SUGGESTIONS FOR IMPROVING THE COLLEGIUM SYSTEM

[Collegium System: How to improve it: Suggestions on certain points specified by the Hon'ble Court: My suggestions and comments thereon sent on 13/11/2015 to the Ministry of Law]

(by Shiva Kant Jha on Nov. 14, 2015)

My suggestions on all the specified points in the Supreme Court's directions, dated Nov. 5, 2015 in the *Supreme Court Advocates-on-record Association and Anr. v. UoI* be considered in the context of my two articles recently published, and now placed on my website: shivakantjha.org, against the NJC and the stray pleadings in its favour. These two articles are:

(i) NJAC: Triggering a Great Constitutional Question [http://www.shivakantjha.org/openfile.php?filename=constitution/njac.htm], and

(ii) What a comedown! Even this can happen ("Postscript to my article on "Triggering a Great Constitutional Question" [http://www.shivakantjha.org/openfile.php?filename=constitution/ps_njac_comedown.htm].

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I understand that views have been solicited on 5 specified points:(1) Transparency, (2) Eligibility. (3) Secretariat, (4) Complaints, and (5) Miscellaneous. In this NOTE I would restrict myself only to short comments on some of these topics.

(1) Transparency

Secrecy goes against our Public Policy as it serves to hide mistakes, whether innocent or not. Transparency works to exclude the evil that darkness breeds. It is often well said: “Sunshine is the strongest antiseptic.”

But decision-making is a complex process in which various conflicting interests are to be harmonized to arrive at feasible and humanly possible solutions under aspects of justice and fair play. Rough realities of polity cannot be lost sight of in such an exercise. Besides, it may become counter-productive to expose things to public scrutiny without caring for the possible consequences as often it can become counter-productive to wear heart on sleeve for the knaves to peck at. For such pragmatic reasons heavy secrecy is maintained in the WTO deliberations, in the treaty and diplomatic negotiations, in the framing of fiscal policies and the budgetary exercises, in matters of corporate structuring and decision-making, in security analysis, *et al*. There may be things involved in the selection process of someone the disclosure of which would be unwise. There may be certain things in the deliberative process the disclosure of which can be embarrassing. . Like most other situations, the grammar of decision-making would involve balancing of conflicting interests. We shall have to trust the decision-makers of the collegium unless something comes to public gaze. To deal with such rare situations, it is wise to set up some protocol to bring such facts to the notice of the decision-makers, and also to the notice of the enlightened citizenry. And this protocol should be so set up as to inspire confidence and trust. But the protocol must not suggest distrust in the decision-makers unless there emerges some firm proof revealing deliberate knavery, or studied and cussed depravity. But the measure of transparency and the reasonable quotient of secrecy can be worked out from case to case under practical parameters of the possibilities of the judicial administration. Too much of prying into the process may delight some peeping Tom, but it may not be good in public interest. Some lapses not of culpable type may have to be ignored as 100% perfect system is impossible in matters where a lot of variables and sub-variables are to be balanced. Any quest for perfection must not be allowed to drive us off the precipice, and make the exercise itself unrealistic. My view is

that with some measure of peer pressure, professional criticism, and academic evaluation, the present system can work well. I think the right moment to assert against things done wrong are when they are noticed for the first time.

It will unwise to subject the selection process of the judges to the RTI. The operation of the RTI has been excluded from many areas spelt out under the RTI. For similar reasons and to promote amity and harmony, the process should remain outside RTI. Light is surely antiseptic, but too much of light can dazzle so much that the decision-making can get clogged.

The suggestion that some candidates can be considered by the Collegium on the recommendation of 2/3 senior counsels does not sound good. We all know how similar approach in dealing with Curative petitions has not demonstrated any worth.

It is a salutary suggestion that the decision of the collegium may not be subjected to Judicial Review except in those cases where there are clear breach of someone's Fundamental Rights as in such situations the Supreme Court can itself be invited to exercise its jurisdiction on itself as Article 12 does not exclude it. [*Shiva Kant Jha v. UoI* (2009 -TOIL-626-H.C.-DEL) http://www.shivakantjha.org/pdfdocs/on_the_loom_of_time_2nd_edition/35_loom_21.pdf at p. 296]

There would be no harm if at certain levels the process of selection becomes participative. If the only road-block is the vigilance report from the Government, the Collegium can examine to see whether some vested interests are out to jeopardize someone's claim without good reasons to do so. Even the candidates can be heard to examine the worth of the complaint. As the advocates are themselves the product of the system of judicial administration, their interests deserve protection till doing so becomes unjust. It is often easy to make out a seeming case against someone. We all know

how for long the guilt of Lord Srikrishna was believed in the episode relating to the theft of the Shyamantakmani! [vide pp,195-196 at http://www.shivakantjha.org/pdfdocs/on_the_loom_of_time_2nd_edition/28_loom_14.pdf].

(2). Eligibility

Our Constitution prescribes, in Art. 124, clear criteria for eligibility. These criteria set up the bottom thresh-hold for selection. It creates a wide trajectory for choice. Persons, who deserve to be noticed for recognition, must distinguish themselves in the fraternity of the learned profession. If someone manages to remain in the bush at the base of a mountain, they must not crib if they go unnoticed. They must create for themselves opportunities to get noticed for their professional distinction. But this would cast an enormous responsibility on the collegium to cast its glance wide and deep by creating situations under which they get quick feedback, and materials needed for decisions come within their ken. The Secretariat be set up so that decision-making is on adequate and sound materials; and nothing is missed which can be relevant in the deliberative process of the collegium. .

I do not think it is wise to make much fuss of the fact that no so-called "jurist" has been made a judge under Art. 124 (c) of our Constitution. I think, even at the cost of a rebuff from many, that if this happened, it has happened because our academic world has not produced any jurist of eminence. All our eminent jurists have been shaped in the creative vortex of profession. Many such persons have adorned the Benches; even many of them have declined/ have not shown interest in becoming Judges. I do not see anyone in the profession or in the academic world who can, without doubt and demur, can qualify under Art. 124 (c) as eminent jurists. Do we have anyone comparable to Professor Glanville Williams whose one article, “The

Lords and Impossible Attempts, or *Quis Custodiet Iposos Custodies*? [1986] CLJ 33 criticizing *Anderton v Ryan* led the House of Lords, in *R v. Shivpuri,* to overrule a decision of the House given only a year back[1]! No academician has written a critique on *Vodafone* judgment that is founded on a core conviction that the income tax law was used to facilitate incoming of the FDI (despite the fact that the Income-tax Act is an exhaustive enactment, and an intake of FDI is wholly an extraneous pursuit), or how the idea of Pope Innocent on corporate restructuring of the R.C. Church, were developed by the most corrupt Western institution, the R.C. Church, providing our Supreme Court reasons to accept that as a model of corporate structuring in our days[2] when we are governed by a democratic Constitution with egalitarian commitments!

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[1] In *R v. Shivpuri* the correctness of Anderton was questioned before a palinode composed by one of the original authors of the majority judgment in *Anderton v. Ryan*. Lord Hailsham of St. Marylebone L C in his concurring speech observed:

> "But there is obviously much to be said for the view about to be expressed by my noble and learned friend that "If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better'. This consideration must be of all the greater force when the error is, as in the present case, to be corrected by a palinode composed by one of the original authors of the majority judgment."

[2] The main Judgment says: "In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle." The Hon'ble Court refers to the dictum of Pope Innocent IV as stating the right perspective on 'corporation' that determines corporate structuring. This view is fraught with dangerous consequences for our democracy, and our Constitution. Innocent IV (1195 – 7 December 1254), like his predecessor III, considered himself God's vice regent. Most assertive doctrine of the power of Church was in the declaration by Pope Innocent III (1198-1216) who preached at his consecration for all the kings and lords to note: "See, I have this day set thee over the nations and over the kingdoms, to pluck up and break down, to destroy and overthrow, to build and to plant." The R.C. Church was a corporation, all-absolute over everyone existing everywhere. If this protocol of 'corporation' is accepted in our times, our democracy and constitution would get subjugated to what has come to be called *Corporate imperium*.

I would not suggest any weightage to be given for higher academic distinctions, or for writing books and articles, as in our times that breed of distinguished academic jurists is conspicuous by their absence. . Rather the right course would be evolve a method, and develop an insight, in selecting persons who can develop to become great judges of our Superior Courts. From this point of view, two things most important are:

(i) to discover persons of good competence for judicial decision-making[3]: and

(ii) to create an environment in the court[4] that shapes the emergence of good judges for our superior courts.

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[3] Judicial process provides 'solutions through insight'. How this 'thought process' operates is precisely stated in *The New Encyclopedia Britannica* (Vol. 28, p. 654): to quote –

> "In striving toward insight, a person tends to exhibit a strong orientation toward understanding *principles* that might bear on the solution sought. The person actively considers what is required by the problem, noting how its elements seem to be inter-related, and seeks some rule that might lead directly to the goal. The insightful thinker is likely to centre on the problem to understand what is needed, to take the time to organize his resources, and to centre on the problem (reinterpret the situation) in applying any principle that seems to hold promise."

In effect, the process involves the following stages:
(i) the Right Knowledge of the Constitution and law without missing its text and context;
(ii) the Right comprehension of the facts placed before the court playing its role as our Constitution's watch-dog and sentinel *on the qui vive*;
(iii) the correct determination of the problems to be judicially solved after applying critical sense, and judicial sensibility taking judicial notice of the fact that there is no presumption that governments do not speak lies;
(iv) the identification of the law and juristic principles in the light of law and the Constitution with Justice as the non-failing sovereign guiding star; and
(v) the application of the legal principles to the solution of the problems presented for judicial decision.
In this process, the decision-maker must not allow factors to disturb, distort, or pollute the decision-making process: I mean the factors such as 'inhibitions', 'stock-responses', received notions', psychic or crypto-psychic pressures or persuasions of myriad brands.

at pp. 463-464

http://www.shivakantjha.org/pdfdocs/on_the_loom_of_time_2nd_edition/42_loom_28.pdf

[4] " For a month I stayed with Shri Jadunath Prasad at Jodhpur Park in south Calcutta. I heard from him words of high appreciation for the Bengali Theatre. I never thought that

Multi-tire protocol should be devised to assist the collegium in its decision-making. To do so, it is worthwhile to see to what extent the aforementioned two parameters are at work at present. Steps should be taken to improve them. The ideas suggested in the footnotes deserve a consideration. These two extracts are

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the first play which I had seen was so controversial. It was called 'Barbadhu', and was being performed at some theatre in old Calcutta (now Kolkata). The conservative Bengalis considered the play obscene and unworthy for gentlemen to visit that. The boys and girls were prohibited from seeing it. Yet they invented ways and means to see the theatre. The 'Barbadhu' meant a 'whore' that played the role of a wife. I would tell you first its story.

A rich man of Calcutta went for a change to Hazaribagh. Such visitors were known at Hazaribagh, a hill station now in the State of Jharkhand, as the 'changers'. Those days a lot of persons used to spend a month at Hazaribagh enjoying its scenic beauty and its salubrious climate. He engaged a young beautiful woman from Sonagachhi (a red-light area) to play the role of his wife while he stayed at Hazaribagh. The lady, while there, played the role of wife with remarkable perfection. She wore sari with wide red border, and bore at her forehead a deep vermilion mark. The parting of her hair had a prominent deep red vermilion line skilfully engineered to taper off underneath her glossy thick long hair. Her earlobes carried earrings with shining 22 carat gold inverted lotus dangling exquisitely and modestly while she interacted with the wives of the other changers in her impeccably perfect style. Her superb black curls ruffled on her wheatish cheeks, and she wore a bashful modest demeanour. She was moderately built and her whole body was shapely. Nature had made her at its leisure. Her voice was rhythmic and melodious. Through her gestures and sound mutations, she expressed her romantic expressions with the mastery of a superb artist. After sometime, she was getting gnawed realising that the 'contracted 15 200 period' was waning with each passing day. The core situation of the play was her inner transformation through her inner crisis. In playing her role as a Kulabadhu (housewife), she underwent a change at the deepest level of her personality. In her private moments, she felt deeply anguished apprehending that on the expiry of the period of contract she would have no option but to become again a trading ware at the mart of flesh at Sonagachhi. The dramatist had portrayed with great aesthetic fidelity how an avalanche of excoriating distress crushed her. Her gradual evolution from the delighting whore to a dedicated housewife had brought her to a precipice: her inner fire had rid her of her dross: she had become one of pure gold! This crisis in her inner self had been well portrayed in the drama.

Barbadhu became in my mind a metaphor. It illustrated how great change is brought about in one's psyche by one's role performance. Once while having a stroll in the park on Ritichie Road, I met a Bengali gentleman, who had been an eminent Chief Justice of the Calcutta High Court. Some context emerged for me to tell him that I had seen Barbadhu twice. He cast on me a crooked and inquisitorial glance expressing his obvious displeasure. His subdued displeasure turned into evident wrath when, in my reckless bravado, I told him that I learnt an important principle of jurisprudence from that play. I stressed on how an institution could shape a person, and condition one's sensibility. But I have never forgotten his sneering look. Didn't T.S. Eliot say in 'Four Quartets'? Human kind Cannot bear very much reality. " at pp. 199-200

http://www.shivakantjha.org/pdfdocs/on_the_loom_of_time_2nd_edition/29_loom_15.pdf

from my published book *ON THE LOOM OF TIME, Portrait of My Life and Times* placed on my website www.shivakantjha.org.

Adoption of any quota system in the selection of the judges of our Superior Court, it is submitted, may not be wholesome for our country. Quota system would spoil the judicial *esprit de corps*, would subject the administration justice to unfair brands, and, as an inevitable consequence, would undermine our trust in the even and equitable administration of justice. Quota system, once begun, tends to perpetuate itself. We must not allow the superior courts to become a forum for playing politics, or to share any unwholesome features of the chequer-board of extrinsic pursuits.

Besides, creation of professional pockets, constituted on any criteria (including the group of the advocates appearing in Legal Aid matters) may not be wise. The lawyers, who render assistance in providing good Legal Aid, should be paid better so that they can prove their worth through the cases they handle.

(3) Secretariat

The idea to set up a Secretariat to assist the Collegium to work effectively is good. But there is one suggestion: a firewall be erected to ward off the Executive intrusion to promote the Corporatic agenda of aggressive capitalism at the cost of our constitutional socialism, and commitments for building up a public welfare system. It has to be ensured that vested interests do not get ensconced on contrived niches, seen or hidden.

(4) Complaints

If the functioning of the superior judiciary is continuously monitored by a committee of peers (being a body consisting of 3 or 5 Hon'ble Judges from the Judges of the court), it would have wholesome effect. Besides, there be a committee of senior lawyers constituting a committee of lawyers competent to keep the functioning of the judicial system under critical vigilance and well-equipped to provide inputs to the committee of peers in a manner that is not unbecoming of the profession, and that does not jeopardize the public interest, or undermine public confidence in judicial system. But in this context, we should not forget that 100 % perfect system cannot be achieved as the humans must await for that stage of evolution. In this context I draw your attention to my article "What a Comedown" referred to above[5].

(5) Miscellaneous

The idea to include in the collegium two Sr. Advocates is no good. After all most of the Judges constituting the collegium are themselves Sr. Advocates. It would be good if more women become judges of the Superior

[5] . "In the Western philosophy the Good and Evil are the warring forces; but in our worldview the Supreme transcends Good and Evil both. We believe that the universe has been made by kneading together both so that the humans can transcend the dichotomy and evolve through their *karma*. Those who love blame game should study the *Mahabharata.* Krishna never considered the Pandavas all virtuous as they too had their share of faults. His verdict was only that under the aspects of the prevailing facts and circumstances wrought by all the actors, the Pandavas were less to be blamed. In any decision-making on the process of the judicial appointment, we cannot ignore the trends of this corporate globalization which has made the nation States servile. I had discussed these matters in my article on "NJAC: Triggering a Great Constitutional Question" already referred. In some rare moments Destiny demands a prudent decision from the people, who constitute a political society and an insightful decision from the organs of polity set up by the Constitution created by the "We the People". . Not only the text and the context of the Constitution are to be seen, but also the strategies and the stratagems of the global vested interests are to be examined."

Courts. But this be not erected as a fostered category *de facto* quota in a guise of gender. It is time to think why the salutary effect of possible impeachment has vanished from the mind of the Judges. If the ground realities of parliamentary politics is responsible, we must consider how this state of affairs has come about, and how can things be improved. If a judge deserves impeachment, he must be impeached. It would have macro effect, ripple effect, and long lasting impact both on the selection of the judges and their work while under harness. And if gross remissness cannot be punished under our Constitution, only God can save our democratic Republic whose Constitution is *sui generis* as it creates all the organs of the State with specific powers and duties, mandated to perform the constitutionally prescribed roles. I have analyzed these features of our Constitution at http://www.shivakantjha.org/pdfdocs/on_the_loom_of_time_2nd_edition/51_postscript6.pdf.

CONCLUSION

While devising the right method for selecting the Judges, the hard and unpleasant realities of this market-driven world must not be lost sight of. I would end my this NOTE with a quote from my article on "NJAC: Triggering a Great Constitutional Question":

"The impact of this market-driven Globalisation: *Pax Mercatus*

It can be seen that the global conspirators want the Executive organ of the State to become most assertive and powerful. Under the realities of our market-driven globalised world, we are, in effect, ruled by newly erected structures of 'corporate power' as established by institutions like the IMF, World Bank, the WTO, and many other institutions promoting the global corporate agenda. The operational realities brought to mind a story that was often narrated in the days when Charles II (1630 – 1685) ruled England. The country's parliament had been dissolved for many years, and the king ruled the realm with the cabal of advisors one of them was the most deceitful and crafty, the Duke of Buckingham. Someone who saw that government at work, observed:

"Who rules the kingdom?' "The king." "But who rules the king?" "The duke." "Who rules the duke?" "The devil."

Parliament is already a decadent institution dominated by the cabinet which, in its turn, is subservient to the Prime Minister. It is most often the Prime Ministerial Form of Government rather than the Parliamentary Form of Government! Once I was absorbed thinking about the ways the governments work, I heard two birds twitter in the bush on the roadside. They seemed to say:

"Who rules our country? Our Parliament.

Who rules out Parliament? The Cabinet under the dictatorship of the Prime Minister.

Who rules the Cabinet? The MNCs and the syndicate of the foreign investors, and the domestic calculators."

Shortly before his death, President Abraham Lincoln (1809-1865), the 16th President of the United States, expressed, on 21 November 1864, his apprehension about the future of his Republic:

"I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country... Corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavour to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."

What he said with agony has already overtaken the USA. Noam Chomsky has perceptively written in his *Failed States* (at p. 238):

'One predictable result has been a "new, higher level of corruption." Corruption includes extensive gerrymandering to prevent competition for seats in the House, the most democratic of government institutions and therefore the most worrisome.... More generally, there have been "profound" effects on "the way the country is governed. Not only is legislation increasingly skewed to benefit the richest interests, but Congress itself has been changed," becoming a "transactional institution", geared to implementing the pro-business policies of the increasingly powerful state.' ...."

[http://www.shivakantjha.org/openfile.php?filename=constitution/njac.htm]