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Judicial Education

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JUDICIAL EDUCATION

Judicial Education as an Agent of Leadership and Change: Lessons in Common and Civil Law Experience

Judicial Education

Judicial Education and Judicial Reform

The Impact of Judicial Education and Directions for Change

The PHILJA Judicial Journal.

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Judicial Education As An Agent of Leadership and Change: Lessons from Common and Civil Law Experience*

Livingston Armytage**

Good judges can be made,
but they make themselves through learning,
rather than being taught

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* Delivered at the *First Judicial Career Enhancement Program,* on May 26, 2000, at PHILJA, Tagaytay City. This paper draws from selected extracts from Armytage L, *Educating Judges,* (Kluwer Law Int., The Hague, London & Boston, 1996), and has been updated since originally presented to the Chief Justices of Southeast Asia at the 10th Biennial LAWASIA Conference, Manila. These remarks draw on the writer's experience directing, and consulting on, programs of judicial education in both common law and civil jurisdictions. These jurisdictions include Australia, the United States, Cambodia, Vietnam, the Philippines, Mongolia, Palestine, Pacific Island Nations and Haiti.

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I. Abstract

Judicial education is emerging as a potentially significant agent of leadership and change in the Rule of Law context in Asia, a role which is relatively new in both common law and civil systems of justice.

The introduction of formalised judicial education in countries such as Australia addresses the internal need to contribute to improving the professional performance of judges and, equally, the external need for the judiciary to become more accountable and to demonstrate its recognition of the need to be concerned with performance enhancement.

As is illustrated in countries such as Cambodia, Vietnam, the Philippines, Mongolia, Palestine and Haiti, judicial education also plays a significant and dynamic role in social governance through the promotion of the Rule of Law: free and fair trial, the consolidation of judicial identity and independence, and the preservation of human rights.

Judicial learning is a complex process. Judges, as both adults and professionals, exhibit characteristics, styles and practices as learners which are distinctive, and which have direct and important implications for educators.

These learning characteristics arise from the process and criteria of judicial selection, the formative nature of the judicial role, doctrinal constraints relating to the imperative to preserve judicial independence, the environment surrounding judicial office, and the specific needs of judges. In addition, there is emerging evidence to suggest that judges, as professionals, exhibit preferred learning styles and utilize preferred learning practices developed over the course of their careers.

Judges as learners are characterised as being rigorously autonomous, having an intensely short-term problem-orientation, and being exceptionally motivated to pursue competence for its own sake rather than for promotion or material gain. Those appointed within a merit system may also generally represent a professional elite possessing extraordinarily levels of pre-existing professional competence.

These considerations affect the application of educational theory to judges in a number of significant ways. In particular, there is a need to recognize the intrinsically aspirational role of continuing judicial education. This role is determined by the above features, which in turn cast the mission of judicial education as extending beyond the conventional domain of technical competence.

Consequently, the application of adult and professional education practice should be modified for judicial learners to embody the particular importance of peer leadership in the education process, procedural knowledge ("knowing how" as opposed to "knowing what"), and the facilitation of individualized learning.

These insights directly affect how we should go about educating judges in order that judicial education can assume its full potential as an agent of leadership and change.

II. Introduction

There are many emerging programs of judicial education and training in both developed and developing jurisdictions throughout our region. Within this context, continuing judicial education is assuming a potentially significant role as an agent of

leadership and change, which is relatively new to both common law and civil systems of justice.

On recent research, there are no fewer than 59 current legal strengthening projects in the region, many of which directly promote the Rule of Law and/or the independence of the judiciary through education and training strategies.[1] Some of those countries, which are presently developing programs of judicial education, include Bangladesh, Cambodia, China, Fiji, Mongolia, Pakistan, Papua New Guinea and Vietnam.

This is typical of the position elsewhere. Around the world, international agencies such as the Asian Development Bank (ADB), the United Nations (for example, UNDP) and the World Bank, together with national agencies such as the United States Agency for International Development (USAID) and AusAID (Australia) are assisting in numerous, sometimes quite substantial, judicial education and development programs.

The reasons for the current spate of judicial development programs are twofold. First, is the recent emergence of judicial education as a coherent and distinctive discipline of professional development; and, second, is the institutional recognition of the needs for and benefits of judicial strengthening as a strategy to enhance social governance, promote the Rule of Law and advance human rights.

The goal of judicial education is to enhance the quality of justice by raising the professional competence of judges. Judicial competence, in terms of continuing education, is a very new concept to both the common law and the civil systems of judging. In this sense, continuing judicial education is a novel agent of change.

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1. ADB, Law and Development Bulletin, April 1997.

To be effective educationally, and thereby truly potent as an agent of change, any program of judicial education should be developed to address the distinctive learning characteristics of judges as professionals. These characteristics relate to the process of appointment and tenure, their preferred learning styles and practices, doctrinal constraints of independence, and their reasons for participating in continuing education.

Consequently, it is argued that programs of judicial education should exhibit the following characteristics:

a. Doctrinal imperative for an independent, "judge-led" process

Common to all systems of justice, there is a universally recognized need for an independent education process for judges. Whether described as judge-led, or court-owned, the credibility of any education process for judges is critically dependent on the ability of any education provider to preserve judicial independence from any risk of indoctrination, whether actual or apparent.

b. Focus on procedural knowledge

Judicial education should promote the development of the distinctive skills of judging and the reflection on attitudes relating to fair trial and equality before the law (knowing "how"), once the challenge of teaching substantive law and procedure (knowing "what") has been overcome.

c. Individual vs. group learning

Any formalized process of judicial education should facilitate individualized learning that is self-directed and critically reflective, and accommodate the distinctive styles in which judges prefer to learn and practice.

The educational adequacy of group learning for judges is limited, generally, to teaching and updating substantive law and procedure. While instructional design and delivery based on group learning offers a valuable opportunity for the exchange of experience and values for judges, who otherwise practice in isolation, it is inadequate and inappropriate as a comprehensive delivery strategy.

If learning rather than teaching is recognized as the critical element in adult education – and if judges are recognized as epitomizing autonomous self-directed learners, as it will be argued – then the concept of facilitated learning acquires particular significance in any model of judicial education.

Accordingly, it is argued that there are two answers to the classic "nature/nurture" debate as it applies to judges: first, good judges can be made; but, second, they make themselves through learning, rather than being taught.

III. Survey of Judicial Education

In civil systems of jurisprudence where the profession of judging is an alternative to practising law, a more careerist, structured approach to judicial development has been traditional. This has usually involved highly formalised entry-level assessment procedures, and extended orientation training.[2] Notwithstanding, in most civil or Roman law based systems, the notion of

2. In France, for example, candidates for judicial office will usually be graduates of law, aged between about 26-30 years, who undergo 31 months of formalised class-based and on-the-job training supervised by L'École Nationale de Magistrature (ENM); Marcel Lemonde, Deputy Director of ENM, Training of Judicial Officers and Attorneys in France, unpublished ALRC

formalised *continuing* professional education, as we presently observe it emerging around the world, is a relatively new phenomenon.

Even more so, judicial education is altogether new to the common law tradition of judging, relying as it has on the appointment of "the gifted amateur" from the ranks of the practising Bar, and continuing on-the-job-learning.[3]

A. Rationale for Judicial Education

Recognition of the need for judicial education is now firmly established in many jurisdictions around the world. The reasons for the emergence of judicial education are multifold. Prominent among these are the need perceived by the judiciary to professionalise, in large part by improving competence, and the need for the judiciary to provide a visible means of social accountability to address mounting consumer dissatisfaction with judicial services.

Recognition of the former need for continuing education by the judiciary comprises two principal elements. These elements are, first, the need to train and educate new appointees to assume office, to facilitate the transition from advocate to adjudicator, and to bridge the gap between inexperience and experience.

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conference paper, Brisbane, July 1997. In Germany, candidates for judicial office undergo preparatory training and a 3-5 probationary period after academic selection; Dr. J-F Staats, German Ministry of Justice, FRG, unpublished ALRC conference paper, Brisbane, July 1997.

3. Kennedy GA, "Training for Judges?" University of South Wales Law Journal, 1987, 10, 47-59, 48.

Second, there is an acknowledged need to facilitate the ongoing professional development of judicial officers and to keep them abreast of change.[4]

In 1992, the National Association of States Judicial Educators in the United States published some Principles and Standards of Continuing Judicial Education. These Principles and Standards define the goal of judicial education to be:

> to maintain and improve the professional competency of all persons performing judicial functions, thereby enhancing the performance of the judicial system as a whole. [5]

They outline the objectives of judicial education to be:

> to assist judges acquire the knowledge, skills and attitudes required to perform their judicial responsibilities fairly, correctly and efficiently; to promote judges' adherence to the highest standards of personal and official conduct; to preserve the integrity and impartiality of the judicial system through elimination of bias and prejudice, and the appearance of bias and prejudice; to promote effective court practice and procedures; to improve the administration of justice; to enhance public confidence in the judicial system.[6]

Recognition of the latter need is encapsulated in the observation of Nicholson, himself a Justice of the Supreme Court of Western Australia:

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4. See, for example, Wood J, The Prospects for a National Judicial Orientation Program in Australia, Journal of Judicial Administration, 1993, 3, 75-96.

5. Principles & Standards of Continuing Judicial Education, National Association of States Judicial Educators (NASJE), 1991, 1. NASJE, Commentary on Preamble, 3 and 6.

6. Id.

> Judicial education is now an accepted part of judicial life in many countries. It is an enhancement of the mental qualities necessary to the preservation of judicial independence…Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.[7]

As is illustrated in the examples of Cambodia, Palestine and Haiti outlined below, judicial education plays a significant role in social governance through the promotion of the Rule of Law: free and fair trial, the consolidation of judicial identity and independence, and the preservation of human rights.

In effect, the introduction of formalised judicial education addresses the internal need to contribute to improving the professional performance of judges and, equally, the external need for the judiciary to become accountable and to demonstrate its recognition of the need to be concerned with performance enhancement.

B. History

A study of the history of judicial education illustrates the manner in which the judiciary has addressed these issues over the past thirty years. While this history is short, the rate of development in judicial education has been described, in the words of Sallmann, "without exaggeration as an explosion of activity in the field in the last decade."[8]

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7. Nicholson RD, "Judicial Independence and Accountability: Can They Co-exist?" Australian Law Journal, 1993, 67, 404-426 (hereafter, Nicholson, ALJ,1993), 425.

8. Sallmann PA, " Comparative Judicial Education in a Nutshell," Journal of Judicial Administration, 1993, 2, 245-255, (hereafter, Sallmann 1993), 252.

1. United States

In the United States, continuing judicial education is accepted as an "integral and essential part" of the judicial system.[9] Indeed, it is increasingly seen as a basic necessity, made so by pressures of workload, the size of courts, the complexity of modern judicial programming and the invasion of technology.[10]

Formalized judicial education commenced in the United States with the establishment of the National Judicial College in 1963, and the call of Chief Justice Warren Burger in the following year for judges nationally to participate in continuing judicial education.[11] In 1967, the Federal Judicial Centre was established to provide federal judges with a range of services including continuing education. Subsequently, the provision of judicial education evolved predominantly on a state basis. At the forefront, the Californian Centre for Judicial Education and Research conducted its first orientation program for trial judges in 1976.[12] In the following year, the Michigan Judicial Institute

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9. Riches AL, "Judicial Education – A Look at the Overseas Experience," The Australian Law Journal, 1990, 64,189-202, 190.

10. Hudzik JK, "The Continuing Education of Judges and Court Personnel," Judicial Education Network, 1989, (hereafter, Hudzik 1989), 5.

11. Burger WE, School for Judges, Federal Rules Decisions, 1964, 33, 139-150; see also, Li P, "How Our Judicial Schools Compare to the Rest of the World," The Judges Journal, Winter 1995, 17-51.

12. McCabe HH, "California's Approach to Judicial Education," Judicature, 1967, 51, 2, 58-63.

commenced its education program. In relation to the development of judicial education, Catlin has observed:

> Lawyers don't become good judges by the wave of a magic wand. Not even the best lawyers. To reappear behind the Bench as a skilled jurist is a tricky manoeuvre. Going from adversary to adjudicator means changing one's attitude, learning and using new skills, and in some cases severing old ties. In many jurisdictions, judges must learn their new roles by the seat of their pants. In Michigan though, both new and veteran judges are trained extensively.[13]

By 1986, all states provided some form of education for judges, and judicial education was well established. Most state programs are in fact mandatory. The average number of training leave days allowed for education and training is approximately five per year. Most programs are conducted to designated "principles and standards of continuing judicial education." Formalized post-graduate judicial education programs are also conducted for judges. Most recently, Hudzik observes:

> The most striking trend of the last twenty years in continuing judicial education is its virtual spread throughout the United States and its emergence as a big business...programming [in 1990] was provided annually to nearly 57,000 participants... [In 1992 these are] now estimated at nearly 72,000 participants annually.[14]

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13. Catlin, 32; Catlin is the founding head of the Michigan Judicial Institute.

14. 75% of these programs are state-based, 17% are for the federal judiciary, and the remainder are nationally-conducted; Hudzik 1993, 205.

Analysis of judicial education activities in the United States reveals that most effort is focused in two areas. These are orientation programs for new appointees, and continuing education which is usually updating on recent developments. The content of these activities is not confined to the law but is, in Hudzik's words, "substantively heterogeneous" in character and tends to focus on substance.[15] Nor is it confined to judges. Judicial education is usually offered to all court and justice system employees, which extends the clientele for judicial education tenfold.[16]

A significant factor influencing the character of judicial education in the United States is the process of judicial appointment, which is predominantly by election. Judicial election allows appointees to join the Bench with a broad range of backgrounds in the United States, but with less insistence on extensive forensic experience which is characteristic of systems of merit appointment operating in jurisdictions such as Britain

15. Hudzik 1993, 188; "the majority of programming relates to the fundamental business of courts – the law, sentencing, procedure and so forth. However, about 25% of all topical offerings during the year related to organizational and personnel management…topics related to social sciences, humanities, ethics, and discipline and domestic relations account for nearly another 18% of topical offerings."

16. Catlin DW, A Composite Picture of State Judicial Education Programming in the United States, unpublished conference paper, Vancouver: The Commonwealth of Learning, March 1992. Catlin estimates that judicial support staff in the United States totals some 300,000 for purposes of continuing judicial education. In 1986, 46 states reported that they provided some training to non-judges: Murray, 7.

and Australia. It follows that the appointment process affects the threshold of competence for new judges and, as a result, the need for judicial education may vary between different jurisdictions and judicial systems.

2. Britain

In Britain, the Judicial Studies Board, which found its origins in a one-day sentencing conference organized by Lord Parker in 1963, administers judicial education. In the mid-1970's, a working party on judicial studies was formed under the chairmanship of Lord Justice Bridge which resulted in the establishment of the Board and commenced operations in 1979. [17] The Board was established with the object of providing a range of education services to the judiciary, magistracy and lay magistracy. The Board confined its role to training in the criminal jurisdiction until 1985 when it was expanded under the direction of Lord Hailsham to cover the provision of training in the Civil and Family jurisdictions.

The British approach to judicial education is less formalized than is the case in the United States. The Board conducts a range of judicial orientation and updating programs, and has a

17. Working Party on Judicial Studies and Information, chaired by Lord Justice Bridge in 1978, known as the Bridge Report: a principal recommendation was for the establishment of the Judicial Studies Board. The terms of reference for this report were (1) to review the machinery for disseminating information about the penal system and matters relating to the treatment of offenders; and (2) to review the scope and content of training and the methods whereby it is provided": Judicial Studies Board, Report for 1983-1987, London: HMSO, 1988, 7; and Judicial Studies Board, Report for 1987-1991, London: HMSO, 51.

substantial clientele which predominantly consists of lay magistrates and tribunal members. Regarding the standing of judicial education in Britain, the Board observed in 1988 that:

> Judicial studies are no longer a novelty…No competent and conscientious occupant of any post would suggest that his performance is incapable of being improved, and, since there is a limit to what can be done simply by self improvement, almost all judges are able to perceive the need for organized means of enhancing performance.[18]

By 1995, this position had dramatically consolidated when Lord Justice Henry reported what he described as a "sea-change in judicial attitudes to training over the past 25 to 30 years." He added, "judges have accepted, appreciated, and benefited from training in a way that has confounded the skeptics."[19] This is confirmed by Partington:

> Twenty years ago, a majority of judges would have denied there was any need for training. Today only a minority would share that view.[20]

In the same year, the Board completed a thorough review of its remit and is now in the process of developing and extending arrangements for judicial training.

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18. Judicial Studies Board, Report for 1983-1987, 13.

19. Judicial Studies Board, Report for 1991-1995, 4.

20. Partington M, "Training the Judiciary in England and Wales: The Work of the Judicial Studies Board," Civil Justice Quarterly, 1994, 319-336, 322. This is supported by calls outside the judiciary for more education; see, for example, Holland A, "Training Judges," New Law Journal, 1993, 143, 895.

3. Other Countries

Numerous other countries have recognized the need for continuing judicial education and some, most notably Canada, have established specialist judicial education bodies. In 1992, a Commonwealth conference on judicial education noted:

> While none of the Commonwealth countries could boast as comprehensive a system for the training and the continuing education of judges as could be found in the United States of America, there was, however, a wide variety of programs already in existence, ranging from established institutes to local programs.[21]

In Canada, the Canadian Judicial Council conducted its first educational activities in 1972, followed by the establishment of the Canadian Institute for the Administration of Justice in 1974, and the Canadian Judicial Institute in 1988. Other educational bodies also operate at a state and local level, such as the Canadian Association of Provincial Court Judges, and the Western Judicial Education Centre.

Similarly, in New Zealand, an active program of court-based continuing judicial education operates within the District Court structure which commenced with the launching of a judicial induction program in 1988.

As at the present time, the judiciaries in both Canada and New Zealand are re-examining the need for continuing education and are exploring the options for its institutionalization.

At a regional level, a number of entities operate to provide judicial education within a framework of developmental projects.

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21. "Continuing Judicial Education," Commonwealth Law Bulletin, July 1992, 1037.

Among these is the Commonwealth Magistrates and Judges Association (CMJA) which was established in 1971. Presently operating from Canada, the CMJA formed the Commonwealth Judicial Education Institute (CJEI) in 1994 to coordinate and provide educational activities to judiciaries operating in developing countries.

4. Australia

Judicial education in Australia is similarly in its formative years.[22] It is, however, gathering considerable momentum and, in the words of Sallmann, "heralds the advent of potentially significant changes in the Australian judicial culture."[23]

Traditionally, judicial education was non-existent in any formalized sense and relied heavily, in the words of one senior judge, on "the gifted amateur."[24] During the 1970's various courts took initiatives to conduct conferences and seminars usually on a national, biennial or ad hoc basis.

The history of judicial education in Australia can be traced to the formation of the Australian Institute of Judicial Administration (AIJA) by judges in 1975, and by a call in 1983 from Justice Michael Kirby for the introduction of formalized judicial education to assist new appointees in the transition to

22. Riches AL, "Continuing Judicial Education in New South Wales," Journal of Professional Legal Education, 1989, 6, 2, 149-162, 151.

23. Sallmann PA, "Judicial Education: Some Information and Observations," Australian Law Journal, 1988, 62, 981-1005, (hereafter, Sallmann 1988), 981.

24. Kennedy GA, "Training for Judges?" University of New South Wales Law Journal, 1987, 10, 47-59, 48.

the Bench and to keep judges abreast of change.[25] These calls were met with a mixed response within the judiciary. It was not, however, until the establishment of the Judicial Commission of New South Wales in 1986 and the formation of the AIJA secretariat in 1987 that any permanent infrastructure was dedicated to judicial education. Since 1987, both bodies have conducted an increasing range of judicial conferences and workshops for judges and judicial administrators on a national and state basis respectively. In 1991, Victoria followed the example set by New South Wales by enacting legislation for the establishment of a judicial studies board. Western Australia is presently investigating the options in establishing a similar body to assist the judiciary of that state.

In recent years, there has been major increases in the provision of judicial education. Government has provided substantial funding particularly in response to high levels of criticism for alleged "gender bias" and cultural insensitivity.[26] Additionally, in 1994, the first judicial orientation course was conducted on a

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25. Kirby MD, The Judges, The Boyer Lectures, Sydney: ABC, 1983, 24-26.

26. The response in New South Wales has been to develop judicial education on equality, integrating issues of gender as much as race, culture and wealth; Armytage L, "Judicial Education on Equality – With Particular Reference to Gender and Ethnicity, "The Modern Law Review, 1995, 58, 160-186. The English response is similar: Judicial Studies Board Report 1991-1995, 8. These are contrasted to the approaches taken in the United States and Canada where specialist programs on gender equality are conducted.

    Within the domain of feminist jurisprudence, there is an emerging literature relating specifically to the judiciary and to

national basis by the AIJA and Judicial Commission of New South Wales. This course was opened by Chief Justice Mason:

> [In the past] new judges were expected somehow to acquire almost overnight the requisite knowledge of how to be a judge. Perhaps it was thought that judicial know-how was absorbed by a process of osmosis… One of the myths of our legal culture was that the barrister, by dint of his or her long experience as an advocate in the courts, was equipped to conduct a trial in any jurisdiction.[27]

This course was attended by new appointees from across the spectrum of judicial office and, owing to high levels of support from the courts, will be conducted on a regular ongoing basis.[28]

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the need for judicial education. See, for example, Mahoney K, "Gender Bias in Judicial Decisions," The Judicial Review, 1993, 1, 197-217; and, Mahoney K and Martin S, Equality and Judicial Neutrality, Toronto: Carswell, 1987; Graycar R & Morgan J, The Hidden Gender of Law, Sydney: Federation, 1990; Hecht-Schafran L, Overwhelming Evidence: Reports on Gender Bias in the Courts, 26 Trial 28, 1990; Hecht-Schafran L, Issues and Models for Judicial Education About Gender Bias in the Courts, Court Review, 1989, 26, 3; and, Wikler N, Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts, Court Review, 1989, 26, 3.

27. Mason A, The Role of the Judge, Inaugural Judicial Orientation Program, Sydney, 1994, (as yet unpublished paper).

28. This national Judicial Orientation Program was jointly developed by the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales; see Wood J, "The Prospects for a National Judicial Orientation Programme in Australia," Journal of Judicial Administration, 1993, 3, 75-95; and Armytage L, Judicial Orientation: Six Factors Influencing Program Development, unpublished paper, 25th

5. Cambodia

Up until the coup of July 1997, there were a number of judicial development projects operating to strengthen the Rule of Law in Cambodia.[29] While any ongoing nature of these projects is unresolved at the time of writing, it can be observed that judicial education and training was a significant social governance strategy to promote the Rule of Law in the post-genocide period of Khmer Rouge history. The challenges of rebuilding, however, remain awesome: only six lawyers, including just one judge, survived the Khmer Rouge period in 1979. 1997 marks the graduation of the first cohort of new graduates from the re-opened École de Droit in Phnom Penh.

6. Mongolia

Following its emergence from the Soviet Block in 1992, Mongolia is striving to introduce a market economy, supported by a competent judiciary capable of resolving the range of commercial litigation which flows from this development. In the past two years, USAID has sponsored the commissioning and publication of the first judges' Benchbook to assist judicial officers to administer judicial procedures on a practical day-to-day basis.

7. Pacific Island Nations

The UNDP has recently sponsored the establishment of a comprehensive judicial education and training program for Pacific Island Nations, comprising conferences, update seminars and skills

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biennial conference of the International Bar Association (IBA), 1994.

29. UNCHR, ADB, USAID, ODA, AusAID and the French government all funded substantial legal and judiical projects.

development workshops; Benchbooks, bulletins, and orientation and mentor programs for new appointees.

8. Palestine

Under the Oslo Accords, Palestine is a state under formation. A major project to train and strengthen the Palestinian judiciary, legal profession and police is presently funded by AusAID and the World Bank. Judicial education combines with law development and harmonization strategies to unify historically and culturally diverse systems of law (both British-Egyptian common law and French-Jordanian civil system) operating in the West Bank and Gaza in preparation for the new state of Palestine to emerge from Israel.

9. Haiti

Following the re-establishment of the present democratically-elected regime in 1992, the US government is sponsoring substantial re-training of the judicial corps in this civil system jurisdiction, at least in part, as a principal means to promote and consolidate the protection of human rights by the judiciary.

There are numerous other examples within our region, including the ongoing initiative of the ADB to support the development of the continuing education and training program of judicial officers in Pakistan.

IV. Educational Considerations: Judges As Learners

A. Application of Adult Learning Theory

In broad terms, judges epitomize adult learners. There is a broadly held consensus among educational theorists, commentators and

practitioners that adults do learn in a manner which is distinctive to children.

Adult learning, according to Knowles, is characterized by its autonomy, self-direction, preference to build on personal experience, the need to perceive relevance through immediacy of application, its purposive nature, and its problem-orientation.[30]

Put another way, Brookfield argues that adults learn throughout their lives:

> As a rule, however, they like their learning activities to be problem-centred and to be meaningful to their life situations, and they want the learning outcomes to have some immediacy of application. The past experiences of adults affect their current learning… Finally, adults exhibit a tendency towards self-directedness in their learning.[31]

The application of learning theory provides a range of useful insights on the process of judicial learning. For this purpose, the observations of Cross are endorsed:

> It does make sense to argue that, generally speaking, humanist theory appears relevant to learning self-understanding; behaviourism seems useful in teaching practical skills; and developmental theory has much

30. Knowles MS, The Modern Practice of Adult Education: From Pedagogy to Andragogy, Chicago: Follett, 1980, 43-44, and 57-58 (note earlier 1970 edition bi-lined Andragogy versus Pedagogy, 39); see also Knowles MS, The Adult Learner: A Neglected Species (2nd Ed.) Houston: Gulf, 1973, 55-59.

31. Brookfield SD, Understanding and Facilitating Adult Learning, San Francisco: Jossey-Bass, 1986, 91.

> to offer to goals of teaching ego, intellectual or moral development.[32]

Adults participate in continuing education for a variety of reasons: to become a better informed person, prepare for a new job, improve present job abilities, spend spare time enjoyably, meet interesting people, carry out everyday tasks, and get away from daily routine:

> The major emphasis in adult learning is on the practical rather than on the academic; on the applied rather than the theoretical; and on skills rather than on knowledge or information.[33]

B. Practice of Professional Learning

Judges are professionals by training, career practice, and self-image.

Houle argues that the way in which professionals learn requires the development of a specific professional education which involves a separate body of knowledge, inquiry, research and practice.[34] This has been frequently endorsed by subsequent

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32. Cross KP, Adults as Learners, San Francisco: Jossey-Bass, 1981, 233-4.

33. Johnstone JW & Rivera RJ, Volunteers for Learning Chicago: Aldine, 1965, 3. Cross observes that nothing in the myriad of surveys since has changed that general conclusion – Cross, 91.

34. Houle advances two central propositions: first, that there is commonality between the continuing education of many professions (14-15); and second, that professional education is distinctive to adult education (49-73, and 121); see also, Cervero, RM, Effective Continuing Education for Professionals, San Francisco: Jossey-Bass, 1988, 15-16; and Grotelueschen AD, "Assessing Professionals' Reasons for Participating in Continuing

theorists.[35] Houle demonstrates that professionals' reasons for participation in continuing education generally tend to be more refined than adults at large are, and are usually job related. Professionals participate for functional purposes rather than for the sake of learning per se, and focus more closely on the job relationship and career development. For most professionals, continuing education is seen as a means to assist them with new duties or to prepare them for promotion.[36]

Cervero agrees that the study of professional learners builds on general adult learning theory to develop its own distinctive process:

> Members of a specific profession are like all other adults [sic] in that they share basic human processes such as motivation, cognition, and emotions, like some other adults in that they belong to a profession, and like no other adults in that they belong to a particular profession. Each frame of reference implies important dimensions that need to be taken into account in the practice of continuing professional education.[37]

Schon, in developing a model of professional knowledge, argues that the context of a professional practice is significantly

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Professional Education," in Cervero RM and Scanlon CL (Ed), Problems and Prospects in Continuing Professional Education, San Francisco: Jossey-Bass, 1985, 34-35.

35. See, for example, Cross, 1981, 45-46, 82; Brookfield SD, Understanding and Facilitating Adult Learning, San Francisco: Jossey-Bass, 1986, 171; Cervero 77.

36. Houle 1980, 121. Grotelueschen endorses this conclusion: Grotelueschen 1985, 34-35.

37. Cervero 1988, 15-16.

different from other contexts for the purpose of learning and education. Schon identifies the characteristics of professional practice. He argues that professionals -

> share conventions of action that include distinctive media, languages and tools. They operate within particular kinds of institutional settings – the law court, the school… Their practices are structured in particular kinds of units of activity…and [are] made up of chunks of activity, divisible into more or less familiar types, each of which is seen as calling for the exercise of a certain kind of knowledge.[38]

Cross describes professional people as being among the most active self-directed learners in society. This is due in part to patterns of learning developed in attaining and retaining membership to a profession, and in part to the nature of the professional role itself. She argues that professionals have highly focused problems; they usually know what they need to learn, and, consequently, any general course will probably contain much that is redundant or irrelevant to the problem-oriented learner. Cross observes that:

> A corollary to the assumption that adults are largely problem-orientated learners is that the more sharply the potential learner has managed to define the problem, the less satisfactory traditional classes will be.[39]

In essence, professionals exhibit certain general characteristics as learners which are distinctive: they are more active, career-related and self-directed as learners than adults at large. Each profession, Schon argues, has a systematic knowledge base with four essential

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38. Schon 1987, 32-33.

39. Cross, 193.

properties: "It is specialized, firmly bounded, scientific and standardized."[40]

Cervero argues that continuing professional development should be seen seen as a self-managed process giving the individual ultimate control over his or her long-term learning and growth. His observations highlight the difference between education based on the delivery of declarative knowledge (knowing what) and procedural knowledge (knowing how), and reveals a contradiction in the practice of judicial education. The application of facilitated learning is specifically applicable to professionals. While recognizing the importance of facilitation in adult education and need for adults to assume self responsibility for their own learning -

> [I]t is evident that professionals require guidance and assistance in structuring their continuing professional education so that it will, in fact, benefit their practice.[41]

Self-managed professional development requires both the learner and the educator to rethink their roles and goals, and is a logical consequence of the application of adult learning theory to continuing professional education and, in turn, to judicial education. The precise nature of this application is affected by the characteristics of judges as learners, the assumptions of competence which can be reasonably inferred from the appointment process, the continuing education needs of judges, the features of judicial tenure in terms of career development, and the environment surrounding the office of the judge in

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40. Schon 1983, 23.

41. Smutz WD & Queeney DS, "Professionals as Learners: A Strategy for Maximizing Professional Growth," in Cervero RM, Azzareto JF & Tallman D, 1990, 183-205, 186.

society. Each of these factors plays a role in the development of any program of continuing education for judges and has an impact on its character.

Within this understanding of the process of adult and professional learning, it is argued that any paradigm of formalized judicial education should be seen, primarily, as a process of facilitation based on self-directed learning rather than an authoritarian model of teaching.

C. Judicial Disposition

Within the framework of adult and professional education outlined above, it is possible to identify characteristics and practices of judges as learners which give rise to the need to pose a particular model of judicial education. There are significant differences between judges and other professionals in their motivations and perceived needs for continuing education.

Catlin, for example, has found that appointment to judicial office and the environment surrounding judicial tenure created educational needs distinct from other professionals.[42] These distinctive features related in particular to the motivational factors

42. Catlin DW , The Relationship Between Selected Characteristics of Judges and Their Reasons for Participating in Continuing Professional Education, unpublished doctoral dissertation, Michigan: Michigan State University, 1981, 125; see also, Catlin DW , "An Empiric Study of Judges' Reasons for Participation in CPE," The Justice System Journal, 1982, 7,2, 236-256. Catlin's research has revealed that judges' reasons for participation are complex and multidimensional. Three underlying factors emerged from an analysis of judges' reasons for participation which, in order of importance, were judicial competence, collegial interaction, and professional perspective. Catlin found

in continuing learning where personal benefits, professional advancement and job security were ranked significantly lower by judges, than by other professionals such as physicians and veterinarians.[43] This is consistent with judges perceiving themselves as public officials, now behaving differently from professionals in the private sector. Catlin observes that "the difference appears most dramatic when the reward system is examined."[44] Judges may participate to develop new skills in order to be more competent, but not to increase their income; thus, the development of competence, in the case of the judge, must be a reward itself.

The lack of importance of job security, professional advancement and personal benefits have "serious implications" for purposes of planning education programs. Comparison between groups suggests that for judges, the concept of judicial competence is a factor much broader than professional service. In addition, judges operate in an environment where there is a lack of any distinctly identifiable patient or client relationship.[45]

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that significant relationships exist between these participation factors and judges' characteristics including their sex, years since qualifying, tenure on current Bench and court level currently served. Thus, Catlin concludes that is wrong to assume that participation is primarily a function of program content in formulating curricula and designing programs.

43. Compare the empirical findings of Catlin with those of Cervero relating specifically to physicians and veterinarians: Cervero R, "A Factor Analytic Study of Physicians' Reasons for Participation in Continuing Education," Journal of Medical Education, 56, 1981, 29-35.

44. Catlin 1981, 125.

45. Catlin 1981, 126.

Added to this, the circumstances characterizing the process of appointment on merit to judicial office, in terms of the formal and informal criteria of selection, arguably have an impact on the type of person – and even personality types – selected for appointment. These circumstances may also have an impact on the preferred learning styles of those successful advocates who are likely to be considered for appointment to the Bench, and, thus, on preferred forms of education. Herrmann, for example, argues that there is empirical evidence that the preferred learning styles of judges and lawyers tends to be "left brained," that is, logical, analytical, problem-solving, controlled, conservative and organizational.[46]

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46. Herrmann N, The Creative Brain, Lake Lure, N. Carolina: Ned Herrmann/Brain Books, 1989; Herrmann argues that judges tend to learn in a distinctively "left brained" style – characterized for being logical, analytical, problem-solving, controlled, conservative and organizational. Additionally, judges tend to be intensely autonomous and self-directed in their preferred learning practices. See also comparison on left-mode and right-mode characteristics in Kolb, 49 and 141; and application of the "Myers-Briggs Type Indicator" to lawyer types, American Bar Association Journal, July 1993, 74-78. If these various observations of the characteristics of lawyers and judges are valid, this raises the vexed question whether the practice of law creates these characteristics in practitioners or whether persons with these characteristics are attracted to practice in the law. Detailed exploration of this issue, and its full implications for educators, remains a matter for further research. Claxton & Murrell, 1992, address a chapter on "Learning Styles of Judges." However, this work is an application of Kolb's general work on experiential learning, and lacks any grounding in empirical data distinctive to judicial learning; see Kolb DA, Experiential Learning, Englewood Cliffs NJ: Prentice Hall, 1984.

The distinctive elements of continuing judicial learning include judges' motivation to learn and their perception on the need to learn, learning practices predicated on the process of judicial selection, and their preferred learning styles. These elements are important distinguishing features in terms of any program of continuing judicial education, and have significant implications on both the content and the process of any program of continuing judicial education.

V. Judges As Distinctive Learners

It follows from this discussion that the characteristics of judges as learners are distinctive in a number of ways that are significant for educators. These characteristics arise from four factors relating to selection, learning preferences, doctrinal constraints and perceived learning needs.

A. Judicial Appointment and Tenure

The process of selection determines appointment to judicial office, and establishes a particular threshold of pre-existing competencies in legal knowledge and skills. Consequently, it is generally valid to claim that judges appointed on merit are likely to possess extraordinary high levels of pre-existing professional competence in terms of their knowledge of the law. In addition, Catlin has demonstrated that the distinctive nature of judicial tenure, specifically, its security and lack of promotional opportunity, have implications of systemic influences affecting individual judges' motivation to learn, and place them in a different position to many other professionals who operate in working environments lacking these features.

B. Preferred Learning Styles and Practices

There is emerging evidence of judges as professionals exhibiting preferred learning styles, and utilizing preferred learning practices developed over the course of their careers. Judges are generally autonomous, entirely self-directed, and exhibit an intensely short-term problem-orientation in their preferred learning practices. Moreover, clinical experience tends to suggest that Schon's approach to professional learning is apposite to judges' continuing learning and should, as a result, form an active element in any process of continuing judicial education.

C. Doctrinal Constraints of Judicial Independence

It is the imperative to preserve judicial independence within any Westminster system of government. The doctrinal significance of this precept has been seen to be highly influential in any judicial approach to the notion of continuing education. It follows that educators should make efforts to ensure that judges recognize the independence and integrity of the process, in order to appease any concerns of possible indoctrination. Equally, the formative nature of the judicial role can create a discomfort for some judges participating in continuing learning under conditions which could possibly be seen to erode the authority of their role. Both these considerations contribute to the need for an independent, discrete process of education.

D. Reasons for Participating in Continuing Education

Judges' reasons for participating in judicial education have been discussed above.[47]

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47. Armytage L, The Need for Continuing Judicial Education, 16 University of NSW Law Journal, 536.

VI. Six Guiding Principles

Sustaining the development of judicial competence requires incremental change, constant coordination of related strategies and ongoing support in the years to come. Taking into account the assessment of needs and the availability of resources, it is useful to distil some guiding principles with which to develop, plan and implement any program of judicial training and development.

1. *Judicial ownership* – There is a doctrinal imperative for judicial education to be judge-led and court-owned, if it is to be successful in strengthening an independent and professional judicial system. This is best attained by securing the endorsement and support of the Chief Justice and the Supreme Court from the outset.

2. *Faculty development* – Training of judges should, wherever possible, be by judges themselves to ensure authenticity. This will require an ongoing program of faculty development and train-the-trainer.

3. *Bench-specific focus* – It is educationally most effective that the training should be designed and delivered to meet specific needs of each court wherever economically feasible.

4. *Bottom-up and top-down strategies* – Curricula should be designed to integrate distinct approaches which address the respective training needs of both judges at first instance and superior/appellate judges.

5. *Consolidate judicial identity* – All training endeavour should address the needs of judges and court administrators and, wherever appropriate and feasible,

consolidate judicial identity by training all participants together, for example, in case management.

6. *Centralised and regional delivery* – Training should be conducted on both a centralised basis to maximize resource-efficiency and to provide opportunities for collegial networking and the exchange of professional experience nationally, and on a regional basis to promote accessibility and convenience for participants.

VII. Planning Matrix: Content And Structure of Education Programs

The content of any program of judicial education will vary according to the needs identified by each judiciary. It follows from this that care should be taken to avoid emulating the structure and content of other programs without first assessing their suitability.

In overview, the content of judicial education programs will fall within a number of broad categories: substantive law, court procedure, judicial skills, case management and administration, judicial skills and "court craft," disposition (attitudes, values and ethics), and interdisciplinary matters (such as DNA forensic science, financial reporting and so on).

In addition to content, there are different levels of application required to meet the diverse needs of judicial officers. In summary, these can be classified as orientation/induction, update, exchange of experience, specialist and refresher.

In planning terms, the identification of these needs and the selection of educational services to match them, can be usefully undertaken with the matrix planning instrument outlined beneath:

PLANNING MATRIX

CONTENT/ LEVEL	ORIENTATION INDUCTION	UPDATE	EXCHANGE OF EXPERIENCE	SPECIALIST	REFRESHER
SUBSTANTIVE LAW					
COURT PROCEDURE					
CASE MANAGEMENT & ADMINISTRATION					
JUDICIAL SKILLS & COURT CRAFT					
DISPOSITION ATTITUDES, VALUES AND ETHICS					
INTERDISCIPLINARY					

VIII. Foundations for A Model of Continuing Judicial Education

It follows from this study that a distinctive model of formalized continuing judicial education should be based on foundations of adult and professional learning, but should also reflect the distinctive characteristics of judges as learners which have been outlined above.

These insights directly affect how we should go about educating judges in order that judicial education can assume its full potential as an agent of leadership and change.

Judicial Education*

*Judge Sandra E. Oxner***

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* This section is based on a portion of a paper by the writer entitled, "The Many Facets of Training," in Rudolf V. Van Puymbroeck, ed., *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington: World Bank, 2001) at 273, and is published at "Desk Review: Judicial Appointments, Career Development," *Strengthening the Independence of the Judiciary*, SC-ADB TA No. 3693-PHI.

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I. Introduction

The objective of judicial education is to support an impartial, competent, efficient, and effective judiciary.[1] To a considerable extent the quality of the judiciary will depend on the existence and quality of pre-service and in-service training available to the judge.

Judicial education is a term used to include collegial judicial meetings to discuss education topics (international, national, regional and local) and all professional information received by the judge, be it print, audio, video, computer disk, online or electronic. It includes distance learning – electronic and print, self-study, mentoring and feedback programs. It has two divisions: (1) pre-service or orientation programs, and (2) continuing judicial education and professional growth training throughout the judge's professional life.

II. Targets

The targets of judicial reform training are:

1. Aspirant judges
2. Newly appointed judges
3. Sitting judges

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in the field. Her work in this area has been recognized by national and international honours including honourary degrees. She was made an Officer of the Order of Canada in 2000.

1. S. Oxner, "Judicial Education and Judicial Reform" in B. Ajibola and D. Van Zyl, eds., *The Judiciary in Africa* (Cape Town: Juta & Co., Ltd, 1998) at 64; *Canadian National Judicial Education Objectives* (Ottawa: National Judicial Institute, 1990).

4. Judicial support staff
5. The Legislature
6. The Executive
7. The Media
8. School Children
9. The community at large including NGOs and CSOs

The targets of judicial training institutes vary from one jurisdiction to another. Some offer training to subordinate court judges only (Sri-Lanka[2]); some to appeal court judges, high court judges, subordinate court judges (Canada[3], UK[4]); and some offer orientation and continuing judicial education training to appeal court judges, high court judges, subordinate court judges and judicial support staff (United States[5], Malawi[6]).

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2. 1999 visit by writer to the Sri Lankan Judiciary. Notes in the writer's files.
3. National Judicial Institute, *Annual Report 1995–1996* (Ottawa: National Judicial Institute, 1996) at 4.
4. Judicial Studies Board, *Annual Report 1997–1998* (London: Judicial Studies Board, 1998) and writer's discussions with Mr. Edward Adams, Secretary to the Judicial Studies Board. Notes of which are in her files.
5. Federal Judicial Center, *Annual Report 1999* (Washington: Federal Judicial Center, 1999).
6. Visits by the writer to Malawi 1995–2000 and discussions with the Honourable Chief Justice R. A. Banda and the Honourable Justice R. R. Mzikamanda and the Honourable Justice D. Tambala, judicial education chairs. Notes in the writer's files.

Pre-appointment training is relatively rare in common law countries, although there are exceptions. England and Wales give training to part-time judges whose part-time work forms part of the criteria for appointment to judicial office.[7] Some African common law jurisdictions, such as Zimbabwe and Uganda, have formalized training for lay magistrates. The Uganda program is under a statutory body called the Law Development Center. It is chaired by a Supreme Court justice and gives a nine-month diploma course on the basics of substantive, procedural and evidentiary law, as well as ethics. The cost for tuition and accommodation is two million Uganda shillings (US$1,112). Successful completion of the course qualifies one for a lay magistrate position. The course has been such a success, however, that there are more graduates than lay magistrate positions. Many graduates find employment in legal firms.[8]

On the other hand, pre-appointment training is part of the judicial culture in the European countries of Italy, France, Germany, Portugal and Spain.[9]

Judicial education in Germany is under the supervision of the state justice ministry. The education process is composed of two examinations and an apprenticeship period. The first

7. Information from correspondence with Mr. Edward Adams, Secretary of the Judicial Studies Board of England and Wales, dated April 5, 2001, held in the writer's files.

8. Information received from the Honourable Justice John Tsekooko, Chairman of the Law Development Center in Uganda. In Zimbabwe, the Justice College, chaired by the Chief Justice, trains lay magistrates. Both programs were inspired by the need for magistrates created by a lack of legally trained candidates for the positions.

9. Di Federico, *supra* note 6.

examination, with written and oral components, is prepared by state justice ministries assisted by university law faculties and follows three and a half years of university studies. This is followed by two years of apprenticeship training. The first year is devoted to three-month periods in civil courts, criminal courts, the prosecutor's office, administrative agencies and private law offices. The second year of apprenticeship training is spent in courts or agencies of their choosing.

The second examination, in which candidates for the judiciary must achieve a grade of high honours, is prepared, conducted and graded by committees made up of judges, senior civil servants and law professors. Only 50 percent of candidates achieve appointment to the judiciary.[10]

Fifty years ago, *L'École Nationale de la Magistrature* (ENM) was established at Bordeaux to train law graduates for the judiciary. ENM is under the administrative control of the ministry of justice.[11] Training lasts 31 months. The period of studies includes practical training in government administration or with a business corporation, 14 months at ENM and 14 months in the courts. Candidates are paid a salary during their training and on successful completion they are nominated, with the approval of the Superior Judicial Council, to judicial posts. Eighty percent of the judiciary is recruited directly from ENM. It is possible to enter the judiciary

10. D. Kommers, "Autonomy Versus Accountability" in P. Russell and D. O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* at 143, forthcoming, University of Virginia Press, 2001. Copy in the writer's files.

11. This describes the main category of candidates. There are two other minor streams.

by a special examination (3 percent) or by lateral recruitment (12 percent).[12]

The cost of judicial training in France is 140,000,000 francs (US$23,430 000) per year. In the Netherlands, it is US$20,008,500 per year, and in the United States (1,000 federal judges and support staff), it is US$17,495,000 per year. [13] This makes duplication of such training impossible for post-Soviet states and developing countries following the civil law pattern, which have difficulty in attracting suitable candidates to the judiciary and would like to adopt the European judiciaries' approach of training their own.

III. Levels of Judicial Education

There are four levels of judicial education. The first level of judicial education is the provision of information and "tools" necessary for the judge to effectively do his/her job. This required information usually includes legislation, practice directions of higher courts, case reports, scholarly articles,

12. The lateral recruits are regarded suspiciously by ENM trained judiciary as an executive intrusion upon the judiciary; see B. McKillop, "The Judiciary in France – Reconstructing Lost Independence" in H. Cunningham, ed., *Fragile Bastion: Judicial Independence in the '90s and Beyond* (Sydney: Judicial Commission of New South Wales, 1997) at 126.

13. The writer was advised of the budget of the Federal Judicial Center by the Honourable Judge Rya Zobel, Director; of the Dutch budget for judicial education by Judge Rosa Jansen, Director of the Judicial Training Center; and the budget of the French judicial training body by the Director of the French *L'École Nationale de la Magistrature*. (Notes in the writer's files).

Benchbooks or manuals, and judicial journals and bulletins. Such information can be given by printed material, audiotapes, audiovisual tapes, electronic means (diskette or e-mail), local area networks, and by cable and satellite television, as well as through collegial meetings. Discussions of issues in substantive and procedural law are the traditional first step in collegial judicial education programs.

Ensuring judges understand new laws that define a shift of philosophy (as in the modernization of the legal framework of the Philippines to support a vibrant market economy or to promote an efficient court process) is a second phase.

The third step is teaching a judge new intellectual approaches, as in the judicial exercise of discretion. The exercise of discretion is common in areas such as sentencing and assessment of damages. In a country undergoing judicial reform, the exercise of judicial discretion takes on new dimensions.

Inspiring attitudinal change required to provide an impartial and accountable Bench rising to social expectations is the fourth and most sophisticated level of judicial education. In some countries, the dominant attitudinal change required may relate to eliminating gender or racial bias. In others, the dominant attitudinal change required is to encourage the judicial culture of service to the community and the fact and perception of judicial integrity, independence, competence, efficiency and effectiveness. Attitudinal and thinking process change is the most difficult area of education in any field. It requires motivated and inspired teachers who are respected and trusted by the judges – most often other judges skilled in this area.

How does judicial education support an impartial, efficient, competent and effective judiciary? It does so by analyzing the weaknesses of the judiciary, designing programs to compensate

for these weaknesses and presenting them to judges in a manner that is both effective in imparting knowledge and cost effective.

"Impartial" stands for both the reality and the perception of impartiality. This includes the concepts of:

1. An impartially minded and independent judiciary respected for its integrity;
2. Transparency from the appointment process through to the rendering of judgments comprehensible to the public;
3. A transparent and accessible judicial complaint process; and
4. An articulated and publicized code of judicial ethics and conduct so that the community is aware of the standards they have the right to require of a judiciary.

"Impartiality" and "Independence" are often used interchangeably. "Impartiality" is used here to describe the desired judicial character and state of mind. "Judicial independence" is used to refer to the freedom from improper pressure in the decision-making process from any quarter. This concept of judicial independence identifies roles and responsibilities for the judiciary, the executive, the media, the legal profession and the public.

The creation and support of an impartial mind has different focuses. For example, in the newly emerging states of Eastern Europe, the focus is on changing the judiciary from a bureaucracy mechanically applying the law and acting as a conduit for the delivery of political decisions, to an impartial, independent dispute resolution mechanism, as well as a protector of the Rule of Law and civil and human rights. In other countries, judicial education places emphasis on attitudinal change to improve judicial integrity and independence, and to eliminate open and hidden bias from

the judicial mind in fact-finding, particularly in relation to gender and ethnic issues.

"Efficiency" includes efficient judicial courtroom management - placing the judge and not the Bar in charge of case management, caseflow and process efficiency, reform of rules and procedures to narrow the issues early. It encourages timely settlements and court-annexed and free standing mediation, as well as other ADR practices. Efficiency also relates to appropriate physical structures and adequate equipment and access to such judicial tools as statute books, precedent cases, legal texts and other scholarly writing.

"Competency" relates to knowledge of substantive and procedural laws – no easy task for a generalist judge in the complex modern legal world, and almost impossible in developing countries where statutes, case reports and textbooks are in short supply. It also includes "judicial skills" such as chairpersonship skills and oral and written communication skills.

It is not enough for a judge to be impartial, efficient and competent. He or she must also be effective in interpreting and shaping the law to achieve a just solution. This may be achieved by the use of judicially developed techniques such as domestic application of international human rights norms, interpretation of constitutions, or through the judicial exercise of discretion. Integrity, legal competence and valour are required to bridge the gap between the law and a just solution, or to prevent decisions on technicalities that unnecessarily avoid the merits of the case. Knowledge and understanding of the community in which one lives is a prerequisite for an effective judge. Knowledge and understanding of the philosophy behind economic reform is also a prerequisite.

A second aspect of judicial effectiveness is judicial predictability. A third aspect is the collective judicial responsibility of listening to the community's complaints about the justice system and using its influence to shape the justice system to respond to responsible complaints. For example, judges do not generally consider a low rate of judgment recovery their responsibility. In many countries, difficulties in enforcing judgments can make successful litigation a hollow victory and bring the judiciary into disrepute. There are judicial, legislative and administrative ways of improving judgment recovery. In its role as guardian of the image of justice, the judiciary has an interest and responsibility in supporting this and other necessary reforms in non-political ways.

To be effective, a judiciary must be legitimate; it must be trusted, respected and relevant. A judiciary must not only be impartial, competent, efficient and effective, but must be perceived to have those qualities. Transparency in procedure and process is required to achieve public faith, as is an understanding by the judiciary that they perform a public service and need to respond to community expectations. Judges, like other players in the justice system, often need intellectual leadership to help them to fully understand the importance of this and to encourage them to lend their support to the means to achieve it.

IV. Training in Detection of Factual and Jurisprudence Bias in Fact-Finding

The greatest power of a fact-finding judge lies in the function of accepting or rejecting evidence, as for all practical purposes, a judge cannot be reversed on appeal in this area. Any finding of guilt or innocence or rights between parties determined by the facts is based on subjective beliefs of the trier of fact. In many

jurisdictions, a single judge sitting alone without a jury is the finder of fact.

A judge should also be aware, as most of any experiences are, of the fallibility of the human powers of observation and memory. The experiments of psychologist Elizabeth Loftus[14] have shown us how sympathy can make honest people see things inaccurately. Many experienced judges are of the view that their function in making findings of credibility is not in danger of being usurped by a lie detecting machine, as in their experience most people have convinced themselves that their evidence is true by the time they get to the courtroom.

The science (or is it an art?) of fact-finding in judicial decision-making is an important, but neglected, issue. While legal writers have given some attention to this issue,[15] their analysis is different

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14. Elizabeth Loftus, *Eyewitness Testimony* (Cambridge: Harvard University Press, 1979). Elizabeth Loftus, *Memory, Surprising New Insights into How We Remember and Why We Forget* (Reading: Addison-Wesley Publishing Co., 1980).

15. R. S. Abella, "The Dynamic Nature of Equality" in S. Martin and K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Hardwell, 1987) at 8; B. L. Shientag, "The Virtue of Impartiality" in G. R. Winters, ed., *Handbook for Judges* (The American Judicature Society, 1975); Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall Law Journal at 507; J. H. Wigmore, *The Science of Judicial Proof,* 3d ed., (Boston: Little Brown, 1937); W. L. Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985); N. Gold, C. Mackie & W. L. Twining, *Learning Lawyers' Skills,* (London: Butterworths, 1989); W. L. Twining, *Rethinking Evidence: Exploratory Essays*

from the process of belief and proof that is considered by Seniuk.[16] His works points out that because of the power of the finder of fact, the outcome of a case is often determined by which judge is drawn. This, in essence, leaves the outcome as much to chance as would the flip of a coin.[17] His conclusion is supported by mock findings of guilt or innocence made by judges in judicial education programs. Having viewed a video which depicts a trial in which a young female from a troubled past alleges a retired war-disabled veteran sexually assaulted her, the judges are polled for their verdicts. When used throughout the Commonwealth, the result has almost always been an approximate 40/60 split on

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(Oxford: Basil Blackwell, 1990). For a number of articles considering an academic movement called the "new evidence scholarship," which considers the implications of decision theory, probability and statistics for the study of evidence, see "Decision and Inference in Litigation" (1991) Special Issue 13 Cardozo Law Review at 253. I am indebted to the Honourable Judge Gerald T. G. Seniuk for this reference.

16. G.T.G. Seniuk, "Judicial Fact–Finding and A Theory of Credit," paper given at the Nova Scotia Judicial Education Seminar, Halifax, Canada, February 16, 1994. This section is based on Judge Seniuk's paper.

17. Rabelais' Judge Bridlegoose did decide cases by tossing a coin, *Gargantua and Pantagruel*, transl. J. M. Cohen, Vol. 3, Chs. 39-43 (London: Penguin, 1955). Another unusual story of a coin-tossing judge is that of the Manhattan judge who used this method to decide the length of a jail sentence. He also asked courtroom spectators to vote on which of two conflicting witnesses to believe. He was removed from office in 1983 by the New York State Commission on Judicial Conduct; *The Times*, 3 February, 1982.

the part of the experienced judicial decision-makers.[18] Programs assisting judges to analyze, detect and improve biases in their fact-finding process are important to the success of the judicial reform process.

Judges also need to be aware of analyses of schools of jurisprudence.[19] It is important that they be assisted to be sufficiently introspective to identify the school they follow and to determine if there is a need to consider a change in jurisprudential approach to achieve justice in their decisions. This will involve the study of academic articles analyzing judicial approaches to decision-making, an analytical and introspective self-study of the judge's decision-making process, and a philosophical consideration of the objectives of the justice system.

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18. Experience gleaned from the use of the video at Commonwealth Judicial Education Institute programs.

19. See generally R. Devlin, "Judging the Diversity: Justice or Just Us?/Les Décisions Judiciaries et La Diversité: La Justice des Justiciables ou de Justiciers?" (1996) 20(3) Provincial Judges Journal 4; R. Devlin, "ReDressing the Imbalances: Reflections on Judicial Decision-Making After R. D. S." (1999-2000) 31 Ottawa L. Rev. at 1; Devlin, MacKay and Kim supra note 7 at 734.

Judicial Education and Judicial Reform*

*Judge Sandra E. Oxner***

Mr. Presidents, My Lord Chief Justice, My Lords, My Ladies, Your Honours, Members of the Bar, other distinguished guests.

Not long ago, Her Majesty, Queen Elizabeth II, made a royal visit to Canada. The first stop on her itinerary was a visit to a town which had just elected a new head of local government, to whom we give the title of "Mayor" and honorific of "Your Worship."

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* A paper prepared for the World Jurists Association, January 1997, Cape Town, South Africa.

** Judge Sandra E. Oxner is a retired Canadian judge. During her career, she was extensively involved in judicial education and judicial reform both in Canada and internationally through her work with the Canadian Association of Provincial Court Judges, the Canadian Institute for the Administratioin of Justice, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Judicial Education Institute, all of which organizations she chaired. Since her retirement, she has been a judicial education/judicial reform consultant for the World Bank (WB), United Nations Development Programme (UNDP), Asian Development Bank (ADB), Canadian International Development Agency (CIDA) and United States Agency for International Development (USAID) and has published widely in the field. Her work in this area has been recognized by national and international honours including honourary degrees. She was made an Officer of the Order of Canada in 2000.

The new Mayor was apprehensive about receiving such an important visitor so early in his career. In his nervousness, His Worship forgot to put on his Mayoral ceremonial chain of office before leaving to greet the Queen.

Her Majesty, noting his obvious stress, kindly tried to put the Mayor at his ease by engaging him in a little conversation. Unfortunately, the topic she selected was an inquiry if the Mayor did not have a ceremonial chain of office. This exacerbated the Mayor's nervousness. To his eternal embarrassment, and, no doubt, the Queen's private amusement, he found himself stammering in reply, "Oh yes, Ma'am, I do, but I only wear it on important occasions."

Had I a chain of office I would certainly be wearing it today. Being invited to address such a distinguished audience is a very important event in my life and I thank you for the honour you have done me by your invitation.

What does a judge do at the World Bank? This is a natural question and the first thought in my mind when I heard from the Bank that it was interested in having a Judge as a staff Judicial Reform Specialist.

The answer is that the Bank has recognized that international and private investment will only be attracted to countries that have well functioning judiciaries. This recognition of the economic importance of the courts means that, at the request of the country concerned, loans are made to support judicial reform to create well functioning judiciaries. Just what is meant by judicial reform? It refers to projects to support an independent, competent, efficient and effective judiciary trusted and respected by the community, operating in appropriate physical facilities and accessible to the public it serves.

My happy task at the Bank is to work with national judiciaries to identify with them their reform priorities. I have had the privilege of working this year with the judiciaries of Russia, Ukraine, West Bank – Gaza, Uganda and Sierra Leone. It has been fascinating to learn that no matter the legal family to which the judiciary belongs – common law, civil law, Shari'a, post Soviet – many problems and remedial solutions appear common to all.

What are the objectives of judicial reform? I like to use the acronym "ICEE," pronounced as "icy," to identify them. I am told this is not inappropriate for a Canadian.

"I" stands for both the reality and the perception of impartiality. This includes the concepts of:

1. An impartially minded and independent judiciary;
2. Transparency from the appointment process through to the rendering of judgments comprehensible to the public;
3. A transparent and accessible judicial complaint process;
4. An articulated and publicized code of judicial ethics and conduct so that the community is aware of the standards they have the right to require of a judiciary.

"Impartiality" and "Independence" are often used interchangeably. I choose "impartiality" to describe the desired judicial state of mind. I choose to use "judicial independence" to mean far more than judicial independence from the Executive and Legislature or control over budget and administration. This analysis includes mechanisms that have been found to be supportive of the environment that is most likely to ensure an impartial judicial mind.

This concept of judicial impartiality-independence identifies roles and responsibilities for the judiciary, the Executive, the media, the legal profession and the public.

The creation and support of an impartial mind has a different focus in different countries. For example, in the newly emerging States of Eastern Europe, the focus is on changing the judiciary from a bureaucracy mechanically applying the law and acting as a conduit for the delivery of political decisions to an impartial independent dispute resolution mechanism. In such countries as Canada, England and Australia, judicial education places emphasis on attitudinal change to eliminate hidden bias from the judicial mind in fact-finding, particularly in relation to gender and ethnic issues.

Leaving "C" for the moment, let me address "E for efficiency" which includes efficient judicial courtroom management, caseflow and process efficiency, reform of rules and procedures to early narrow the issues and encourage timely settlements, court-annexed and free standing mediation and other ADR practices. Efficiency also relates to appropriate physical structures and adequate equipment and access to such judicial tools as laws, precedent cases, legal texts and other scholarly writing.

Jurisdictional restructuring is a basic reform being successfully used in many countries to achieve greater efficiency. Examples of how this may be done include:

1. Downloading cases to subordinate courts by increasing their jurisdiction. (As a byproduct, this makes them a better training ground for elevation to higher judicial office. This, in itself, may be a supportive reform as recruitment to superior courts from the private legal

profession is a problem in many countries due to the great disparity in income between judges and lawyers in private practice.)

2. Making room in subordinate courts by use of out-of-court settlement techniques for quasi-penal and regulatory matters. These may be enforced by refusal to issue government licenses to those with outstanding fines or court appearances.
3. Free standing small claims court, perhaps sitting in the evening to meet public convenience. These may be presided over by non-judicial members of the legal profession and may or may not allow representation by counsel and appeals.
4. Elimination of Preliminary Hearings or proper use of paper committals in jurisdictions which retain preliminary hearings.
5. Criminal and juvenile diversion processes for appropriate cases.

I use "E for effectiveness" to describe two aspects of judicial effectiveness. The first is bridging the gap between law and justice by judicially developed techniques such as domestic application of international human rights norms, judicial activism in interpretation of constitutions or through the exercise of discretion. All these judicial techniques are in use to achieve justice in particular cases.

The second aspect of judicial effectiveness is the collective judicial responsibility of listening to the community's complaints about the justice system and using its influence to shape the justice system to respond to responsible complaints. For example, judges often do not consider a low rate of judgment recovery their

responsibility. In many countries, however, difficulties in enforcing judgments make successful litigation hollow victories and bring the judiciary into disrepute. There are legal and administrative ways of improving judgment recovery. Should the judiciary not be interested in supporting these?

With your permission I will return to the heart of my paper, which is "C," judicial education. This is not only a separate component of judicial reform; it is a supporting thread running through all components of judicial reform. Walk through, as I have, courthouse after courthouse in developing countries and see boxes of unopened or dusty computers. This makes the point that even computerization of courts requires considerable judicial education – particularly for those of us over the half century mark who tend to be particularly resistant to the charms of technology.

I would like to use judicial education as a framework to briefly look at judicial reform. What is judicial education? A definition of judicial education includes collegial meetings (international, national, regional and local) and all professional information received by the judge, be it print, audio, video, computer disk, satellite television, on-line, and mentoring and feedback.

Target areas of judicial education are:

1. Potential judges
2. Newly appointed judges
3. Lay members of the Court
4. Continuing judicial education
5. Judicial support staff
    a. Administrator

b. Clerks

c. Court Reporters

d. Interpreters

e. Bailiffs (Executioners)

f. Summons Servers

Levels of judicial education are:

1. The provision of information necessary for the judge to effectively do his/her job.
2. Ensuring judges understand new laws that define a shift in philosophy, as in the laws of a new regime creating a democracy or market economy.
3. Teaching a judge a new intellectual approach, as in the judicial exercise of discretion is common in areas such as sentencing, assessment of damages.
4. Inspiring attitudinal change required to provide an impartial and accountable Bench rising to social expectations. In some countries, the attitudinal change required may relate to gender or racial bias. In others, the attitudinal change required is to encourage the judicial culture of service to the community and the fact and perception of judicial independence, integrity and impartiality. Attitudinal and thinking process change is the most difficult area of education in any field. It requires motivated and inspired teachers who are respected and trusted by the judges. For this reason judges or former judges are likely to be the most effective teachers.

How does a jurisdiction determine the judicial curriculum to study? In many countries, judicial education began with judges

electing to spend their study time considering the law of evidence and procedure. However, community criticism of the justice system never seems to find fault with judicial application of the law of evidence and procedure. Criticisms dwell on the other weaknesses that are perceived.

You may recollect the story of the Chief Justice of England during medieval times who wished to petition the King to seek improvements in the benefits of judicial office. Thinking it tactful to take a soft approach, the Chief Justice wished to begin the document with the following preamble, "mindful as we are of our inadequacies. . ." The judges, however, were not prepared to agree that they had inadequacies. The following compromise was arrived at: "mindful as we are of each other's inadequacies. . ."

Therefore, mindful as we are of each other's inadequacies, what should we study? There are two techniques commonly used to determine curricula. The first is a needs analysis of the court users (including the community at large) to assess the public's perception of what judges could usefully study. It is interesting to note that an additional benefit of such a needs analysis is that it often produces a prioritized list of needed judicial reforms. It also tends to enhance public confidence in the judiciary as soliciting court users' opinions assures the public of judicial sensitivity to the community it serves.

A second method of determining a suitable curriculum is to analyze the function and role of a judge and to use this analysis to identify areas that merit study. The function of the judge is to serve the community by being the arbiter in constitutionally established hearings to resolve disputes between citizens and, between citizens and the State. To achieve public acceptance of judicial decisions, the judge's functions

must both be and be perceived to be carried out impartially vis-à-vis the parties and the executive and legislative branches of the State.

The first task of the judge is to chair the proceedings before him or her. The judge must keep order to allow the hearing to proceed in a dignified and organized way. He or she must do so in such a manner that is most conducive to the truth emerging from the evidence gathered. He or she must protect the rights of the litigants and witnesses, and ensure all the rules of natural justice are in effect.

An important function is to ensure witnesses are not harassed while not protecting them to the extent that cross-examination is hampered in exposing the truth. A judge must ensure that the defendant, litigants and witnesses are fully aware of their rights and have all the benefits with which the law and the constitution clothe them.

With the ever increasing press of litigation, the judge must learn methods and technologies which will allow cases to be processed with all efficiency consistent with a just determination.

The second function of the judge is ruling on the law on evidentiary motions and instructing the jury or herself on the law applicable to the case in hand. Considerable knowledge and skill by the judge are required to ensure the evidence considered by the finder of fact is restricted to that determined by human experience, as embodied in legal precedent, to be trustworthy. Knowledge of the law is an even greater challenge for the jurist in this day of ever increasing legal complexity which has driven most practitioners to the comfort of specializing in a specific area of the law. This comfort is not available to the generalist judge who is expected to be an expert in all areas of the law.

The judiciary is one of the last listening professions. A primary judicial function is to listen to the evidence given and the arguments made. The judge must not only listen attentively, but be observed to do so.

At the conclusion of the hearing, findings of credibility and fact must be made. This requires sensitivity and understanding of the witness's background, mores, health, and nervousness. Experienced judges know that quite composed looking witnesses can suddenly faint dead away, vomit, or burst into tears. In assessing credibility, fact-finders need to be aware of their own biases of which they may be unaware or which may be ill-founded.

A judge should also be aware, as most of any experience are, of the fallibility of the human powers of observation and memory. The experiments of psychologist Elizabeth Loftus[1] have shown us how sympathy can make honest people see things inaccurately. Many experienced judges are of the view that their function in making findings of credibility is not in danger of being usurped by a lie detecting machine, as in their experience most people have convinced themselves that their evidence is true by the time they get to the courtroom. The greatest power of a judge lies in these functions of being a finder of credibility and fact, as for all practical purposes, a judge cannot be reversed on appeal in these areas.

Any finding of guilt or innocence or rights between parties determined by the facts is based on subjective beliefs of the trier

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1. Elizabeth Loftus, *Eyewitness Testimony,* Harvard University Press, Cambridge, 1979. Elizabeth Loftus, *Memory, Surprising New Insights Into How We Remember and Why We Forget,* Addison–Wesley Publishing Co., Reading, 1980.

of fact.[2] In most Commonwealth cases, a single judge sitting alone without a jury is the finder of fact.

The science of fact-finding in judicial decision-making is an important, but neglected, issue. While legal writers have given some attention to this issue,[3] their analysis is different from the process of belief and proof that is considered by Seniuk.[4] His work points out that because of the power of the finder of fact, the outcome of a case is often determined by which judge is

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2. R. S. Abella, "The Dynamic Nature of Equality" in S. Martin and K. Mahoney, (eds.), *Equality and Judicial Neutrality*, Toronto, Hardwell, 1987, p. 3 at p. 8. B. L. Shientag, "The Virtue of Impartiality," G. R. Winters, (ed.) *Handbook for Judges,* The American Judicature Society, 1975. Bertha Wilson, "Will Women Judges Really Make A Difference?," 28 Osgoode Hall Law Journal, 1990, p. 507.

3. E.g., J. H. Wigmore, *The Science of Judicial Proof*, 3d ed., Little, Brown, Boston, 1937; W. L. Twining, *Theories of Evidence: Bentham & Wigmore*, Weidenfeld & Nicolson, London, 1985; N. Gold, C. Mackie & W. L. Twining, *Learning Lawyers' Skills,* Butterworths, London, 1989; W.L. Twining, *Rethinking Evidence: Exploratory Essays*, Basil Blackwell, Oxford, 1990. For a number of articles considering a new academic movement called the "new evidence scholarship," which considers the implications of decision theory, probability and statistics for the study of evidence, see "Decision and Inference in Litigation" (Special Issue) 13 Cardozo Law Review, 1991, p. 253. I am indebted to the Honourable Judge Gerald T. G. Seniuk for this reference.

4. Gerald T. G. Seniuk, "Judicial Fact–Finding and A Theory of Credit," paper given at the Nova Scotia Judicial Education Seminar, Halifax, Canada, February 16, 1994.

drawn. This, in essence, leaves the outcome as much to chance as would the flip of a coin[5] . His conclusion is supported by mock findings of guilt or innocence made by Canadian and American judges in judicial education programmes. Having viewed a video which depicts a trial in which a young female from a troubled past alleges a retired war-disabled veteran sexually assaulted her, the judges are polled for their verdicts. When used in both Canada and the United States and at a Pan Commonwealth Judicial Meeting, the result has been an identical nearly 40/60 split on the part of the experienced judicial decision-makers.[6]

A further function of the judge is the delivery of a judgment, either orally or in written form. This function is of great significance as it is the reasons for judgment that will generally determine the acceptability of the judge's findings to the parties and the community. For this reason, it is imperative the judge realizes the reasons must be given clearly, concisely, and coherently in a language that is understandable both to the parties and to the average citizen who may have an interest in the case. This is perhaps easier in oral decisions than in written ones where complex factual situations and legal principles must be explained so that

5. Rabelais' Judge Bridlegoose did decide cases by tossing a coin, *Gargantua and Pantagruel*, transl. J. M. Cohen, Vol. 3, Chs. 39-43, Penguin, 1955. Another unusual story of a coin tossing judge is that of the Manhattan judge who used this method to decide the length of a jail sentence. He also asked courtroom spectators to vote on which of two conflicting witnesses to believe. He was removed from office in 1983 by the New York State Commission on Judicial Conduct. *The Times*, 3 February 1982.

6. Information given to the writer by the Honourable Judge Gerald T. G. Seniuk and the writer's personal experience.

there is no possibility of misunderstanding. In addition, a properly drafted judgment often precludes the cost to the litigants of an appeal.

A final function of the judge is the imposition of sentence. This is the ultimate demonstration to the community that the courts are protecting community rights and is the essence of the criminal justice system. Trials merely ensure those found not guilty are not punished. The correlative in the civil law to the imposition of sentence is the allocation of money damages after a decision has been made of blame among litigants. Again, clear concise reasons for the decision assist the community's acceptance of the decision and strengthen the judiciary.

In accordance with this analysis of judicial function, a judge needs assistance and support in the following areas to perform his or her duties in a manner that responds to the public's expectations: judgment writing and delivery; sentencing; assessments of damages; the science of fact-finding; judicial skills – chairmanship of the proceedings, maintenance of a dignified, orderly, efficient pace; sensitivity to the needs and rights of the witnesses, litigants, and the public; caseflow management; computer training; and professional skills updating – continuing education in substantive and procedural law.

Unlike the function of the judge, which has increased in complexity but has not changed in essence over the years, the role of the judge is in flux.

Clothed since the Act of Settlement in 1700 with constitutional independence from the Executive arm of government to protect the citizen from arbitrary executive action, the common law judge has been perceived both as the guardian and personification of justice. This perception also holds true for judges of many civil law countries. The need for an independent

judiciary is at least as great today as in the less intrusive society of the eighteenth century. Contemporary threats to judicial independence range from powers of chief judges and court administrators responsive or responsible to the Executive to retrospective legislation or illegal removals from office, kidnappings and killings.[7]

The protected position given the judge to enable him or her to protect the citizen and arbitrate impartially created a mysticism around the judicial role which has been enhanced by the medieval trappings, legal benefits and protection of office. Until recently, the judicial appointment process and security of tenure of the judge prevented complaints and disciplinary action against judges for improper judicial behaviour on or off the Bench. Because of a lack of procedure for redress, aggrieved citizens felt it useless to complain.

The security of tenure given the judge for the protection of the citizen came to be perceived by the community as blocking the accountability of the judiciary to the public they serve and protect. The all powerful and righteous judge became exposed by the spotlight of contemporary media scrutiny as a human being subject to all human frailties. The public became very interested in the workings of "Judge & Co."[8]

The response to this change in the public's attitude to the judiciary can be traced through the increased mechanisms for

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7. Information given to the writer at the Council meeting of the Commonwealth Magistrates' and Judges' Association, London, UK, April 28, 1994.

8. Jeremy Bentham's term for the judiciary in *The Works of Jeremy Bentham* (ed.), Bowering, Vol. 4, p.359.

judicial public accountability which circumscribe the traditional untrammeled power of a common law judge.

The rise over the past twenty years in public hostility to public office holders is clearly evidenced in the media and ordinary social intercourse by a lessening respect for public figures from the Head of State to local government members. No longer does the holding of office clothe the incumbent with the respect of the community. On the contrary, the cynical public is suspicious of the power given by office and confident of public support in challenging it. The judiciary is not excluded from this general iconoclastic attitude.

This public disillusionment with official office holders coupled with the lingering respect for the judiciary from a time when the judge and his or her behaviour were protected from public scrutiny combine to create an expectation of a very high standard of judicial conduct in and out of court. While the expectation is not misplaced,[9] the burden it places on a judge is such that a support system of advice and collegiality must be in place to allow the judge to live up to these expectations and not inadvertently bring the administration of justice into disrepute. The establishment of ethical standards of conduct and collegial discussions of specific problems will assist the judge in ordering his/her affairs and conduct in such a way as to maintain public trust and better withstand the searing light of media scrutiny.

Community acceptance of the decisions of the judiciary is a basic requirement in an orderly democratic society. Respect for the Bench, therefore, is an essential part of the administration of justice.

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9. J.B. Thomas, *Judicial Ethics in Australia*, The Law Book Company Ltd., Sydney, 1988, p. 13.

In countries with a career judicial pattern or, like Canada, with a highly professionalized judiciary which makes little use of lay magistrates or juries, the image of justice is created mainly by the media. Few people attend court hearings. Relatively few people are involved in the administration of justice as litigants, witnesses, or jury persons. This means public information about and impression of judges and the justice system is shaped by the members of the media. Their understanding of the justice system will colour their reporting and the public perception.

For this reason it is important that lines of communication are open between the media and the judiciary. This can ensure an understanding, on the part of two essential elements of a democracy, of the objectives, principles, and difficulties of the other.

A strong, independent and accountable judiciary is necessary for the economic development and stability of a country. Judges need to be aware of the importance of the reality and perception of judicial performance in the economic life of their country. They need to respond to the demands of investors for fair and speedy judgments by judges sophisticated in commercial law. They need to appreciate the importance of their support of alternative dispute resolution techniques within and without the judicial process.

This analysis of the role of a judge points up the need for judicial support through education in the following various fields: the principle and practice of the independence of the judiciary; accountability to the public that judges protect and serve; judicial ethics and conduct; sensitivity training in contemporary social issues; gender, aboriginal, ethnic, and other disadvantaged groups sensitivity training; Media-Bench relations; judgment writing and delivery; exercise of judicial discretion in assessment of damages

and sentencing; judicial reasoning; commercial law; caseflow management; management skills; stress management and adapting to change; judicial activism and effectiveness; and mediation and alternative dispute resolution techniques.

Judicial attention to the issues identified is consistent with the good-governance concept of an independent, predictable, effective and efficient judiciary operating under the scrutiny of a responsible media, and rendering decisions acceptable to the citizenry.

The Impact of Judicial Education and Directions for Change*

World Bank

I. Agenda For Development

1. Executive Officials and Members of the Academic Council of PHILJA have, since its inception, been exposed to foreign models and paradigms of judicial education: the Commonwealth Judicial Education Institute at Halifax, Nova Scotia (CJEI), thanks to the support received from the Canadian International Development Agency (CIDA), the Centre for Democratic Institutions in Australia, thanks to Director Roland Rich and the National Center for State Courts, among others. These exposures as well as input from Members of the Supreme Court as well as the Academic Council of PHILJA itself have goaded the Academy to move towards more interactive sessions as well as the use of multimedia.

2. The most frequently used forms of interactive sessions are:

   a. Workshops involving:

      i. Brainstorming sessions on common problems

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* A Judicial Reform Project, World Bank, 2000.

ii. Working on and solving hypotheticals

iii. Discussions on group problems

b. Panel Discussions

c. Open Forums

3. Workshops and group discussions take place either after the presentation of the lecturer or as integral part of the exposition of the topic. Panel discussions are confined to selected topics such as "Media and the Courts." The use of interactive sessions has been more frequent in some subject areas (Jurisprudence, Human Rights, Judicial Conduct) then in others where the straightforward lecture approach is still the preferred method. However, even lecture sessions always include a period for an open forum.

4. Among the media used for presentations are:

a. Overhead projector

b. Visual presentor: combination of an overhead projector and an opaque projector

c. Powerpoint presentations

d. Computer hands-on exercises

e. Charts and diagrams (particularly in Legal Research)

5. Post-program evaluations indicate a favorable response both to interactive sessions and multimedia presentations. The complaint, however, is frequently heard that the time allotted for open forums is hardly enough. The Academy has realized the need to extend the period for open forums, especially since matters are brought to the attention of the lecturers or presenters that they would have otherwise glossed over.

6. One problem in this regard is the need to convince lecturers themselves to adopt newer methods of presentation. Most of them having been law school professors, the method they prefer and are comfortable with is the straightforward lecture. One member of the Academic Council admitted his aversion at having to learn new pedagogical skills.

7. The very concept of judicial education also calls for elucidation, and should trigger more fruitful exchange among the key officials and the instructional corps of the Philippine Judicial Academy. Comments have been made that subjects like "Stress Management," "Social Contexts," "Legal Philosophy" and others like them are "esoteric," and that emphasis should be on Remedial Law. Clearly underlying this persuasion is the view of judicial education as a "continuation" of law school. Thankfully, other members of the Academic Council have exhibited sensitivity to dimensions of judicial education which foreign models especially emphasize.

II. Proposed Concept Of Judicial Education

1. The concept of judicial education here proposed emerges from three bases:

   a. The concept of judicial education implicit in the administrative and legislative charters of the Philippine Judicial Academy;

   b. The concept of judicial education that is suggested by the view of members of the Academic Council of the Academy, which can be attested to by its members;

c. The concept of judicial education advanced by foreign references.

2. Section 3 of R.A. 8557, which virtually reproduces in statutory form Administrative Order No. 35-96 of the Supreme Court mandates the Academy to "serve as a training school for justices, judges, court personnel, lawyers and aspirants to judicial posts." The programs are designed to "upgrade their legal knowledge, moral fitness, probity, efficiency and capability." Quite obviously, there is no way that the Academy can adopt a philosophy or a concept that is not pursuant to its mandate. When clustered according to conceptual relatedness, the concerns of the Academy to which its charters direct its attention are:

   a. Legal knowledge

   b. Moral fitness and probity

   c. Efficiency and capability

   It would not do to subsume "efficiency and capability" within "legal knowledge" because the efficiency and capability of a judge must necessarily also refer to the competence of a judge at managing the court and attending to the administrative functions that the law and the rules entrust to him.

3. Because of this basic direction given the Academy's existence, a concept of judicial education that excludes updates in substantive and remedial law will not be acceptable. But with equal clarity, judicial education cannot be confined to these, nor do these necessarily constitute the exclusively central concerns of PHILJA. The Ministry of Justice, DAP and IJA precedents assure us, however, that the clientele of

the Academy need, appreciate and value courses in remedial and substantive law that update legal knowledge and, in some measure, continue on the legal education received from law school. Contrary then to foreign models that suggest that judicial education should veer away from substantive and remedial law subjects, it seems clear that, in the Philippines, these cannot but form a major part of the judicial education program.

4. Other aspects of judicial education, however, are suggested by the theoretical framework at the beginning of this study:

   a. Understanding new laws that define a shift in philosophy

   b. Introducing judges to new intellectual approaches

   c. Attitudinal change: preparation of leaders of society and responsiveness to the demands of judicial office as well as to public expectations

   4.1 There are new laws in the Philippines that presuppose, as well as introduce, shifts in philosophy. One can think, for example, of the well-commented *Oposa* case on the environment. There, not only was there enunciated the concept of "intergenerational responsibility," i.e., the responsibility of one generation for the wholesome environment of succeeding generations, but this was also linked to a revolutionary women's concept of *locus standi*. Then there is the now growing number of cases on women's rights, including judicial appreciation of such phenomena as the "battered wife syndrome." Reference to international covenants guaranteeing equality of treatment for women as well as non-

discrimination against them necessarily involves a shift of cultural perspective that has traditionally subordinated women to men. The recently decided cases on the rights of indigenous peoples provide yet another example. While an evenly divided court resulted in the dismissal of the petition to void the law, the *Indigenous Peoples Rights Act* itself embodies a shift in philosophical perspective that at least relativizes the prevalence and dominance of such a juridical theory as the regalian doctrine.

4.2 Among judges – and even among judicial educators in the Philippines - is to be found, very often, an aversion for academic approaches. There is a dislike for discussions that are "too theoretical." Judicial education must then address itself to this attitude primarily for if, as we have seen, recognizing shifts in philosophical perspectives is essential to judicial education, then there must be developed, in judges and judicial educators alike, a healthy regard and an appreciation for more philosophical approaches. The point ultimately is that it is not enough for the judge to be conversant with a new law, but with the philosophical shift that such a new law defines, if it does so! It is not too difficult to see that absent this, the judge will attempt to apply provisions of the new laws within conceptual frameworks as well as attitudes engendered by a different philosophy and orientation - and this, quite clearly, will not do!

4.3 Intellectual approaches are best introduced in those areas where a judge is pretty much left to herself and to her best lights. Intellectual approaches, for example, in the

exercise of discretion relative to the grant of bail, where there is a matter left to the discretion of the court, or in resolving motions to postpone or motions to reset hearing dates - considering the overriding interest of the judiciary to dispose of cases expeditiously - are of utmost usefulness. Likewise important would be intellectual approaches to the propitious and correct use of the doctrine of primary jurisdiction that enables the court to act only when it has the useful input of an administrative agency. Rather than dealing with a plea of primary jurisdiction as a contest to the jurisdiction of the court, the judge may be usefully schooled in the concept that it is meant to aid a court in the resolution of issues that administrative agencies have been constituted to deal with. In courts vested with appellate jurisdiction or review powers, a new intellectual approach is called for in the matter of exercising discretion towards petitions for certiorari. There has to be resisted the urge to go over ground already covered either by a lower court or an administrative agency on the assumption that review yields a result that is better than that which preceded it. When the position though is seriously taken that what a reviewing body arrives at is a determination from its own vantage point - and not necessarily superior to that of the forum reviewed - then there might be greater hesitation about readily granting petitions for certiorari resulting, allowing the superior courts a respite from the relentless barrage of more cases.

4.4 The matter of attitudinal change has always been one of PHILJA's principal concerns, considering that the judiciary has, in the past, suffered an image-problem

from sensationalized reportage of wrongdoing on the part of some members of the judiciary. Cleansing the ranks is also one of the priorities of the *Davide Watch*. But the theoretical framework at the beginning of the study suggests one more component of attitudinal change: the preparation and formation of leaders in society. Fostering more cordial relations between the judiciary and media should be an important dimension of this aspect of judicial education.

5. We then propose the following components of judicial education in the Philippines:

   5.1 The acquisition of those attitudes, values and patterns of behavior that allow make of judges men and women of probity and integrity, that merit the trust, confidence and respect of the public, and the acquisition of those traits and skills that allow the judge to be a leader in society, through a fruitful and productive exchange with various sectors of the public, within the confines of law, and the faithful discharge of the duties of judicial office.

   5.2 A grasp of the philosophy underlying the laws, and the shifts in such philosophies, particularly those that suggest a new manner of resolving issues and disputes, including intellectual approaches towards various problems and situations calling upon the judges' exercise of discretion, and appreciation of facts and circumstances.

   5.3 Providing the judges with continuing information on the latest developments in law, both substantive and procedural, and jurisprudence, and leading them to a

more coherent grasp of the entire legal system of this jurisdiction.

5.4 The cultivation of those skills particularly needed by judges, such as assiduous and competent research, legal reasoning and persuasive writing, management, administration and supervision, as well as human relations and the dynamics of group cohesion.

6. Towards Program and Curricular Development

6.1 The curricular and program content are, by this concept of judicial education, also suggested. It is not presumptuous for the Philippine Judicial Academy to claim that its programs are on target. This assertion is borne out by the high satisfaction rating registered by participants to PHILJA's programs, and the correspondence between existing curricular and program content and the concept of judicial education enunciated above. It is also clear, however, that the following aspects need more thorough attention:

a. Values-education and the question of judicial conduct

b. Leadership orientation, including judiciary-media relations

c. Management, administration and supervision

d. Perspectives in:

i. Technology, e-technology and law

ii. Economics, industry and law, including transnational and multinational commerce

iii. Bioethics, biotechnology and law

iv. Penal theory

v. Socially marginalized sectors and social context issues

6.2 The fact that, sometimes, participants do not appreciate subjects like"Legal Philosophy" and "International Law" does not necessarily argue against these subjects. In fact, pursuant to the concept of judicial education thus far discussed, it is necessary to convince judges of the importance and necessity of such subjects.

6.3 The mature and learned approach to the law that shuns from its mechanical application presupposes what many have referred to as "the educated heart" – that which is the fruit of a more-than-cursory exposure to the liberal arts and the humanities. There should therefore be some room in occasional programs of the Academy for the humanities such as literature and visual and auditory arts.

6.4 PHILJA might also wish to review its present system of offering "a little of something" at each seminar. A frequent complaint received is that the time allotted to a favored subject – remedial law, for example – is not enough. The Academy might wish to structure separate programs on judicial conduct, remedial law, management and administration, etc. Because all judges, however, have to be benefited by these different programs, it is obvious that there will be a need for PHILJA to run simultaneous programs – and this calls for facilities (including its training campus) and personnel that it now does not have. Then, too, the Academy must also attend to the training and education

needs of other court officials and employees, for so does its mandate direct it.

6.5 It is likewise important, however, for judicial educators not to make themselves responsible for the entire education of judges and court personnel, for these officials of the judiciary do have an obligation to themselves, to the offices they occupy, and to the people they serve to avail of every learning and growing opportunity. It does not seem correct that the Academy should make itself responsible – and accept responsibility – anytime there seems to be a lack, or failure in knowledge, values, and skills!

6.6 The Academy also seems to be doing well in the area of involving non-judicial experts in the process of judicial education. Thus, there are human relations, psychology, and management experts that have taken instructional roles in PHILJA's programs. Other areas should be explored, but the expertise of non-judicial lecturers, demonstrators, presentors, facilitators and discussants should be indubitable so as to avoid credibility and acceptability problems.

6.7 In discussions with some foreign consultants and assisting agencies, it has been suggested that the Academy should be regionalized, that regional offices of the Academy be established. There are many difficulties attendant to this proposal, foremost among which are feasibility and sustainability, considering the budgetary, infrastructure and maintenance problems that the PHILJA already encounters. What may be fruitfully developed and continued, however, are the

regional programs of the judicial academy, as well as the involvement of key executive judges as coordinators or contact-persons for the distance-education programs of the Academy.

6.8 Experience thus far with foreign lecturers and professors has been, at best, ambivalent. Language is not the only problem, but method and horizon as well. It might be more useful for foreign experts to meet with the relevant department of the Academy, and the professors and lecturers of that department can then enrich their own syllabi, lectures and presentations from such exchanges.

7. Method and Teaching Strategy

7.1 While most participants are satisfied with the method of presentation – which is predominantly still the traditional lecture method – sound pedagogy dictate that the Academy explore other methods and strategies. It must be made of record, however, that PHILJA has made distinct efforts to incorporate different teaching strategies, as a result of having sent its professors and lecturers to courses on judicial education in other jurisdictions. Among these are:

a. Group discussions and group work

b. Hypotheticals and problem-solving

c. Case-studies

d. Pre-test/post-test technique

e. Use of instructional aides and devices including:

i. Overhead projector

ii. Powerpoint presentations

iii. Charts and flip-charts

iv. Video presentation

7.2 The direction in adult instruction seems to be interaction. The efforts that PHILJA has taken in this regard are noteworthy, but professors and lecturers of the Academy who still swear by the lecture-method may want to re-study their positions.

7.3 It must be admitted, however, that while some subjects lend themselves to interactive sessions more readily, the lecture method is still very efficient for others. The latter, however, must be attended by the use of multimedia to enhance retention.

7.4 PHILJA, however, must address itself to the learning and study habits of judges themselves, and for this, the learning-styles inventory may be useful. Unsatisfactory experiences with distance-education thus far, such as that on civil procedure, point to the fact that judges do not seem to be effective at getting themselves to study. Together then with developing more effective methods of distance-education, PHILJA must address learning habits, skills and attitudes of judges and court personnel.

7.5 Values-education has been a perennial problem to educators, for it is realized that values cannot be the subject of instruction as in substantive criminal law. It becomes PHILJA's challenge then to deal with the subject of judicial conduct, ethics and discipline in a manner that will be effective and that will bring about long-term results. So far, PHILJA has given a premium

to judicial conduct, but the Academy must address itself to other methods of dealing with education on judicial conduct, attitudes and values.

7.6 Management, administration, supervision and interpersonal relations must be given more than grudging room in the programs of the Academy, and the interactive sessions that characterize these courses must be given as much importance as all others.

8. Organizational-Structural Changes

8.1 The Philippine Judicial Academy (PHILJA) is, under its legislative and administrative charters, a component of the Supreme Court. A dialogue with judicial educators from other jurisdictions at the Commonwealth Judicial Education Institute (Halifax, Nova Scotia) underscores the advantage of having a judicial education provider operate by authority of the Court. For one thing, participation in judicial education programs is not left to the goodwill and earnestness of the individual judge. For another, PHILJA's programs are assured of more than grudging consent on the part of the Court. That the Academy is a component of the Court therefore lends it a marked advantage.

8.2 On the other hand, the Supreme Court has always operated as a court, supreme to be sure, but a court nevertheless. By law, the Office of the Court Administrator had to be set up, and till now, the Court endeavors to define the proper relation between the Office of the Court Administrator (OCA) and the Court itself. This is because the former office is

primarily managerial, while the Court, as a court, is adjudicative. Something in the same vein can be said of the Philippine Judicial Academy. There must be struck that very delicate - but necessary balance - between the supervision of the Court and the autonomy that is concomitant of academic freedom that every educational institution must enjoy.

8.3 That, of course, brings us to the core of the entire discussion, for we respectfully submit that the Academy must be acknowledged, dealt with, and related to as an educational institution, not an administrative component that *happens to be* engaged in some educational programs. The heart of the Academy is education, and at the very root of its raison d'être is education. It cannot, therefore, but be in essence an educational institution.

8.4 From this it follows that it must be structured as an educational institution. This must be evidenced also by the qualifications required of key officials of the Academy. To PHILJA's credit, it has had to structure itself by a set of operational arrangements (many admittedly *ad hoc*, but necessary under the circumstances), internal memoranda and suggestions made to the Court. There remain many obscure points – including the duties and service expected of a professor – and while it may not be necessary – nor advisable – to amend the charter, an academic and an administrative code, hewn along university or colleges lines, will be helpful.

8.5 It will certainly not help to multiply the layers of bureaucracy, but certainly the Academy has to make

provision for the following necessary components of an educational institution:

a. Academic planning and implementation;

b. Research, including research exchanges and fostering truly innovative studies, and seeing to their publication and distribution;

c. Records keeping and credentialing;

d. Faculty development and evaluation;

e. External development, including linkages.

8.6 While it would be desirable to have full-time academic officials, professors and associates, the PHILJA can fair no better in recruiting full-timers than can the Philippine Judiciary, and so it must adapt itself – as most faculties and colleges of law in the country have done – to operating with a largely part-time complement.

8.7 It is also clear that for PHILJA to carry out its mandate, its fiscal affairs must be administered and managed accordingly. Hence, it will not do to insist that PHILJA submit its budget proposal as any other office of the Supreme Court does. The very categories and underlying concepts of the budgets and budget proposals of the different offices of the Court are ill suited for an educational institution.

8.8 The portion allotted the Philippine Judiciary is a miniscule part of the entire national budget; PHILJA must therefore limit its programs and activities to those that its share in the budget of the Judiciary allows. In this regard, it has been asked whether or not PHILJA

can generate income. The matter has to be explored further. Whether or not the Academy, being a component of the High Court, may generate income is a legal issue that must, in the first instance, be addressed. But, certainly, the fact that PHILJA is also mandated by the Court by an Administrative Resolution to provide professional education to officials of quasi-judicial officers may provide it with an opportunity to earn. Then, too, it should be able, within a reasonable period, to develop optional enrichment programs for judges and judicial officials, and again, these would be income-generating activities.

III. A Last Word...

PHILJA is still in its infancy, but it does not have the luxury of a gradual, more leisurely, measured process of maturation. The Judiciary must be re-engineered, not really because something terribly wrong has happened to it, but because a rapidly changing world, complex and trying times, a new temper so demand it. That PHILJA has been commissioned for a leading role in this difficult process augurs well for the rationality of change and development, even as it challenges PHILJA even more to mature faster!