bidding, behind our back.

I read with dismay and disbelief the "confidential report" sent to the Hon'ble Chief Justice by Shri Dinesh Maheswari, the Chief Justice of Karnataka High Court. To begin with, it was unasked for. Second, it is uncalled for. The confidential report blatantly records the impropriety of the executive directly contacting the High Court to reassess a collegium recommendation of the Supreme Court.

It is a moot proposition that any Principal & Sessions Judge is the administrative head of the district he works in. He has to exercise his supervisory, and "disciplinary" power over all other judicial officers in that district.

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From the letter of the Hon'ble Chief Justice, Karnataka, the following facts can be culled out. In 2014, when Shri Krishna Bhat, a District & Sessions Judge, was working in Belagavi district, he sent to the High Court a report concerning the (mis)conduct of Ms. M.S. Shashikala, a Judicial Magistrate of First-Class. The High Court registered a vigilance case (HVC) No.93/2014 but did not choose to act upon the same till 18.02.2016. Till that time, Krishna Bhatt had faced no allegations from any quarter, including his subordinates.

With Shri Krishna Bhatt's elevation around the corner, Ms. M.S. Shashikala chose to complain against him.

If such retaliatory complaints are entertained, no career conscious judge would ever risk disciplining his subordinates.

From the material available on record, it appears that Ms. M.S. Shashikala offered her resignation in April 2016 and withdrew it in June 2016. The then Chief Justice of Karnataka High Court was asked to provide the details and background of Ms. Shashikala's resignation. The then Chief Justice, after inquiring into the issue, sent two confidential reports dated 14.10.2016 and 14.11.2016. He asserted that the allegations levelled against Shri P Krishna Bhatt were incorrect and concocted. He has found that Ms. M.S. Shashikala has made her allegations only to malign Shri P Krishna Bhatt.

In the meanwhile, acting on the recommendations of the Karnataka High Court collegium, we recommended his name, along with five others from the service category, for elevation. At that time we were aware of the allegations but we consciously and rightly disbelieved them. Surprisingly, the Government selectively withheld his elevation and accepted that of the remaining five others', though all the five are juniors to Shri Krishna Bhatt.

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Now comes what is unpredictable and unthinkable. If the government had any reservations or misgivings about Shri Krishna Bhatt's nomination, it could have sent back the recommendation for our reconsideration — a well-established though long forgotten practice. Instead, it sat tight on the file. In other words, our recommendation still retained its validity and legitimacy.

For sometime, our unhappy experience has been that the Government's accepting our recommendations is an exception and sitting on them is the norm. "Inconvenient" but able judges or judges to be are being bypassed through this route.

I do not think any of us disputes that elevating a person to be a judge of a High Court is a constitutional concern involving two authorities: the Supreme Court and the executive. The role of High Court ceases with its recommendation. Any correspondence, clarificatory or otherwise, has to be between these two authorities. To my mind, I could recollect no instance from the past of the executive bypassing the Supreme Court, more particularly while its recommendations are pending, and asking the High Court, as if it were an interdepartmental matter, to look into the allegations already falsified and conclusively rejected by us. Asking the High Court to reevaluate our recommendation in this matter has to be deemed improper and contumacious.

Now the Chief Justice of Karnataka High Court informs us that he had received a communication from the Ministry of law and justice "to look into the issue." The Chief Justice, establishing himself to be more loyal than the King, acts on it, convenes a meeting of the Administrative Committee, and decides to reinvestigate the issue, thus burying the previous Chief Justice's findings on the same issue, given at our asking. He has been gracious enough to inform us, at least now.

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A long time ago, an idealist, without knowing the ways of the world, has said this: the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Naïve as it may sound now, that was James Madison in the Federalist Papers No.47.¹

We only have to look forward to the time, which may not be far-off if not already here, when the executive directly communicates with the High Courts about the pending cases and what orders to be passed. We can be happy that much of our burden is taken away. And an Honourable Chief Justice like Dinesh Maheswari may perhaps be ever willing to do the executive bidding, because good relations with the other Branches is a proclaimed constitutional objective.

We cannot deny Robert H. Jackson's assertion in ***United States v. Wunderlich***² that men are more often bribed by their loyalties and ambitions than by money. Let us also not forget that the bonhomie between the Judiciary and the Government in any State sounds the death knell to Democracy. We both are mutual watchdogs, so to say, not mutual admirers, much less constitutional cohorts.

I am of the opinion that this matter is now ripe for the consideration of the Full Court on the judicial side, if this institution really is to be any more relevant in the scheme of the Constitution.

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¹ The Federalist Papers : No. 47, The Particular Structure of the New Government and the Distribution of Power Among its Different Parts, New York Packet, February 1st 1788.

² *United States v. Wunderlich*, 342 US 98

Since we are a precedent oriented institution, I may be pardoned for quoting a precedent to the Master of Roster that it was exactly a similar letter written by the then Union Law Minister which sparked up a judicial debate in **S.P. Gupta**³.

With regards,

Yours sincerely,

(J. Chelameswar)

Copy to:

1. Hon'ble Mr. Justice Ranjan Gogoi
2. Hon'ble Mr. Justice Madan B. Lokur
3. Hon'ble Mr. Justice Kurian Joseph
4. Hon'ble Mr. Justice A.K. Sikri
5. Hon'ble Mr. Justice S.A. Bobde
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20. Hon'ble Mr. Justice S. Abdul Nazeer
21. Hon'ble Mr. Justice Navin Sinha
22. Hon'ble Mr. Justice Deepak Gupta

³ *S.P. Gupta v. Union of India & Another*, 1981 Supp. SCC 87