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VOLUME 1

JUDICIAL REFORMS

2005

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FROM THE CHAIRMAN ...

A centre for education and research in judicial policy and administration must have a professional journal communicating to its constituencies the developments in the field and its implications for administration of justice.

The National Judicial Academy set up by the Supreme Court under support from the Department of Justice, Government of India has, in a short span of three years, evolved as a premier centre for judicial training and continuing education attracting attention of judges not only of India but of other countries as well. NJA has helped State Judicial Academies to train their trainers, to standardize their curricula and to develop study materials for different types of courses. In the process, its own capacity to undertake judicially-relevant research got enriched. NJA is presently involved in a major research project on "Access to Justice for Disadvantaged People" in association with High Courts and State Judicial Academies of seven States. A great deal of useful information is being generated at NJA which is being transmitted through NJA Newsletter, Occasional Papers and now the Journal of National Judicial Academy.

2005 is declared as the Year of Excellence in Indian Judiciary. The focus is on judicial reform for better delivery of justice. It is only appropriate that the inaugural issue of NJA journal is also devoted to the subject of judicial reform in its various dimensions with special focus on reform through education and training. I hope every member of the judicial fraternity will find the information useful and instructive towards better delivery of justice to hundreds of thousands of citizens who flock to the Courts every year seeking justice.

Let education lead to enlightenment and a sense of increased accountability for everyone involved in public service.

10th June, 2005

R.C. LAHOTI
CHIEF JUSTICE OF INDIA

EDITORIALY....

Judicial reform has been a priority item in the national agenda for quite sometime. The primary object in the exercise was the reduction of delay in conducting trials and the disposal of huge backlog of pending cases in a satisfactory manner. A large number of expert Committees and Commissions, appointed from time to time have gone into every aspect of the problem and produced instructive voluminous reports carrying recommendations for the Parliament to legislate, the Judiciary to implement and the Executive to support reform with resources and policy changes. There has been some action on all these fronts though they proved to be far too inadequate to address the issue in a complex, growing economy committed to rule of law and democratic change.

With liberalization and globalization, the problem seems to have assumed critical importance not only to individual litigants but also to the society as a whole. The year 2005 being declared the *Year of Judicial Excellence* by the Chief Justice of India therefore raised expectations all around, compelling coordinated and accelerated efforts both at policy level as well as on implementation fronts. Several thoughts in this regard have been thrown into the ring in recent times not only by the leadership but also by concerned people. The National Judicial Academy, the education and training arm of the Indian Judiciary, therefore thought it appropriate to devote its entire Inaugural Issue of the Journal to the subject of 'judicial reforms' in its total perspective. On behalf of the Editorial Board, let me present this maiden issue of the NJA journal to the Indian legal and judicial fraternity and seek the patronage of the readership to make the journal a vibrant instrument for judicial discourse in our country.

Judicial reforms mean different things to different people. For the litigant public for whom the system exists, judicial reforms signify cheap, fair and speedy resolution of disputes. For Parliament it may mean, inter alia, higher judicial productivity, greater democratic accountability and increased judicial support for policy changes. For the lawyers and

judges, it implies more judges, more courts, better infrastructure and freedom from executive interference. For the citizenry in general, judicial reform would mean better protection of rights particularly of weaker sections, greater access and control of executive excesses. These are not mutually exclusive objects nor of unequal importance in the scheme of good governance. The challenge before the judicial establishment is how to comprehend the whole range of reforms proposed and to evolve a policy package which in the foreseeable future will deliver justice more efficiently to the increasing number of litigants seeking its intervention.

In the above context, the present scenario appears to promise a great deal of reform on at least three fronts. Let me briefly explain these trends and the reasons therefor.

Firstly, the Judiciary at the highest level seems to have realized the importance of judicial education and training as the key for all judicial reform. After all, whatever the infrastructure and support systems, ultimately quality and productivity are the outcomes of the human material which manage and direct the system at various levels. In fact, a great deal of systemic inadequacies can be overcome if the institutions are headed by motivated, competent individuals. It is this realization which gave tremendous impetus in the recent past for judicial reform through judicial education. The National Judicial Academy started its activities just two years ago; but very soon the Supreme Court under the dynamic leadership of the present Chief Justice put continuing education for judges and court staff on fast track, creating a ripple effect down the line. In fact, judges of the Apex Court are themselves spending part of their summer vacation at the Academy refurbishing on several issues which concern the judiciary. As many as sixteen State Judicial Academies are now fully geared to mount a variety of programmes to equip the judges and court administrators for the challenges ahead. A number of pieces contained in this volume of the NJA Journal discuss how judicial education can facilitate judicial reform systematically and progressively.

Secondly, the Judiciary with active support of the Government is embarking on an ambitious scheme of computerization of several key activities of judicial proceeding intended to benefit the litigant public

and, in the long run, to introduce e-governance in judicial administration. Having accomplished the formidable task of eliminating arrears in the Supreme Court by rationalizing and streamlining procedures through computerization and modern management techniques, the Apex Court is now implementing a Strategic Plan to introduce information and communication technology in all High Court jurisdictions in a phased manner. The E-Committee set up by the Court is at work and one can expect revolutionary reforms in speeding up the process with greater transparency, productivity and accountability. A couple of articles included in this volume explain this process now under way. The Judicial Academies are mounting a massive scheme of training to prepare the judicial and non-judicial personnel for the tasks which confront them when the computerized systems are put in place in every court of our vast country.

Another trend of equal significance, which will make a difference in the system of justice, is the introduction in a big way of Alternative Dispute Resolution methods. Lok Adalats proved to be a big success in accessing justice. Parliament amended the Civil Procedure Code and introduced mediation, negotiated settlement, conciliation and arbitration to settle all types of civil disputes without trial. Similarly plea bargaining in criminal cases is being introduced through amendment of Criminal Procedure Code. Naturally, these legislative initiatives, if properly institutionalized in the judicial hierarchy are bound to make a difference in arrears and pendency in Courts. The Chief Justice of India put emphasis in his article on all these strategies of judicial reform.

In this on-going process of transformation in Indian judicial system, the training institutions have a critical role to play. They have to prepare an agenda of education and training activities for judicial personnel at all levels and implement vigorously to realize the objects of the strategic action plans. In this historic effort, we hope the articles and notes contained in this volume of NJA Journal will give some information input to all concerned.

We welcome comments and suggestions for improving the content and usefulness of the journal so that it serves the information needs of all those involved in administration of justice. It is our desire to devote each issue of the journal to one major theme of relevance to the judiciary.

Among the themes proposed for the next issue is “ADR” which is now central in judicial productivity and for improved access to justice. Contributions are welcome for consideration of the Editorial Board.

As only limited numbers of copies of the Journal are being printed, those who desire printed copy of the journal may send their subscriptions early. Others may get the electronic version in due course.

10th June, 2005

PROF. (DR.) N.R. MADHAVA MENON
DIRECTOR, NJA

QUEST FOR JUDICIAL EXCELLENCE

Justice R.C. Lahoti*

I. THE JUDICIARY IN INDIAN DEMOCRACY: GEARING UP TO FACE NEW CHALLENGES

The concept of justice in a democratic society is not confined to the judiciary alone; it is true of all other pillars of democracy. If people lose faith in the justice dispensed to them, the entire democratic set up may crumble. It is the trust and confidence of the people in the responsiveness and ability of every organ of the State to deliver true, fearless and impartial justice, which is the foundation of democracy and also the bedrock of every civilised society. The edifice of Indian Constitutional democracy also stands on three pillars of which the guiding pillar is the judiciary. This is so, since the Indian Constitution has assigned to the judiciary the role of being the custodian of the Constitution and the watchdog of Indian Democracy, exercising power of judicial review over the acts of the legislature and the executive. The ultimate goal of the judiciary is to serve the people of the country and to uphold the letter and spirit of the Constitution and in this, the Constitution itself has defined and declared the common goals which should guide

* The Chief Justice of India. This article is based on the following speeches delivered by the Hon'ble Chief Justice of India:

- a) Address on the occasion of LAW DAY (Nov.26, 2004).
- b) Keynote address "Envisioning Justice in the 21st century" delivered during the Conference of the Chief Ministers and the Chief Justices of High Courts. (September 18, 2004).
- c) Inaugural Address on "Management in Judiciary and the Quest for Excellence" at the Joint Session of Registrar Generals, Law Secretaries from various States & Principal District Judges of Madhya Pradesh at the National Judicial Academy (Dec.18, 2004).

The factual data in the Article are with reference to those dates.

the judicial fraternity namely, "to secure to all the citizens of India, JUSTICE, social, economic and political; LIBERTY; EQUALITY and FRATERNITY." Accordingly, the judiciary cannot be oblivious of its tremendous responsibilities and continue to play traditional roles when the demand of the time and the need of the hour is to don new robes. We are all bound to uphold the constitutional values and principles of democracy. The message is in fact clear and writ large: *if we do not save democracy, democracy will not save us*. The hopes of teeming millions are focused on us for protecting their life, liberty, property and all the rights which the Constitution of India and laws of the land grant and guarantee.

Having entered the new millennium and the new century, the judiciary, and in particular, the Indian judiciary, is posed with certain challenges. Globalism has become the order of the day. Being parties to the international agreements and treaties like the GATT and the WTO, we have to march with the advancements in the fields of science, technology, trade and commerce if we are to have our share in international prosperity and achievements. In fact, the secret of our survival lies not in keeping away but in joining the race and competing, so as to achieve excellence as per international norms.

The society is progressing, the values are changing and the complexities of trade and commerce are posing hitherto unknown problems for resolution, this in turn is contributing not only to complexity of litigation but is also adding to the influx of disputes for resolution by courts. In this light, it will be prudent to assess, where does the judiciary stand and what are the problems it faces, before we embark upon equipping ourselves better and preparing ourselves for the future. Means can be better devised if the goals are known.

II. AN OVERVIEW OF THE PERFORMANCE OF THE SUPREME COURT

Before proceeding further, it would be pertinent to have an overview regarding the performance of the Supreme Court.

One of the most powerful institutions of the world, the Supreme

Court of India decides cases touching all facets of human life and relationships. It is the defender of the Constitution and the principles enshrined therein, guardian of human rights, and promoter of peace, cordiality, and balance between different organs of the government. It has worked not in a spirit of formal or barren legalism and yet within the limits prescribed by the Constitution. The Court as part of the federal system and as the defender of democracy has always remained responsive to the changes in our society thereby retaining its relevance; for when society moves and if law were to remain static, it would be detrimental to both. The Supreme Court has, without any reservation, intervened to protect democracy, human rights and has striven hard to uphold and maintain the rule of law.

The Court has even afforded a liberal interpretation to Article 21 of the Constitution thereby giving it more content, meaning and purpose. In expanding the ambit of the right to life and personal liberty, the Court has evolved compensatory jurisprudence, implemented international conventions and treaties, and issued directions for environmental justice. It has given directions, and also prescribed guidelines for the enforcement and achievement of human rights of various groups such as children, women, disabled, scheduled castes, scheduled tribes, bonded labourers, minorities, and socially and economically backward classes.

The Supreme Court has also successfully discharged the onerous task of protecting the values of secularism and respecting the sensitivities of all groups of people without compromising on the need to impart real and even justice in the given circumstances of any case. The Court has thus proved to be a national asset. It has extended its jurisdiction and has made prolific use of the power of judicial review when impelled to do so for the protection of fundamental rights or basic human rights generally and in particular for the disadvantaged and under-privileged sections of the society. Mindful of its special responsibility towards the weaker sections of the society disabled by poverty, ignorance or illiteracy, it has evolved new strategies, such as, public interest litigation and relaxed the rules of procedure. A broad and liberal interpretation to Articles 14 and 21 of the Constitution has enabled the Courts to exercise these powers for the common good. In innovating and developing

constitutional jurisprudence, the Supreme Court of India has always had an edge over other jurisdictions thereby winning the admiration of other judiciaries of the world.¹

As an independent judiciary, under the constitutional scheme, the Court has played its role effectively in acting as a watchdog through judicial review over the acts of the legislature and the executive. Through all its vicissitudes of fifty-five years, the Indian judiciary has served the nation well and in this the major contribution of the Supreme Court has been to uphold the Constitution by delineating the role of the three organs of the State and whenever the other two organs have failed in discharging their duties, the judiciary has never remained a mute spectator. In such circumstances, acting within the bounds of law, it has always risen to the occasion as one of the guardians of the Constitution, criticism of 'judicial activism' notwithstanding.

Sir. Harilal J. Kania, the first Chief Justice of India, at the inauguration of the Supreme Court on January 28, 1950 stated:

We hope and trust that the Court will maintain the high traditions of the judiciary and perform its duties without fear and favour. If we succeed in doing so, we shall contribute our share to the progress of our Republic and render service to this country which none else can render.

¹ In recent years, the decision in *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388, innovating the concept of Curative Petition has been read over the world as unique. There was a growing tendency to challenge under Article 32 of the Constitution, final judgments/orders of the Supreme Court after dismissal of review petitions. The reason for such an unhealthy and unconstitutional practice, common to all such petitions, was lack of a forum where the petitioners could seek appropriate relief. A Constitution Bench of the Supreme Court struck a balance between certainty/finality of judgements/orders of the court of the last resort and setting right miscarriage of justice complained of by holding that a petitioner in a curative petition is entitled to relief if he establishes:

1. violation of the principle of natural justice in that he was not a party to the lis but the judgement affected his interests or even when he was a party to the lis the matter proceeded as if he had notice though he was not served with the notice of the proceedings;
2. where in the proceedings a learned Judge failed to disclose his connection with the subject matter or the parties giving scope for an apprehension of bias and the judgement has already affected the petitioner.

Fifty-five years later, I, as the Chief Justice of India, can with all humility say that this Court has not belied those hopes. If testimony to this is required it has come from our former President Shri. K.R. Narayanan who on the Golden Jubilee of the Supreme Court in 2000 said, "It is not an exaggeration to say that the degree of respect and public confidence enjoyed by the Supreme Court is not matched by any other institution in this country." In fact, it will be no exaggeration to say, that the achievements of the superior judiciary have even exceeded the expectations of the Constitution makers. Of course, in the task of rendering justice to the teeming masses of this country, it should be noted that it is not the Supreme Court alone to which the credit goes.

III. ENVISIONING AN IMPROVED JUSTICE DELIVERY SYSTEM IN THE TWENTY-FIRST CENTURY: DELINEATING THE TASKS AHEAD

Before proceeding further, let me give you an idea of what our legal fraternity, or the family consisting of lawyers and judges, is and what gigantic task it is facing:

STRENGTH OF JUDGES

NAME OF THE COURT	APPROVED STRENGTH	ACTUAL STRENGTH	VACANCIES
Supreme Court	26	25	1
High Courts	719	521	198
Subordinate Courts	13,204	11,103	2,101

As per the latest statistics made available by the Bar Council of India there are 8,58,294 advocates enrolled in the country.

PENDENCY OF CASES AS ON 30/06/2004

Supreme Court	29,315
High Courts	32,24,144
Subordinate Courts	2,53,50,370

INSTITUTION AND DISPOSAL PER YEAR
(BASED ON FIGURES OF PRECEDING 5 YEARS)

NAME OF THE COURT	AVERAGE INSTITUTION (PER YEAR)	AVERAGE DISPOSAL (PER YEAR)
Supreme Court	42,200	40,400
High Courts	12,41,000	11,23,500
Subordinate Courts	1,42,43,500	1,32,29,000

Working under considerable handicaps such as inadequate funds, budgetary allocations for law and justice not being part of the plan expenditure, lack of resources, shortage of staff and infrastructure, the Indian Judiciary can still claim a better standing with the other wings of governance in performance. When one considers the immensity of our country, the diversity of its conditions, its huge population and the range of cases and volume of litigation in our courts, the Indian judiciary has carried a phenomenal burden which perhaps no other judiciary in the world has had to shoulder. In this task, we must acknowledge the exacting burden the subordinate judiciary - the foot soldiers of our cavalcade - has carried. They have unobtrusively and with small recognition rendered justice to the common man in villages and towns. Too often we tend to forget their invaluable contribution to our judicial system and at times we have unjustly condemned them as a whole for failings of a few of their members; failings which are attributable to a few individuals only, not to the system and certainly not to the members as a class.

In spite of all the feathers in its cap, the Indian Judiciary is often criticized for three reasons:

- (i) the ever mounting backlog of arrears and the inability of the judiciary to clear the same;
- (ii) occasional reports of such conduct on the part of the individual judges which is unbecoming of them; and
- (iii) some complaints of corruption.

I have tried to analyse later some of the grievances and the criticisms levelled.

If I do not confess that what I am going to quote are extracts from the two speeches delivered on 26th November, 1979 (twenty-six years before), they may safely be passed on as a vivid description of what is prevailing today. Justice Y.V. Chandrachud, the then Chief Justice of India had said:

An effective judicial system requires not only that just results be reached but that they be reached swiftly.

I am no pessimist but at times I see dark clouds gathering over law's rarefied atmosphere. There is some evidence—feeble I suppose, feeble I hope – of ecological pollution of the Taj Mahal of Justice. Long and interminable arguments, whisperings of heavy professional fees, the unethically excessive impost of court fees by the State which does not plough back its profits from justice back into the cause of justice by undertaking programmes like free legal aid, the chronic delays in disposal of cases and, may I say, the not-so-chronic delays in decision-making, are all matters which require of the men of law a careful and urgent attention . . . I hope and pray that nothing that we will do shall tarnish the fair name of justice which can only come from a keen social awareness, which involves a nice and judicious balancing of conflicting interests.

Dr. L.M. Singhvi, Senior Advocate and the then President Supreme Court Bar Association, also said:

. . . [O]ur courts and the legal profession have played an important and creditable part in working out the terms and equations of justice between citizen and citizen and between the citizen and the State. A whole new jurisprudence of constitutional rights and of judicial review of legislation and of administrative action has been fashioned by Indian lawyers and judges . . . and that is something to be proud of. We as a nation are prone to berate and belittle our own achievements and to give in to moods of melancholy and despair, but quite frankly I know of no other nation in the world which has battled with greater valour and gallantry on the legal front or which has achieved more in legal culture under such heavy and insurmountable odds.

Increasing institution of cases, mounting arrears, accumulating

congestion in courts and inevitable law's delays have given rise not to a body of scientific and rational blueprints in terms of institutional organisation and procedural methods or in terms of assessments of judicial manpower requirements, but to a spate of alarm signals and dire shibboleths. If there are more and more cases in courts, that is because we have a population explosion, we have a more complex and friction-prone society, our dispute resolution and conciliation system are bereft of efficacy, we have increasingly greater awareness of rights, and perhaps because we have more injustice and more arbitrariness in our midst. The Governments are under an obligation to provide adequate machinery for justice, to appoint more judges and to give them better emoluments and facilities, to build more courthouses, to enact better laws, to devise better dispute resolution procedures, and to administer more effectively and equitably, rather than to blame lawyers and judges for the increase and proliferation of litigation. Courts in India cannot apply a mechanical-statistical razor-blade or wave a magic wand to wipe out the enormous pendency of arrears. Nor can the courts afford to turn a blind eye or a deaf ear to the rank injustices and incongruities of administration merely because they have already too much on their hands. If the courts begin to do that systematically, they might endanger the confidence and credibility they have come to enjoy. I might venture the view that we will have a lot more litigation in future when some of the long suffering sections of our people are made more aware of their rights by movements of legal literacy and are enabled and equipped by legal aid and advice to ask for their day in court. Shall we then tell them that we are too preoccupied to take their briefs or to listen to them and their generation?

The purpose of quoting the above said passages was to demonstrate that the same problems existed twenty-six years before as they exist today. Time and place may change; but problems remain the same. Our country is not the only one which is facing such problems. But the difference is on two counts: first, while other countries are scientifically investigating into the causes for judicial delays and adopting modern methodologies for curing the system of all its ills, any concrete step in that direction remains yet to be taken in our country; and second, reforms and modernisation in judiciary have remained on the back bench for long.

2005: The Year of Judicial Excellence

It is in this backdrop that on 18th September, 2004, speaking at the Conference of the Chief Ministers and the Chief Justices of High Courts,' held at New Delhi, I volunteered on behalf of the Indian judicial fraternity to declare the year 2005 to be 'The Year of Excellence in Indian Judiciary,' dedicated to reduction in arrears without sacrificing quality and rising to the highest standards of conduct and behaviour. In this scheme of things, there will be no place for the corrupt and the indolent. Cracking the whip on those who by their conduct or behaviour do not deserve to be members of an ideal judiciary has already commenced. I am confident of developing a system in which only *the best of talent* and *men of character and integrity* alone shall have a place and in this *I mean business*.

Excellence herein consists of five Is:

- (i) *Initiative* – We shall not be satisfied with doing just what is our duty. Each one of us shall exert to do better than his contemporaries or predecessors going beyond the goal of duty and to be better than himself;
- (ii) *Intelligence* – None of us shall feel satisfied by mediocrity, i.e., by just being average;
- (iii) *Industry* – Each one of us shall exert to put his competence and capability to its maximum utilization;
- (iv) *Integrity*;
- (v) *Inobstrusive personality* – i.e., modesty and humility.

Even when imbibed with initiative, intelligence, industry and integrity what has been achieved is just the basic requirement which makes up the personality of a judge. Furthermore, excellence would also have to be achieved in regard to the following matters:

Excellence in Matters of Appointment

The criteria for appointment to the Bench, whether from the Bar or from the Services, should be *character, merit* and *integrity*. It is

because of character that one commands respect in the society. Credibility of the institution is held high if those who compose it are respected in their own right and not because of the institution. A lawyer's merit is to be judged not by the volume of his practice, but by his knowledge of law, the number of cases argued by him which have contributed to the growth of law and his fairness in court. In addition to this, his commitment to the cause of justice has to be seen, by his work as a legal aid advocate or *amicus curiae*. The merit of a judge from the services is to be assessed by the quality of his judgments. It is however not legal competence alone which is to be solely seen. The approach of a judge to the problems of women, dalits and other marginalized sections as reflected in his judgments are to be scrutinized to make sure that they are in tune with the philosophy of the Constitution. The emphasis cannot be on seniority alone, at the cost of everything else.

But, merit without integrity is dangerous for the judiciary. There cannot be the slightest compromise on integrity. Those with questionable or doubtful integrity should not be appointed as judges in the first place, and the procedures for screening judges for appointment must ensure that no wrong person passes through the filter. Let this message go to the circles of law and justice that appointment to the office of judgeship cannot be obtained by soliciting and certainly not by lobbying or clamouring for it. We have to achieve a system where the most deserving and excellent of all available are identified and then requested and persuaded to accept the office of judgeship.

Excellence in a Judge

An 'excellent' judge is impartial and fearless. He is independent of the executive and the legislature, but equally important; he should be independent of his own predilections and prejudices. He should be free of 'isms'. He is patient and courteous, but realizes that he is a manager of the Court's time. He pays full attention to the arguments advanced before him, but is duty-bound to curb irrelevant or frivolous arguments. He is well-versed in the law, but has the humility to learn from the arguments advanced by counsel. He delivers judgments on time. He realizes that the respect of the community is not to be taken for granted, and is conscious that his conduct inside and outside the court must be exemplary. He practices restraint in what he speaks in court or outside

but does plain speaking when required. He maintains dignity in his court room and outside. His social relationships and personal lifestyles are correct and appropriate, conscious as he is that respect has to be earned by 'deserving and then desiring' and not by forcing or dictating.

Excellence in Performance

Excellence in performance is ensured by relentless hard work, constant upgradation of knowledge, punctuality, courtesy and conscientiousness. Proper rest, relaxation and recreation help in judicial performance but a hectic social life and other distractions detract from the discharge of judicial duties. A judge need not be an ascetic or *sanyasi* but a certain degree of aloofness has to be observed by him to see that impartiality and objectivity are not only maintained but also seemingly observed.

Excellence in Bench and Bar Relationship

Excellence in Bench-Bar relationship requires the constant realization on both sides that, both are institutions essential to the administration of justice. Mutual respect for and recognition of each other's role is essential for a healthy and harmonious relationship. The Bar must remind itself that its members are officers of the Court, and while vigorously placing their clients' cases they must be fair and detached. The Bench, equally, must appreciate that in an adversarial system of justice, advocates are bound to place their respective cases persuasively. And while judges are duty-bound to control the court's time, it is useful to remember that firmness is not inconsistent with courtesy.

Excellence in Relationship with other Wings of Governance

The Executive, the Legislature and the Judiciary, the three organs of the State have an important role to play in the constitutional scheme in equal terms. The system of checks and balances is applicable to all the three and none must over-step their respective limits. The inevitable tension between the organs must be viewed as a creative one, which ultimately results in strengthening the foundations of constitutionalism. They work in co-ordination and not in confrontation. The court is not obstructionist, and it is not an antagonist of the other wings. The judiciary

as a public institution must however be receptive to, and not be hypersensitive about criticism either about its role or its functioning.

In short, each one of us individually, and all of us collectively, should be able to say that the year 2005 was our finest hour. In the words of Homer – ‘Always to be the best and be distinguished above the rest.’ I also add the words of Michelangelo who said – “Trifles make Perfection, but Perfection is no Trifle.” Excellence is achieved only when the performer takes pride in doing his best. Every job is a self-portrait of the person who does it, regardless of what the job is, small or big. Autograph your work with Excellence! Be forever in pursuit of Excellence!

IV. IN PURSUIT OF EXCELLENCE

A. Achievements & Aspirations

I have an obligation, to put forward, a bird’s eye view of what we have achieved - whether big or small.

The Supreme Court Collegium

Ever since 1st June, 2004, the Supreme Court Collegium has cleared ninety-eight recommendations for appointment of judges of High Courts. Thirty-six recommendations are being processed. By the end of the year, hopefully there will not be any vacancy in any of the High Courts which would need to be filled up. Every recommendation for appointment in the constitutional courts is subjected to rigorous scrutiny and wider consultation. It will not be inappropriate to claim that the performance of the Supreme Court Collegium during last few months and the quality and quantity of the recommendations made by it would pre-empt a re-look at any proposal for establishing a National Judicial Commission.

The Bar

The Supreme Court Bar Association [hereinafter SCBA] is a class apart and a role model for the profession in the country. Its standards and work culture need to be emulated. I would like to mention only three points out of many more.

On a suggestion made by Mr. Fali S. Nariman, Senior Advocate, and President of Bar Association of India, a system has been introduced whereby all the counsel appearing for one side in batch matters before Constitution Benches sit together, hold a conference and decide amongst themselves which one counsel will address the court on a particular point of law. This avoids repetition of submissions. Synopsis of submissions is filed in advance to enable the Judges to come prepared in advance. This simple device has resulted in substantially curtailing the time consumed in hearing the matters before the Constitution Benches. The credit for this goes to the members of the Bar.

Secondly, a series of lectures is being organised under the aegis of the Supreme Court Bar Association [hereinafter SCBA] which I had the privilege of inaugurating on 20th July, 2004. Every lecture is delivered by a Judge of the Supreme Court and participated by other Judges and members of the Bar. This is a constructive activity giving an opportunity for a free, frank and open exchange of views on topics of contemporaneous significance.

Thirdly, the office bearers of the Bar Association such as SCBA and Advocates-on-Record Association are providing me with several opportunities of interacting with them so as to understand each other better and finding out practical solutions to sort out difficulties experienced in the smooth functioning of the Court.

Changes in the Supreme Court

To enable complete introduction of IT in the Supreme Court, knowledge of computers has been made compulsory for recruitment into executive services. One hundred and seven out of the existing officials have been given computer training and the process is continuing for more employees. A specialised training to officials and staff in the Registry is being conducted by the Indian Institute of Training and Management. Thirty-two officials have already undergone such training. The rest are on the way.

- The working of the filing counter has been streamlined and as a result matters filed after removal of defects are now being registered either on the same day or on the following day.

- Defects in filing of cases found by the Registry in fresh matters are now available on internet enabling rectification by concerned advocates without having to wait for receipt of communication from the Registry.
- “Question of law involved” is extracted in every case filed so as to enable grouping of the cases and consistency in the law laid down by the Court.
- Two Tax Benches have been constituted to ensure expeditious disposal of tax matters.
- Some matters are being heard on a priority basis, such as (i) matters of senior citizens, (ii) matrimonial disputes, (iii) matters in which workmen are out of job, (iv) prevention of corruption cases, (v) group matters, (vi) short matters, (vii) election disputes, and (viii) matters awaiting decision on such points which will affect a large number of cases pending in the Supreme Court, High Courts or Subordinate Courts.
- Ever since July, 2004 one Constitutional Bench is functioning regularly so as to settle law on constitutional issues which would enable decision in hundreds of cases pending in High Courts, Subordinate Courts or Tribunals.
- A Conference of Chief Justices was held with the objective to streamline the functioning of the courts and speeding up disposal of cases with the available strength, by finding solutions to the common issues and the problems being faced by the courts in the country.
- A Joint Conference of Chief Justices and Chief Ministers was held on 18th September, 2004 in which policy decisions of far-reaching implications relating to administration of justice and judicial reforms were taken.
- Assisting staff of the judges would dispense with the black coat uniform and would soon be seen in a new uniform.
- A decision to publish the annual report of the Supreme Court has been taken and the Annual Report for 2003-04 has already been released.
- The construction of the Lawyer’s Chambers building started

with effect from 12th August, 2004 and it is expected to be completed by August, 2005. The construction is in full swing and efforts are being made by the Registry to get the construction completed well before the deadline. The said building will have seventy-two chambers for allotment to advocates, a Conference Hall, a canteen with kitchen, two lifts, and facility of parking fourteen cars in the basement and fifteen cars in open space in the said complex.

- The Supreme Court Museum remains open on all the working days of the Registry from Monday to Friday (10.00 am to 5.00 pm) and on Saturday (10.00 am to 1.00 pm). In order to enable the general public to visit the Supreme Court Museum on Saturdays and Sundays, it has been decided to keep the Museum open full day on Saturdays and Sundays and to close it on Mondays instead of Sundays. A short film on the Supreme Court is also shown.
- Recently, the Planning Commission allocated a fund of Rs.150 crores, for computerization of all the District Courts in the country. The Government of India also has sanctioned the establishment of a Cell consisting of experts in judiciary, technology, administration and human resources management to plan for the introduction of IT in judiciary, suggest administrative reforms, make recommendations and also oversee its implementation once the recommendations are accepted. The Committee would work directly under the supervision of the Chief Justice of India in close coordination with National Informatics Centre.
- The government has also collaborated with the Asian Development Bank to make a sectorial diagnostic assessment of case management in Delhi courts. The objective of the project is to assist in the reduction of congestion in Delhi courts and to develop a sustainable delivery system for speedy and quality justice. Prior to assuming the office of the Chief Justice of India, I was the Chairman of the Project Advisory Group, which office is now adorned by Justice Y.K. Sabharwal. The project has been put to test in thirty pilot courts in Delhi and if found successful it may be adopted by the other courts in the country.

The Department of Justice has, in collaboration with United Nations Development Programme, recently launched a project to identify barriers to justice as perceived by the marginalised sections of the society and evolve strategies that would make justice pro-poor and gender sensitive. The Project Advisory Group is headed by Justice Y.K. Sabharwal. The National Judicial Academy, Bhopal is entrusted with the task of conducting the research presently in seven states of the country which are Kerala, Karnataka, Maharashtra, Madhya Pradesh, West Bengal, Jharkhand and Orissa. The clientele of the study are the vulnerable social groups of women, children, slum dwellers, tribals, downtrodden, and the physically and mentally challenged. This Project has the potential of much larger coverage in the course of time. Apart from the diagnostic study, the project envisages extensive interaction with major stake-holders and civil society organisations as well as running of innovative pilots.

Needless to say, these two projects are complimentary to each other. While the judicial reforms project at Delhi braces up the supply side of justice by activating measures for management of congestion and enhanced case load in Delhi subordinate judiciary, the access to justice project launched in the seven states will work towards demand side strategies for removal of barriers.

The common trait of both these projects is that they provide consultation and dialogue between the judiciary and other stakeholders of justice, including the civil societies, for consensual reforms. The involvement of the judiciary right from their inception to their implementation, including pilot testing and designing has given these projects the benefit of judicial ownership.

The Work of the Law Commission

Under the Chairmanship of Mr. Justice Jagannadha Rao, the Law Commission of India has prepared several reports with far-reaching implications for the justice delivery system of the country.

In the light of globalisation and foreign investment in India, the

recommendations made in the High-Tech, Fast-Track Commercial Division in the High Court (188th Report) and the Environmental Courts Report (186th Report) and in the context of opening up the insurance sector, the Report on Insurance Laws (190th Report) are timely and significant requiring serious thought. Moreover, in the 178th Report, there are again a number of simple non-controversial changes suggested to several civil and criminal laws (called Miscellaneous). These relate to CPC, CrPC, TP Act, Specific Relief Act, MV Act etc. and can bring about significant changes to speed up the justice delivery system of the country.

I would like to specially mention the Law Commission's 185th Report on the Review of the Indian Evidence Act, 1872 which comprehensively deals with the provisions of the Evidence Act and is a treasure house of legal literature. It suggests amendments of far-reaching implications in the context of the present scenario and on the basis of comparative law.

Justice Rao has also authored the Reports relating to: Legal Education and Advocates Act (184th Report), Court Fees Act (189th Report), Insurance Act and IRDA Act, 1999 (190th Report), Mode of Execution of Death Sentence (187th Report), Right to Silence and Article 20 (3) of the Constitution (180th Report), Amendments to Arbitration and Conciliation Act (176th Report), Amendment to Section 106 of the Transfer of Property Act, 1882 (181st Report), Amendment to Section 6 Land Acquisition Act, 1894 (182nd Report) and General Clauses Act, 1897 (183rd Report) etc. The latest in this series – the Consultation Paper on Witness Identity Protection and Witness Protection Programmes is an elaborate document dealing with comparative law and draft proposals.

B. My Priority List

Certain priorities have been enlisted, feeling inspired by what Swami Vivekananda said, "Let us rise and act and keep on marching ahead until the goal has been reached. Future is bright and not bleak for us." The following observation by Martin Luther King Jr., is also apt – "I long to accomplish great and noble tasks . . . but it is my chief duty to accomplish small tasks as if they were great and noble." Speedy disposal of cases and delivery of quality justice, is an ongoing agenda which has been kept in view by the successive Chief Justices and continues in

mine as well. However, after assuming this office, three things have been on my priority list, namely:

- (i) making the National Judicial Academy functional in full swing;
- (ii) introduction of IT in Judiciary; and
- (iii) development of ADR systems.

If I succeed with your cooperation, in completing this agenda, I am confident that the justice delivery system of the country shall stand revolutionized.

The National Judicial Academy

New trends in litigation, such as those related to intellectual property rights, cyber crimes, environment, money-laundering, competition, telecom, taxation, international arbitration and so on needs expertise. Judges need to be trained and updated for achieving and maintaining professional excellence. Need for judicial training and continuing legal education has been to a large extent fulfilled with the functioning of the National Judicial Academy [hereinafter NJA] at Bhopal after the assumption of office by the present Director, Prof. (Dr.) N.R. Madhava Menon, an academician who achieved excellence in the field of legal education. As the Chairman of the Governing Council of the Academy, I am pleased to report that the NJA has completed a year full of activities involving more than 700 senior judicial officers from all the States and Union Territories laying the foundations for strong and dynamic education programmes for the future. The activities of NJA can briefly be stated under the following five heads:-

- (i) Education and Training of higher judicial officers and court administrators;
- (ii) Judicial Research and Judicial Policy Development;
- (iii) Dissemination and management of judicially relevant information;
- (iv) Capacity building of judicial training institutions for better performance; and

- (v) Establishing a centre of excellence in judicial education and administration.

The Academy through a process of consultation with the High Courts and their Training Divisions has evolved a standard training curriculum based on its survey of needs and resources. A series of training and continuing education programmes for judges of High Courts and District Courts on a variety of subjects relevant to administration of justice has also been initiated. A training calendar for a full Judicial Year (July to May) has been prepared and nominations from the High Courts are obtained for all the programmes for the year in advance. Till date, more than seven hundred Districts and Additional District and Sessions Judges as well as sixty-seven High Court Judges have had the benefit of seventeen residential programmes organized by the Academy. Every participant Judge has acquired computer literacy at the Academy's computer laboratory. Each programme conducted by the Academy is associated with lessons in ethics and morality and stress management training through its Yoga programmes. The Academy has also produced over twenty-two volumes of study materials for the trainees. It has generated empirical data both for better judicial training and for improvement in administration of justice. A project on barriers for access to justice on the part of disadvantaged sections of people, supported by the UNDP has been undertaken in seven High Court jurisdictions. This research study will generate useful data to reform court proceedings and make the courts easily accessible for the disadvantaged and downtrodden. The publication of a biannual Newsletter called *Judicial Education*, a series of Occasional Papers on topics of judicial interest and an annual journal of professional interest has also been undertaken. The Academy has produced a CD-Rom on one of its programmes – *Intellectual Property Adjudication* and proposes to enlarge its electronic publication facilities.

The NJA also has networking with judicial training institutions and State Academies for standardizing judicial training programmes and activities. While the State level academies would target the members of the subordinate judiciary, the NJA would aim to cater to the requirements of the higher judiciary. I have high expectations from these academies. The NJA under the leadership of Dr. N.R. Madhava Menon has already justified my expectations. Divinity is showering more results

than goals. I am confident that if the State Academies also get active attention of their Chief Justices, the functioning of the judicial system would be revolutionized and the judges of tomorrow would be far better and, if I may say so, 'more competent and capable judges' or in one word 'more excellent judges.'

Introduction of IT in Judiciary

The core values of justice and judges are eternal and have been handed down as a rich heritage from the past to the present. However, today, we are living in the age of computers. Our methodologies are outdated and need a re-look with innovation. Lord Devlin, a great Law Lord, with profound common sense had said sometime on the Courts of England, "if our business methods were as antiquated as our legal system, we would have become a bankrupt nation long time back." Records of the courts have to be computerized. Facilities for e-filing and hearing through video-conferencing needs to be introduced. This will eliminate such deficiencies in the working of the courts as are the outcome of human weaknesses. The system will be fast, neat and clean and accessible with more ease. It would add to the efficiency of the judges. The Supreme Court has to be interlinked with the High Courts and the High Courts with the Subordinate Courts including those situated in the remotest corners of the country. A litigant sitting in the North-East or down below in *Kanyakumari* should be able to find out the progress/status of his case in the Supreme Court or the High Court just by the push of a button, dispensing with the need to contact someone in Delhi or travelling to Delhi for this purpose alone.

Let me also share some interesting and encouraging information with you. The Karnataka High Court under the leadership of Dr. Justice (Retd.) G.C. Bharuka has been able to develop a system whereby the High Court is interlinked with District Courts and Subordinate Courts. At the touch of a button, at 5 pm everyday, the High Court has the information available with it as to how many judges were on leave, how many witnesses were examined, how many witnesses returned unexamined, how many judgments or orders were reserved, how many were pronounced and how many cases were adjourned and to which dates. This is just an illustration. The system has enabled the High Court to exercise effective control over the working of subordinate judiciary.

At the same time, the members of the subordinate judiciary have become more alert, commenced pooling down all their efficiency components and concentrating on giving maximum quality output. Some other High Courts have also gone a long way in the direction of computerization.

Computerisation During 2004

The Registry of the Supreme Court and National Informatics Centre [hereinafter NIC] has in close coordination developed the following programmes:

(i) Supreme Court's filing defects on web

A list of Filing Defects consisting of 379 items has been standardized and is available on website by reference to each case filed in the Registry.

(ii) Digitisation of old records

Considering the space problem in the record room of the Supreme Court, the NIC suggested to go in for digitization of all records stored in the record room godowns, so as to make space available for the fresh records. This process enables the Supreme Court in preventing loss of records, saving storage space, to manage records easily, to find documents quickly, to make the scanned documents available centrally on internet and to eliminate the need for file cabinets.

(iii) Supreme Court's digital display boards on internet

Court-wise progress of the cases, as they are being heard, is available on internet for the advantage of lawyers and litigants who need not necessarily reach the Court room for watching the progress of the case.

(iv) Automatic deletion/shifting of excess matters and proposing next listing date

This software module has been successfully implemented since July, 2004 and excludes the possibility of manual manipulation.

(v) SUPNET

Entire information of interest for the employees of the Supreme Court including telephone directory is available on internet.

(vi) E-Kiosks

Two E-Kiosks are installed, one at the Filing Counter and the other at the Reception with touch screen facility providing information as to pending status of a case, the latest order delivered by the Court, Cause Lists, judgments, SC website, filing defects and so on.

(vii) Interactive Voice Response System [IVRS]

Any litigant can access and ascertain the status of his case in the Supreme Court by dialing the telephone number: 24357276.

(viii) IT Facilities at the Museum

A brief information about the Supreme Court and its IT related information is shown on a large screen with projector attached to a computer system installed at the Museum of Supreme Court.

(ix) Cause List/Daily Orders on Web

Cause Lists and daily orders passed by the Supreme Court are available on internet.

The projects which are in pipeline and will be implemented shortly are:

(i) Attendance recording system

A computer based attendance system will be installed to record and monitor the attendance of the employees of the Supreme Court.

(ii) Bar coding based file tracing system

To trace files and assets, a Bar code based system will be implemented in all sections and courtrooms.

(iii) Video conferencing facility

A video conferencing facility will be established in the Conference hall of the Supreme Court to enable the Judges to interact with the High Court Judges, Government Ministries if required, or any organization based outside India.

(iv) Electronic self-operating facilitation counter

For providing easy information access to the litigant public, a facility consisting of a few computers, printers and internet will be established at the reception (to be constructed shortly). This will enable the users to access the required information on their own.

(v) Digitally signed certified copies

Parallel to the signing of Daily Orders on hard copies, judges would sign digitally on electronic copies using Digital Signatures. The digitally signed orders would be made available on the court website. Litigants can download the electronic copies, with self-contained proof of authenticity of the document. Every judge will be provided with his/her Digital Signature.

When digitally signed orders are available on a server, the certified copy section simply accepts the application from the litigant, downloads the relevant order from the server, takes a print out, checks the authenticity and integrity of the document, when satisfied simply signs and serves to the litigant on the spot. As the digitally signed copies need not be cross checked with the original file, it can be served to the litigant on the spot without time delay.

Impact:

- A large number of certified copies can be issued in a single day without keeping any application in pendency.
- One person can handle the entire Certified Copy Branch.
- As there will be no delay in issuing the certified copy, the dealing clerk has to provide the copy on the spot.
- No chance for excuse.
- The litigant can even download an electronically certified copy from the net without contacting the court.

Employment of ADR Systems

The philosophy of Alternate Dispute resolution systems has been well-stated by Abraham Lincoln, "discourage litigation; persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time." Litigation always does not lead to a satisfactory result. It is expensive in terms of time and money. A case won or lost in a court of law does not change the mindset of the litigants who continue to be adversaries and go on fighting in appeals after appeals. Alternate Dispute Resolution systems enable change in mental approach of the parties.

Lok Adalats have worked very well and satisfactorily in our country and in fact the first Lok Adalat was held on 14.03.1982 at Junagadh in Gujarat. Lok Adalats have been very successful in settlement of motor accident claim cases, matrimonial/family disputes, labour disputes, disputes relating to public services such as telephone, electricity and bank recovery cases and so on. Ever since 1987, the Lok Adalats have been given statutory recognition. Some statistics may be cited to understand the good results which can be achieved by effectively employing this mechanism. Up to 30th June, 2004, nearly 2,23,159 Lok Adalats have been held and therein 1,63,31,357 cases have been settled, half of which were motor accident claim cases. More than 4,751 crores of rupees were distributed to those who had suffered accidents. 66,73,240 persons have benefited through Legal Aid and Advice. In 2002, the Parliament of India amended the Legal Services Authorities Act, 1987 requiring establishment of permanent Lok Adalats for public utility

services. However, most of the State Governments have not cooperated in establishing such permanent Lok Adalats.

Section 89 of the Code of Civil Procedure as amended in 2002 has opened the scope for the introduction of conciliation, mediation and pre-trial settlement methodologies. Once the model rules framed by the Committee headed by Justice Jagannadha Rao, Chairman, Law Commission of India under the directions of the Supreme Court, are adopted by all the High Courts, funds will have to be sanctioned to meet the need for providing the requisite infrastructure and for employment of mediators and conciliators as part of the justice delivery system. This would drastically bring down the pendency of cases by accelerating disposal of such cases. In California, where the systems of mediation, conciliation and pre-trial settlement have been introduced only two decades ago, it has been found that 94% of cases are referred for settlement through one or the other of the ADR systems and 46% of such cases are settled without contest. The result is that California has been able to achieve the goal of final decision in civil cases within a period of less than two years from the date of institution.

My emphasis is also on the introduction of mediation and conciliation as ADR systems. To achieve this, mediators and conciliators would have to be trained in the art of mediation and conciliation. Dr. H. R. Bhardwaj, the Hon'ble Minister for Law and Justice, who is also the Chairperson of the Indian Council for Alternative Dispute Resolution, has embarked upon a very ambitious project for introduction of mediation and conciliation as ADR systems – both court-annexed and court-referred, apart from out of court or pre-litigative mediation and conciliation. In fact, on the 20th November, 2004, I had the privilege of inaugurating an international conference at Mumbai co-organised by International Centre for Alternate Dispute Resolution and the Bombay High Court. The Conference was followed by a seminar organized by the Bombay High Court in collaboration with the Institute for Study and Development of Legal Systems, USA. The conference and seminar were attended by Dr. H.R. Bhardwaj and Shri. Venkatapati, the Hon'ble Minister of State for Law and Justice as also by the Judges of the Supreme Court of India, the entire judiciary of Mumbai and other legal luminaries from the judiciary and the legal profession. The conference and seminar – each has been a grand success and more importantly it has initiated

awareness and a movement in this direction throughout the country.

C. Problems and Prospects

The Problem of Arrears and Meagre Plan Allocations

The seekers of justice approach Courts of Justice with pain and anguish in their hearts on having faced legal problems and having suffered physically or psychologically. They do not take law into their own hands as they believe that they would get justice from the courts at the end and on some day. People's faith in our judicial system has continued to remain firm in spite of the backlog and delays. Accordingly, the judiciary has an obligation to deliver quick and inexpensive justice shorn of procedural complexities. At the same time, it is to be noted that sheer quantum without quality would be disastrous. The elements of judiciousness, fairness, equality and compassion cannot be allowed to be sacrificed at the altar of expeditious disposal. The hackneyed saying is that justice delayed is justice denied. But justice has to be imparted: justice cannot be hurried to be buried. Judges are to *decide* cases and not just *dispose* them off.

All over, both in the developed and in the developing world, the Indian judiciary is held in high esteem. It is not uncommon to hear from time to time, encomiums showered by eminent jurists and judges on the quality of the decisions delivered and the hard work incessantly done by the members of the Indian Judiciary. As citizens of the country we can legitimately feel proud of this recognition. However, there is often criticism from uninformed or misinformed quarters, that the Indian judiciary is unable to clear the backlog of cases. At times, questions have even been raised on the credibility of the judiciary on account of some aberrations which are not the product of the system but are individual in nature and are isolated cases. These factors have a tendency to bring disrepute to the entire system.

Judicial men are not to be touchy about criticism as long as it is done with objectivity. However, full facts are rarely brought before the people and the brighter aspects of justice administration are not highlighted. Available and relevant statistics point out that it is much easier to be critical than correct. For instance, even though pendency of cases is always highlighted, what is never spoken of are figures of annual

filing and disposal. During the last three years, on an average, the subordinate courts have disposed of 1.30 crore cases every year while the High Courts have disposed of fifteen lakh cases per year. The Fast Track Courts have disposed of 3.70 lakh cases during the last three years. The Supreme Court of India is disposing of 48,000 to 50,000 cases per year. Similarly, it is often remarked that the percentage of conviction in criminal cases is just six per cent. CRIME IN INDIA, 2000 published by the Ministry of Home Affairs, Government of India reports that the conviction rate is 41.8% in cases under the Indian Penal Code [hereinafter IPC] and 81.4% in offences under special and local laws. The same Report also points out that for 2001, 9.31 lakh of IPC cases and 26.60 lakh cases in the non-IPC category were disposed of during that year.

Similarly, there are only eighty-seven Family Courts functioning in the country loaded with as much as 2,24,838 cases. For instance, in 2003, nearly 83,439 matrimonial cases were decided but in the same year 97,549 new cases were filed leaving behind an annual backlog of 14,000 matrimonial disputes. This points out to the need to constitute new Family Courts in a manner which would facilitate every matrimonial dispute being decided within six months from the date of institution of the suit. Such facts if highlighted and brought to the notice of the people would certainly change their perception of the judiciary.

The above statistics would have to be appreciated in the light of the one hundred and twentieth Law Commission Report (1987) which states that the number of judges per million population in India (10.5 which is now said to have gone up to between 12 and 13 per million) is the lowest in the world. Recently, in the *All India Judges Association Case*,² the Supreme Court desired that the number of judges be increased in a phased manner in five years so as to raise the judge population ratio to fifty per million. Any substantial progress in this direction would definitely silence critics of Indian judicial functioning.

An important aspect which needs consideration is whether the judiciary is solely responsible for this backlog? The time has come to make a scientific and rational analysis as to why and how the backlog has occurred and whether, with a specific plan, the same can be cleared.

² (2002) 4 SCC 247.

Interestingly, the ticklish problem has a simple solution as in school-arithmetic on quantum, of work average workload and minimum number of workmen required. The ailment has thus been diagnosed and the medicine is also known. However, what we need is provision for purchasing the medicine and administering it.

During the Eighth Five Year Plan (1992-1997), the Centre spent Rs.110 crores on improving infrastructure, such as constructing court rooms etc. In the Ninth Plan (1997-2002), Rs.385 crores was released for fulfilling priority demands of the judiciary. This is only 0.071% of the Centre's Ninth Plan expenditure of Rs.5,41,207 crores. During the Tenth Plan (2002-2007), the allocation is Rs.700 crores which is 0.078% of the total plan outlay of Rs.8,93,183 crores. The experience shows that these meagre allocations of 0.071% and 0.078% by the Planning Commission in the Ninth and Tenth Five Year Plans respectively are totally inadequate. This coupled with the formulation of a centrally sponsored scheme with a condition that the utilisation of the central grant is permissible only if a matching grant is provided by the States also make the situation more unfortunate. The Central Government had in 1993 represented before the Supreme Court that it had included the judiciary in the Plan expenditure. In this light, the Planning Commission is expected not to make such meagre allocations and that too by way of formulation of the Centrally sponsored scheme, which makes the utilisation of the Central grant conditioned and dependant upon a matching grant being provided by the States, in the context of the grave need to establish more courts and the general criticism regarding the heavy backlog.

Interestingly, the Courts established by State Governments deal with litigation, fifty to sixty per cent whereof calls for administration of laws enacted by the Central Government. The Justice Jagannath Shetty Commission pointed out that there are 340 central statutes which are being administered by the Trial Courts in the States. This justifies a larger share of contribution by the Central Government for justice administration through Subordinate Courts of the States. Moreover, after the Forty-second Constitutional Amendment, "Administration of Justice, Constitution and organisation of Courts," were transferred from the State List to the Concurrent List as Entry 11A. Further, Article 247 of the Constitution vests power, coupled with duty, on Parliament to provide

for the establishment of additional courts for the better administration of laws enacted by Parliament. These constitutional provisions are yet to receive the requisite consideration by the Central Government.

Limited financial autonomy needs to be given to the High Courts. The budgetary demands raised by the High Courts are generally reasonable and never extravagant. Ordinarily, such demands should be met by way of allocation and as a part of plan expenditure. The Chief Justices of the High Courts should have authority to make appropriation and re-appropriation within the overall allocation. However, the High Court should also have proficient accountants and a system of internal audit so as to exercise full financial checks and cross-checks.

Unfilled Vacancies

The total strength of judges in the Supreme Court is twenty-six, of which, twenty-five are in place. The sanctioned strength of Judges in the twenty-one High Courts is 719 out of which 228 remain to be filled up. Against these, 115 recommendations have been received from the Chief Justices of which, after my assumption of office, I have cleared seventy-one recommendations while thirty are in the pipeline. Fourteen are with the government and 113 recommendations are yet to be received from the Chief Justices of the High Courts. In the Subordinate Courts, the sanctioned strength of the judges/magistrates is 13,204 out of which 2,010 posts are lying vacant and are yet to be filled. There are long standing vacancies in the court staff which are not being filled because of financial crunch or ban on appointments. The Courts have bare minimum staff which are already over-burdened. On account of unfilled vacancies Subordinate Courts function like lame ducks. These are the matters to be taken up by the Chief Justices of the High Courts with the respective Chief Ministers of States. Moreover, when Special Judges are being appointed at the request of the Central or State Governments, out of the existing strength without increasing the number of Judges and without providing additional infrastructure, far from delivering justice this has had an adverse impact on the justice delivery system.

Improving Physical Infrastructure

In advanced countries, research has been done for standardising the court buildings so that the lock up, the Magistrate and connected

departments/facilities are available within one campus, avoiding the need for frequent movements which would also take care of security risks as well. Similar research is required to be carried out for our system so as to rationalize and standardize court buildings, court staffing pattern and even residence of judges. Judges in the very nature of their duty have to work beyond the court hours in mornings and evenings and hence there is a need to maintain a residential office and library. Old and outdated court buildings would have to be phased out by adhering to a time-bound programme.

Various Commissions and Tribunals have been constituted to share the burden of Courts. Most of such alternative forums are limping. Absence of proper accommodation for office and for residence, inadequate staffing are common complaints. In fact, the Chairman of one Commission could not write judgements because his Secretary, made available on deputation was withdrawn by the Government without notice. Certified copies could not be delivered to the successful party for reaping the fruits of the decision or to the losing party for exercising his right to appeal because there was no paper and also no money to purchase the same. Even though these are minor issues, the same would not have arisen had a little care and caution been taken.

Weeding out Corruption from the Judiciary

I have never subscribed to the view that corruption has eaten into the roots of the Indian judicial system and I stand firm in my view. Casual aberrations or isolated incidents cannot be pressed into service for branding the institution as corrupt. Wherever corruption has shown its face, it is because we have failed in taking timely steps for preventing such incidents. My plan for preventing such incidents is three-fold:

- (i) exercising extra care and caution at the entry level itself so that there is no scope for later regrets with regard to the appointment made;
- (ii) sending a clear message to the members of judiciary that no incident of corruption would be tolerated and that anyone prone to corruption will have no place in the system;
- (iii) achieving a high degree of competence and professionalism

through continuing education, learning and training, with each programme being associated with lessons in ethics and morality so as to make it a part of the personality of the occupants of the judicial office and at the same time initiating timely, quick and strict action against the corrupt, indolent and deadwood.

In fact in 2004, thirty-one members of the subordinate judiciary have been denied extension beyond the age of fifty-eight years while seventy-nine judicial officers have been shown the door by dismissal, removal or compulsory retirement. These actions have already sent ripples and the fence-sitters have already begun mending their ways.

Financial Memorandum to include Judicial Expenses

Every Bill introduced in the Parliament or the State Legislature has a financial memorandum attached to it and the Memorandum mentions the allocations required from the Consolidated Fund of the Union/State but it confines itself to the expenditure for administrative purposes. The judicial impact of legislation on the Court is not being assessed in India as is done in the United States where, there is a special statute for this purpose. Almost every statute made by the Parliament or State Legislatures creates rights and offences which go for adjudication to the Trial and Appellate Courts established by the States (or before the High Courts). Accordingly, the time has come wherein a policy decision has to be taken to make adequate provision in the Financial Memorandum of every Bill presented in Parliament or State Legislatures to reflect the additional expenditure likely to be incurred by the judiciary as a consequence of any Central or State legislation.

Executive Indifference

The Union of India, State Governments, Public Sector Undertakings and Government Corporations, taken together, are the largest litigants in the courts of law and contribute to the larger chunk of litigation. Indecision, apathy for civilian's rights and absence of accountability are the major factors. Added to this, are the problems of not appointing government advocates and public prosecutors promptly and in requisite numbers or making such appointments often on considerations other

than merit. All the governments should develop an in-house mechanism for settling such disputes, to which they are parties, before they reach the Court and also by taking a conscious decision whether to litigate or not to litigate by constituting high power committees assisted by former Judges or legal advisors of outstanding integrity and independence. In the appointment of government advocates and public prosecutors, consultation with heads of the judiciary at the level of Chief Justice or District Judge should be made compulsory. This would avoid unnecessary litigation and also save the government from suffering decrees by default.

Periodically, the Chief Justice of all the High Courts of the country meets under the Chairmanship of the Chief Justice of India. Resolutions passed at such a high level conference when sent to the Government do not receive requisite attention. In fact most of the recommendations made collectively by the heads of judiciary in the country are dealt and disposed of mostly at the hands of the bureaucracy by simple words like 'rejected,' 'considered' and 'not feasible.' On inviting attention, the only response which is given is 'matter is receiving consideration by the Government.' Such responses, to say the least are lacking in propriety and courtesy.

Let me point out to you yet another instance to drive home the point. Recently, I came across a wonderful official publication of the Planning Commission, Government of India containing a document running into more than 1,000 pages which is the report of the 'COMMITTEE ON INDIA VISION 2020' chaired by Shri. S.P. Gupta, Member, Planning Commission. It contains research papers on various subjects such as human development, infrastructure, energy and the environment, globalisation, governance, transport, telecom, health, population, finance and so on. I think this is a document which every enlightened citizen of the country must have, and look into. However, I was surprised to note that this document does not contain any paper on law and order, the judiciary or the justice system. It gives an impression as if law and judiciary are subjects which have been left to be taken care of themselves for themselves and by themselves.

Need to Cultivate Better Court-Media Relations

As stated earlier, the concept of justice is neither the sole

proprietorship nor the sacred obligation of the judiciary alone. A competent and willing judiciary would be unable to discharge its obligation if not supported by the other organs of democracy. In this regard, the Press and the Media have been recognised as the greatest influencing factors as they have a mass appeal and a powerful role to play in creating and shaping public opinion. The power with them carries with it an obligation to act with responsibility and creativity. However, I am often pained to see some symptoms of negativity in the media. In the context of judiciary, I have been noticing two things:

- (i) positive performance of the judiciary is not highlighted, but failure, howsoever insignificant it may be, is picked up, blown out of proportion and publicised;
- (ii) some of the newspapers have been carrying news on the front page or in the head-lines containing a little truth but intertwined with much distortion, or two unconnected events reported together, so as to create false impressions or misgivings about the judiciary.

The media has to remember that judiciary is the institution of last resort for the common people and if people lose faith in the judicial system, the entire democratic set-up may crumble. I distinctly remember in the Joint Conference of Chief Justices and Chief Ministers held on 18th September, 2004, the Prime Minister delivered the inaugural address and I, as the Chief Justice of India, delivered the key note address. Only that part of the speech of the Prime Minister which made a mention of certain shortcomings in the judicial system and where it needed toning up was reported and my response based on facts and figures showing how the alleged shortcomings of the judiciary were not of its own, much less its creations and that the causes for malaise (if any) lay elsewhere, did not find a place in the newspapers. So far as the judiciary is concerned, my appeal to the media is to play a more positive and constructive role. In matters pending in courts, the media may report the facts but should not commence a parallel trial before a judicial pronouncement, as it is likely to prejudice the case of either party. Regrettably, I have noticed one or two leading newspapers targeting individual judges and tarnishing their image, while such judges are almost speechless and can do little to restore their prestige and esteem

once it has been lost in public opinion. I appeal to such newspapers without mentioning their names to do some introspection. The media would enjoy more credibility and shall be noted for its contribution if it confines itself to reporting correct facts, with objectivity and offering positive suggestions notwithstanding criticism which should be constructive.

Need to Revolutionize Legal Education and Providing Encouragement to the Young Entrants

The advent of the National Law Schools with Five year's course of study has caused a revolution in the field of legal education and legal profession. Brilliant students are coming out of these law schools and are competent enough to appear and argue before courts of law on the first day of their entering the profession. A dialogue has already been initiated to re-model the imparting of instructions in law tailored in such a way that after initial education, different levels of legal education are available to those who aspire to enter the legal profession, to those who aim at joining judicial services and to those who wish to just acquire a degree in law for academic purposes only or wish to remain confined to academics and research.

In this context, I compliment Mr. P.H. Parekh, the President of the Supreme Court Bar Association, for earmarking 2005 as the 'Young Lawyers Year.' This will meaningfully help me in achieving my motto for the 'Year 2005-The Year of Judicial Excellence.' It is by concentrating on the quality of these young professionals and by assigning them a constructive and decisive role in shaping the future of the profession can we be assured of a brighter future.

Infusing Modern Management Techniques

The parting gift of the preceding century to the people generally has been the crisis of 3 Cs. There is crisis of character, crisis of credibility and crisis of competence. We Indians have always believed in 'Old is Gold' and are accustomed to drawing strength from our traditional values. The materialistic attitude of the modern society and the urge for finding pleasure in enjoyment of wealth and resources, has contributed to diluting our faith in our own values and our own system.

Though the twenty-first century has posed new challenges, the silver-lining is that these challenges are accompanied by the availability of the means of resolution as well. The advancements in the field of technology have broken all barriers. There are new means and scientifically developed methodologies available at hand to assist us in finding out solutions to meet these challenges. The problems posed before us may be difficult, but are certainly not impossible to overcome. All that we need to do is to learn new principles, new methods, new technologies and assume new roles not only by learning but also by continuing to learn the wealth of knowledge and skills pouring in from all sides. A study of the problems faced by the judiciaries of other countries, whether developed or developing, shows that the problems are almost identical before all the judiciaries. The problems are not peculiar to us; what is peculiar to us is that we are not gearing up to adopt scientific and systematic methods to solve the problems, as what other countries are doing.

We must be prepared to innovate and also be inspired from our counterparts in other parts of the world and also in other business and professional activities within the country. Just as managers in business and industry approach the courts for sorting out their legal problems, we, as members of the Judiciary should not hesitate in approaching the management experts for solving our problems, which are peculiar to us. In the twenty-first century, a judge cannot afford to be just a gentleman of law sitting in ivory towers and hearing and deciding cases and delivering justice according to law. The new role of a Judge expects him to be an efficient court administrator and a successful court manager so as to rise up to the expectations of the people, whom it is our duty to serve. In the new role, the administration of justice is not just a system of deciding cases through a hierarchy of courts. The emphasis has shifted to speedy justice through uncomplicated procedures, assisted by certain scientific principles and application of electronic technology in all areas where it can be applied. We are on a turning point, as justice delivery system cannot afford to survive merely because its members are just gentlemen and men of integrity. Over and above these qualities, the system should necessarily be manned by such personnel who are equipped with managerial skills and the knowledge and ability to use modern technology.

According to Mr. G. Narayana, a management expert, efficient management is captured in the maxim, 'follow the GOD and avoid the DOG.' Explaining further, he says GOD stands for Group/Organization/Direction. By Group, what he means is that - whether manager or worker, whether leader or follower, they must all be able to develop a team spirit and work together for a common goal. The judge must be able to create a team consisting of all those who work under or along with him. The persons involved and the work on hand should both be organized. And then, there should be a direction or a goal in view, which is to be achieved. "Group, Organization and Direction" translated into Hindi mean "*Sangh/Vyavastha/Disha*."

"GOD" can also be understood in a different sense. 'G' stands for goal. 'D' stands for destiny. You can have an ambitious goal but the destiny may not permit achieving the same. On the contrary, you may have a smaller goal but the destiny may shower results much beyond what you had targeted. This relationship between 'G' and 'D' depends on what meaning you assign to 'O.' 'O' may, for some, mean opportunities and, for some, obstructions. They are the skill, management and qualities and leadership which convert obstructions into opportunities and the lack of these qualities may reduce opportunities into obstructions.

"DOG" in the maxim, on the other hand, stands for "Dis-organized Group." Want of managerial skills and ignorance of modern methods in the leader results in disorganization with zero achievement for the group. Group remains a group on account of disorganization and does not convert itself into a team.

It is in this context that one has to appreciate *Court and Case Management*. The concept of Court Management is to render the judicial system more productive. The principles of Court Management enable improving efficiency. Irrespective of the rank of the Court in which the judge works, he must acquire certain skills and qualities which improve his competence and consequently the productivity of the system. Court Management would include identifying the purpose of courts and court system, qualities of leadership, planning the goals, allocation of funds, case flow management, modernization and rationalization of court system including introduction of information technology, training of

employees and enhancing their skills, human resource management and Bench-Bar relationship.

Case Management has two aspects. One is institutional and the other is individual. As an institution, the Courts have to make an assessment of the case load which they can bear and then, having provided for availability of the requisite number of persons to bear the load, to distribute the work flow between judges fairly and equitably. Case Management, in its individual aspect, aims at retaining managerial control over the flow of an individual case in such a manner that the control is never lost and the flow never stops. In both aspects of Case Management, computers are of great help. They enable maintaining statistics and information. The records can be digitalized into electronic files. The electronic diary enables keeping a record of hearing and its follow up.

EPILOGUE

Whatever I have said is all with good hopes, good intentions and mostly in public interest. Even though the problems of our justice delivery system are many and varied but these are not insurmountable. Similar problems plague the judiciaries of other countries also. The only difference is that we lag behind in implementing solutions. It is true that the judicial branch cannot fund itself. The Framers of the Constitution have themselves chosen not to provide for a judiciary which is financially self-supporting. Its dependence on the executive for funding is part of a system of checks and balances and is not intended to create obstacles. In fact the concepts of independence and accountability of the judiciary are the two arms of a triangle resting on the baseline of funding. This requires that each wing of governance should discharge its duties and fulfill its obligations towards the other. I am told that most of the States are suffering from financial crunch. Since justice dispensation is unavoidable, there should be a proper and effective determination of correct priorities cutting down avoidable expenditure thereby making resources available.

So also, our laws, its interpretation and administration have to be alive to global scenario consistent with the international treaties and agreements taking care of national interests as the uppermost. India has to be a venue for international arbitrations and a world leader in IPRs.

Legal Aid and legal literacy programmes should also expand to take care of the poor and the ignorant.

The introduction of the Five year's course of study in Law Schools, the establishment of the National Judicial Academy and the State level Judicial Academies, providing for training and continuing learning with emphasis on the lessons of morality and ethics, modernisation of courts, inter-twining of ADR methodology with justice dispensation process and at the end a little care towards strengthening the judicial services – numerically and qualitatively so as to attract better talent, I am confident that the Indian judicial system would succeed in delivering more quick and inexpensive quality justice and stand taller over all its counterparts elsewhere in the world.

As the Chief Justice of India my strength are:

- (i) my colleagues;
- (ii) the members of the Bar;
- (iii) the confidence of people in the Court;
- (iv) assurance of co-operation by other wings of government to the judiciary.

I am very confident of achieving excellence in the ongoing year and am very sure that we have a brilliant future ahead. In fact I have ventured to declare the Year 2005 as "The Year of Excellence" in judiciary placing reliance on the mutual trust and confidence which you and I have in each other. If the Year 2005 has to be an "Year of Excellence" each one of us shall have to be first an excellent person and then an excellent judge or an excellent administrator, as the case may be. The secret of excellence is – there is nothing noble in being superior to some other man. To be noble is being superior to your previous self. Each one of us has to strive to improve oneself, to correct one's faults, to control one's habits and to make the best use of one's abilities. The greatest test of man's character is how he takes charge of his own life. As Henry David Thoreau has said, "Every man is the builder of a temple called his body. We are all sculptors and painters, and our material is

our own flesh, blood and bones. Any nobleness begins at once to refine a man's features, any meanness or sensuality to imbrute them.”³

Dr. A.P.J. Abdul Kalam, the President of India on his visit to the Supreme Court gave a message to judiciary that every judge should be a role model to the society to which he belongs. The Hon'ble Prime Minister is alive to the need of uptoning and strengthening the justice delivery system of the country. The Law Minister and Finance Minister too are responsive to the needs of our justice delivery system. Many a member of the Bar occupy important positions in governance and they too have assured of their helping hand in doing whatever they can to see that justice delivery in India excels every other country in the world. The justice dispensation system of the country has high hopes from them. Lawyers and judges are part of one family – one fraternity – united with the sole aim of dispensing justice and serving the society.

The Parachutists have a song, “It does not mean a thing . . . If you don't pull a string.” Many of us are, at times, like the closed parachute – possessed with great abilities, but failing to pull the string of realization. Always remember, the word ‘talent’ is hidden in the word ‘latent’ and all that we need is to switch the places of the two letters ‘t’ and ‘l.’

Let me assure you all once again that as the head of the Indian judiciary, we shall leave no stone unturned in our endeavour to uphold the Constitution and the laws and fulfilling the aspirations for achieving justice to the people of India.

³ LIGHT FROM MANY LAMPS 161,165 (Lillian Eichler Watson ed., 1951).

ACCESS TO JUSTICE AND JUDICIAL REFORMS

Justice S.B. Sinha*

I. ACCESS TO JUSTICE

"Access to Justice" is a curious phrase as it implies that the system of justice is not in fact available to all and that there are obstacles in the way. Is it true? In a civilized society, the State guarantees that each citizen approach the permissible and prescribed grievance redressal forum and obtain his rights whether against his fellow citizens or against the State. However, the truth is that civil justice has been beyond the reach of most of the disputants, though they in turn are by no means beyond the reach of the criminal justice system. So it is profitable to remember that it is only in recent years that an assumption that access to justice as a universal right was made and even more recently have we begun to recognize it as a fundamental right, a right which is political, economic and social as adumbrated in the Preamble to our Constitution.

The right of access to justice, it is true to say, is characterized as the most fundamental of all fundamental rights. The Universal Declaration of Human Rights mandates in Article 10 that, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Until the arrival of legal aid, granted not as charitable indulgence to the weakest and most sympathetic petitioners but as a matter of right, the theory was that the courts and legal services were available to all. Anybody could enter the court halls; all he needed was money.

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However, our society is founded upon the Rule of Law. Consequently, if the people without using force or trying to obtain extra-legal remedies, approach the courts of law for redressal of their grievances, society must do everything at its command to see that they have real access to the courts. If the doors of the courts are not wide open to the disputants, we would be mocking at the rule of law. The economically weak citizens, in a society governed by the rule of law must be able to fight with the economically strong in the courts which would mean that they have to be enabled not access to get into the courts, but to stay, if necessary, to the bitter end. For the said purpose, it is necessary to ensure that the legal services available to the poor litigant is of as good quality as that available to his opponent. Unless these minimum conditions are satisfied, access to the public courts would remain illusory for the under privileged persons.

Access to justice therefore has two parts: (1) where a person is able to approach the courts but may not take his litigation right through the trial or to the appellate court or to the highest court of the land; (2) where a person has not been able to approach the court at all. The latter can be sub-divided into two parts – (a) cases where the person is aware of his right but does not know whom to approach and which forum to approach, or is unable to approach the courts of law because of poverty or other reasons, and (b) cases where the person is not aware of his rights at all. We must address these aspects so as to find out solutions for these problems in the context of legal literacy, protection of rights, legal aid and resolution of disputes. For this purpose judicial reforms are essential, enforcement of the Legal Services Authorities Act, 1987 in both its letter and spirit is also necessary, and so is judicial activism through public interest litigation for fulfilling the courts' duties towards the protection of fundamental rights and creative interpretation of the Constitution.

'Access to justice,' must be broad-based and people-oriented,¹ as it is the most basic of all human rights in any civilized world – one that has a democratic dimension involving remedial jurisprudence for every bona fide seeker. However, before we begin to understand the contours of access to justice, it is essential to address a more fundamental issue:

¹ *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India* (1981) 1 SCC 246, 281.

what is *justice*? After all, it is only when we understand what the 'end' is, that we can properly understand what 'means' are to be adopted to achieve that end. Unless we understand *what* we are attempting to 'access,' we may never truly appreciate *how* to achieve that objective.

A. What is "Justice"?

Before proceeding further it is imperative that one understand the term 'justice.' It is interesting to note that this expression has been used in our Constitution only in the Preamble and in Article 142. No where else in the Constitution has the term been defined. Justice Krishna Iyer in an address to the *18th Annual Conference of the American Judges Association* identified 'justice' with 'truth.' So, in his understanding, the quest for justice is the quest for truth, and by analogy, justice is denied when truth is checked by a Judge's "pet social philosophy" that blocks his mentation. I am inclined to agree but with a slight degree of divergence. The dispensation of justice must not be construed to mean merely the finding of the truth in a given matter, nay, it is much more. The dispensation of justice entails giving one his due. This in turn means that the courts must in every way provide relief and find legal techniques to provide relief to one who has been deprived of what was due to him or to her. Such a situation arises because the law *as it is* may fall short of the law *as it ought to be*. It is therefore well said that justice is the ultimate objective of law, and, where necessary, the law must also bend before the cause of justice. Thus, we observe that while our Constitution guarantees equality for all under Article 14, there are situations wherein an unequal treatment favouring the scheduled castes, scheduled tribes, backward classes is required because justice demands that the law must not stand in the way of giving what was due to them and what had cruelly been snatched away from them for centuries. Beneficial legislations for the upliftment of such sections of society therefore is not considered a violation of Article 14 as justice does not necessarily demand the same result for everybody - inequality of treatment is not an exception but it is a rule of justice.

Nevertheless, questions remain to be answered: does our conceptualization of justice serve the Indian society? (The colonial impact is evident in the way we define justice in the Indian context even till date); have we been able to develop a concept of justice which

is in consonance with the aspirations of the makers of the Constitution as reflected in the Preamble?; does our conception of justice suit the Indian reality? In fact, the more vital question is: does there exist an *Indian* conception of justice, perhaps in the ancient texts such as the *Smritis* and if so, is deciding every case on the benchmark of 'equity and reason' – as the *Smritis* prescribe – justice? These are uncomfortable questions, question which may not yield a ready answer, but questions which we must address if we have to design a justice system which serves our society.

B. The Contours of 'Access to Justice'

As discussed briefly above, any discourse on access to justice must inevitably touch upon the hurdles of differing nature that present themselves in the path of the wronged seeking justice – this includes, the litigant who has had access to the court but has not obtained quick relief; those who have not even had the chance to knock at the doors of the court because of ignorance of their legal rights or poverty; those who *are* aware of their rights but are unable to approach the courts; and even those who have had access to the courts but require justice to be done *after* their case is heard – such as prisoners in need of *post facto* remedy for prison excesses committed during their incarceration.² It is generally agreed that access to justice requires three basic facilities: (a) that there must be a dependable system of laws; (b) that there must be courts to enforce these laws, and (c) that there are well-trained officials to manage such courts. It is also well understood that access to justice is not merely justice in its ordinary sense; rather, access to justice must include access to *social, economic, and political* justice, as encapsulated in Part IV of our Constitution.

It would not come as a surprise that many of the hurdles are those that have often been of the simplest and most obvious nature but have had devastating results, for example, it has been found that the court fees payable by the litigants may at times be an impediment in achieving access to justice for indigent litigants, if it is prohibitively high;³ or that the principle of *locus standi* may many a time, wrongfully prevent officious outsiders from approaching the courts, even when such

² See *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488.

³ *M/s Central Coal Fields Ltd. v. M/s Jaiswal Coal Co.* 1980 (Supp.) SCC 471.

outsiders do so solely for the cause of justice.⁴ Most, if not all, are in the realm of *procedures* that, in the words of Klaus-Friedrich Koch, “enable a party who has been wronged, or alleges that he has been wronged, to obtain redress in a culturally approved fashion.” Economic and geographical barriers, such as the exorbitant costs of employing lawyers or the distances from courts, may also play a part in keeping the disputant from entering the justice dispensation machinery.

C. The Efforts of the Superior Courts in India – Ensuring Existing Rights and Creating New Rights

To tackle such problems and more, courts in India continuously adopt strategies that challenge the bounds of judicial creativity. Such ameliorating judicial inventions as public interest litigation owe their existence to the liberal construction which our courts have given to the phrase ‘access to justice.’ While, as Earl Johnson, Jr. finds, American courts consider indigents to have “access to the courts” on the count that they could come to the courtroom without cost, even though they could not engage a lawyer, courts in India have sought a holistic understanding of the concept of accessibility. For the latter, access is not merely superficial attendance in the court; it connotes “access” both in letter and spirit. At the forefront in facilitating access to justice has been the Supreme Court of India which has not hesitated to “innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning.”⁵ Thus, in *Fertilizer Corporation Kamgar Union (Regd.) v. Sindri v. Union of India*,⁶ the Apex Court acknowledged that the goal of ‘access to justice’ would stand defeated if:

Public-minded citizens or organizations with serious concern for conservation of public resources and the directions and correction of public power so as to promote justice in its triune facets were forced to choose the streets rather than the courts to dispense justice simply because they could not cross the technical hurdle of *locus standi*.

⁴ *P.S.R. Sadhanantham v. Arunachalam* (1980) 3 SCC 141.

⁵ *S.P. Gupta v. Union of India* 1981 (Supp.) SCC 87.

⁶ (1981) 1 SCC 568, 584-85.

Class-action suits, representative suits, and public interest litigation are some of the techniques which have been evolved to overcome the problems of accessibility. At the same time, the superior courts in India have also ventured to *create* new rights for the citizens through progressive interpretations of the constitutional provisions. For example, most recently, in *Union of India v. Naveen Jindal*,⁷ the Supreme Court created a new right by holding that every citizen of the country has the fundamental right to fly the national flag with dignity under Article 19 (1) of the Constitution. Besides this, the other rights created are, for example, the right to travel,⁸ right to privacy,⁹ prisoners' right to interview,¹⁰ right to a fair trial,¹¹ right against torture and custodial violence,¹² right to free legal aid,¹³ right to health care,¹⁴ right to safe drinking water,¹⁵ women's right against sexual harassment,¹⁶ right to quality life,¹⁷ right to family pension,¹⁸ right to work (though not fundamental),¹⁹ and right to environmental protection.²⁰

II. WHAT AILS THE JUDICIAL SYSTEM?

Krishna Iyer, J. in his inimitable style observed, "the current situation is grim." Chief Justice Chandrachud lamented about the fall in the quality of justice administered by the courts; Chief Justice Bhagwati called it a 'crying shame,' while Nani Palkhiwala remarked that our 'courts are not cathedrals but casinos.' He went further and opined that while justice is blind generally, in India 'it is also lame and hobbles on crutches.' But the question is: who provides the crutches and runs the casinos? It must be realized that the pathology of the

⁷ (2004) 2 SCC 510.

⁸ *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

⁹ *Kharak Singh v. State of U.P.* AIR 1963 SC 1295.

¹⁰ *Prabha Dutt v. Union of India* AIR 1982 SC 6.

¹¹ *Police Commissioner, Delhi v. Registrar, Delhi High Court* AIR 1997 SC 95.

¹² *D.K. Basu v. State of West Bengal* AIR 1997 SC 610.

¹³ *State of Maharashtra v. M.P. Vashi* AIR 1996 SC 1.

¹⁴ *CERC v. Union of India* AIR 1995 SC 922.

¹⁵ *APPCB v. M.V. Nayudu* AIR 1999 SC 822.

¹⁶ *Vishakha v. State of Rajasthan* AIR 1997 SC 3011.

¹⁷ *Hinch Lal Tiwari v. Kamala Devi* (2001) 6 SCC 496.

¹⁸ *S.L. Mastan Bee v. General Manager, South Central Railway* (2003) 1 SCC 184.

¹⁹ *Air India Statutory Corporation v. United Labour Union* AIR 1997 SC 645.

²⁰ *M.C. Mehta v. Union of India* AIR 1997 SC 734.

judiciary affords a unique opportunity for radical change.

Indeed, the crisis of the judicial process is too serious a disease, the diagnosis so complex, the prognosis so murky, the infirmities so controversial, the preferred solutions so polemical and sometimes so superficial that pontifical infallibility or consensus as to the therapeutic prescriptions is an impossibility. But, in all humility and sincerity, a tentative critique is offered on the assumption that there is a judicial syndrome which calls for 'intensive care' treatment, but I confine myself to the two facets of this multi-dimensional ailment which will be analysed in the course of the discussion. 'Judiatics' (a word coined by Krishna Iyer, J.) must find answers for several shortcomings and shocking failings.

The Indian judiciary is, thus, at the cross-roads today. When India attained independence more than fifty-eight years ago, it inherited a British legacy – the Judiciary. By and large, the system has worked well but several maladies have gripped this system.

Recently, bizarre incidents of communal disturbances, and barbaric killings of young men and women arising out of inter-caste marriages, the burying alive of infants as a religious ritual, sale of kidneys to earn a livelihood and eating of rats by members of the Scheduled Tribes in Tamil Nadu clearly demonstrate that justice whether economical or political is a far cry. If access to justice is to be given to the citizens of India truly and effectively, justice must be given a new meaning and must be demonstrated with a different objective. Socio-economic right of the citizens should be at the forefront for giving access to justice to the needy, poor and deprived people.

III. *UBI JUS IBI REMEDIUM* – IS IT AN EMPTY FORMALITY?

A potent judicial technique for dispensing justice within the context set out above, is to provide succour to those who have a right to relief. In other words, no one must be denied a remedy if he or she has a right – *ubi jus ibi remedium*. It is said that the maxim is of such consequence that it led to the invention in England of the form of action called an 'action on the case' - where no precedent of a writ could be produced, the Clerks in Chancery agreed to form a new one. So much so, that in

Dhannalal v. Kalawatibai,²¹ the Supreme Court observed that:

[i]f a man has a right, he must, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

The principle that rights must have remedies is ancient and venerable.²² In *Ashby v. White*,²³ the Chief Justice of the King's Bench stated:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.

The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something legal, rather than a moral or a natural right.²⁴ In the *Federalist* Alexander Hamilton states that the definition of a claim as a "legal" right depends upon the availability of this enforcement:²⁵

It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions of commands which pretend to be laws will, in fact amount to nothing more than advice or recommendation.

The remedy is thus the integral part of each right that is ultimately necessary to the effectuation of the rule of law. For without a remedy, judicial decisions are merely advisory opinions, hypothetical

²¹ (2002) 6 SCC 16, 29-30.

²² Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71 (2001)

²³ 92 Eng. Rep. 126 (K.D. 1703).

²⁴ See I. JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW* 247-55 (1980).

²⁵ THE FEDERALIST NO.84, at 110 (A. HAMILTON).

undertakings with no practical effect. Without remedies, the law simply has no force in society. Individuals need not conform their behavior and established rights may simply be ignored.

The Supreme Court of India has gone further by stating that access to justice requires *more* than “mere declaration of invalidity of an action or finding of custodial violence or death in lock-up. . .”²⁶ Rather, the principle of *ubi jus ibi remedium* mandates that those who approach the courts for justice should be provided a “meaningful” remedy. Thus, for instance, access to justice may require the court not only to prosecute the offender, but also where necessary to provide monetary compensation to the victim of the crime. *Olga Tellis*,²⁷ and *Bandhua Mukti Morcha*,²⁸ are but a few of the instances out of countless many where the Apex Court of this land has provided not merely relief, but relief with compassion and foresight that would merit being called “meaningful.”

The aspect of “meaningful” remedy has found application in the courts of the United States as well. In the tax cases of *Reich v. Collins*,²⁹ *Harper v. Virginia Department of Tax*,³⁰ and *Kesson Corp. v. Division of Alcoholic Beverages*,³¹ the United States Supreme Court has held that the Due Process Clause requires State Courts to provide a successful plaintiff with a minimally-adequate remedy that provides “meaningful” relief. A similar line of thought is reflected in the European Court of Human Rights’ decision of July 2003 in *Hatton v. United Kingdom*,³² where the European Court of Human Rights noted in the context of Article 13 of the European Human Rights Convention: “[w]here an applicant has an arguable claim to a violation of a convention right, however, the domestic regime must afford an effective remedy.” Since the domestic courts in England did not at that time (that is, prior to the entry into force of the Human Rights Act, 1998) apply any judicial test that could determine violation of Article 13 *purely on facts*, the European Court of Human Rights was compelled to step into the shoes of the

²⁶ *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416, 437-38.

²⁷ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

²⁸ *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802.

²⁹ 513 U.S. 106 (1994).

³⁰ 509 U.S. 86 (1993).

³¹ 496 U.S. 18 (1990).

³² 15 BHRC 259.

domestic regime and provide the claimants damages to the tune of 50,000 Euros.

IV. PROVIDING JUSTICE FOR A BILLION SOULS : IDENTIFYING STRUCTURAL AND OPERATIONAL JUDICIAL REFORMS

While the courts have never shun away from its duty of providing access to justice for the teeming millions of this country, it would not be incorrect to state that the objective would be impossible to achieve unless justice dispensation mechanism is reformed. There are two ways in which such reform can be achieved – through changes at the *structural* level, and through changes at the *operational* level. Changes at the structural level challenge the very framework itself and require an examination of the viability of the alternative frameworks for dispensing justice. It *might* require an amendment to the Constitution itself or to various statutes. On the other hand, changes at the operational level require one to work within the framework trying to identify various ways of improving the effectiveness of the legal system.

It must nevertheless be borne in mind that the effectiveness of the justice dispensation machinery ultimately depends upon the way in which we conceptualise justice. As a World Bank Report titled *Comprehensive Legal and Judicial Development* asserted: “The elements of a well functioning justice system ultimately depends on the cultural context in which it operates - justice is defined by the society which it serves.”

A. Changes at the ‘Structural’ Level

Shift from Conflict Resolution to Justice Dispensation

Indian courts are attuned to resolving conflicts between the parties based on the pleadings presented by them. The higher judiciary, particularly the Supreme Court, while exercising its jurisdiction has devised several instruments for dispensing justice. Several innovative legal approaches have been used which can serve as a catalyst for legal reform. This is evident in the creation and development of the PIL jurisdiction. Similarly, attempts are to be made to decentralise judicial activism right down to the lowest court in the country, as well as to effect a paradigm shift in favour of justice dispensation. In this regard, the concept of *Lok Adalats* – or, people’s courts – is particularly relevant.

Prior to the introduction of the Legal Services Authorities Act, 1987, legal services by the State were provided under various government orders issued in 1976 which also organised Lok Adalats. The present form of Lok Adalats introduced under the Legal Services Authorities Act, 1987 has since then gained considerable popularity in providing cheap and speedy justice in an atmosphere of friendly spirit hardly resembling a conventional court of law. It is the Lok Adalats which go to the people to deliver justice at their doorstep both, by settling disputes which are pending in courts, and also by resolving disputes which have not yet reached the stage of litigation in court. The basis for the dispute settlement in the Lok Adalat system is the principle of mutual consent and voluntary acceptance of the solution with the help of conciliators.

Justice for the Poor: Judicial Enforcement of Socio-Economic Rights

Any discussion on justice for a billion people necessarily requires reference to socio-economic rights. Unlike western societies, socio-economic rights are important for an ordinary Indian for exercising his rights. Although the Indian Constitution does endorse these rights in the form of *Directive Principles of State Policy* in Part IV of the Constitution, it does not provide any mechanism for their enforcement. Therefore, the Indian Supreme Court has made them partly enforceable by extending the language of Article 21 of the Constitution. To paraphrase Justice Albert Sachs of the South African Constitutional Court, "the Supreme Court of India smuggled the rights from Part IV to Part III of the Constitution."

This innovation of the Indian judiciary to enforce socio-economic rights has seen parallels in courts of other jurisdictions as well. For instance, the South African Constitutional Court in *Minister of Health and others v. Treatment Action Campaign and others*,³³ ruled that the State must "act reasonably to provide access to the socio-economic rights identified in Sections 26 and 27 [of the South African Constitution] on a progressive basis" and that the, "state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society... [by ensuring that] legislative and other measures taken by the state are reasonable." Again, in *Government*

³³ 13 BHRC 1.

of the Republic of South Africa v. Grootboom and Ors.,³⁴ the South African Constitutional Court ruled that:

[E]conomic rights cannot be said to exist on paper only. The Constitution requires the State to respect, protect, provide and fulfill these rights and the courts are constitutionally bound to ensure that they are protected . . . The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependents. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

However, the question still remains: *Should India adopt a new model where the judiciary has a more active role in the enforcement of these rights?* This question has provoked a profound debate in which both sides have exchanged persuasive arguments. Any strategy to resolve this dilemma must take into account the fact that the civil and political rights without socio-economic rights are inadequate for the poor and the deprived. At the same time, due respect must be paid to democratic deliberation and resource intensive nature of these rights. A distinction must be made between the core socio-economic rights and those that lie outside the periphery of the former. The core rights represent the basic entitlements of every citizen which cannot be left to the ordinary political processes. In respect of the other socio-economic rights, they are dependant on the democratic prerogatives and therefore the traditional scheme of judicial review has to be modified. This strategy will ensure that socio-economic rights are not mere "constitutional ropes of sand," but are concrete constitutional commitments.

If our Constitution is skillfully implemented by the judiciary, it may transform the society which would go a long way to ensure socio-economic and human rights to the citizens of India. By enforcing the political rights and civil liberties to the citizens under Part III of the Constitution, the framework of the socio-economic progress of the nation is ensured. The rule of law which is the bedrock of democracy, if strictly enforced, would enable us to bring economic progress for the nation also.

³⁴ 2000 (1) SA 46 (CC).

B. Changes at the 'Operational' Level

At the operational level, one is working within the framework with the intention of fine-tuning it so as to achieve its objectives. At this level, we have to look at several factors which affect the efficiency and the effectiveness of the justice dispensation machinery.

All successful justice systems provide access to all citizens requiring their services, operate with a reasonable amount of efficiency and timeliness, make decisions and resolve conflicts in line with legal norms and widely held values, and operate in a predictable, transparent, and effective fashion. In my view, the biggest hurdle in administering justice for a billion people is delays. Delay in justice administration is the biggest operational obstacle which has to be tackled on a war footing. As Justice Warren Burger, the former Chief Justice of the U.S. Supreme Court observed in the American context:

The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion that ordinary people want black robed judges, well-dressed lawyers, fine-panelled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible.

This observation applies with greater force in the Indian context. We require a new vision accompanied by a concrete strategy to accomplish that vision. The whole emphasis is to develop a legal system which does not stop at giving empty rights but backs it up with concrete rights.

Judicial Infrastructure

There is a need for greater allocation of funds for the development and maintenance of the judicial infrastructure in India. There is an urgent need to develop judicial libraries, improve communications facilities, and link all courts through the internet. Allocation of resources by the government plays a key role in ensuring the independence of the judiciary. Realizing this principle, our Constitution-makers have expressly incorporated charging the expenses of the Supreme Court and the High Court on the Consolidated Fund of India.

The famous *Syracuse Draft Principles* on independence of the Judiciary were formulated by a Committee of Jurists and the International Commission of Jurists at Syracuse, Sicily in 1981. Articles 1, 24, 25 and 26 of the said principles are of fundamental significance for all countries. They specially deal with the need for collaboration with the Judiciary in the preparation of the budget for the judiciary so that reasonable provision is made for infrastructural developments, for clearance of backlog of cases, and for avoiding undue delay. It would be worthwhile to quote the following provisions from that draft:

Financial Provisions:

Article 24: To ensure its independence the judiciary should be provided with the *means and resources* necessary for the proper fulfillment of its judicial functions.

Article 25: The *budget* of the judiciary should be established by the competent authority in *collaboration* with the judiciary. The amount allotted should be sufficient to *enable each court to function without an excessive workload*. The judiciary should be able to submit their estimate of *their budgetary requirements* to the appropriate authority. [emphasis added].

On similar lines, the Universal Declaration on the Independence of Judges as adopted in the World Conference of the Justices, Montreal provides:

It shall be a priority of the highest order for the State to provide *adequate resource* to allow for the due administration of Justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel; and *operating budgets*.

The *budget* of the courts shall be prepared by the Competent Authority in *Collaboration with the Judiciary*. The Judiciary shall submit *their estimate* of the budget requirements to the appropriate authority. [emphasis added].

For ensuring a greater degree of independence, the following steps may be adopted:

1. There is a need for a national policy decision whereby a percentage of the government funds must be allotted towards

the judiciary. This is of particular importance in the Indian context since electoral imperatives play a key role in the allocation of funds and judicial reform is definitely not an electoral imperative in the Indian context.

2. Judiciary must be included separately in the Plan by the Planning Commission and separate allotment must be made by the Planning Commission and the Finance Commission.
3. A National Judicial Council and State Judicial Councils may be set up as recommended by the National Commission to Review the Working of the Constitution. The National Judicial Council will deal generally with the overall needs of the Judiciary. The State Judicial Council will deal with policy making, budget and implementation of the same, as far as the Subordinate Judiciary is concerned. Budgets are to be prepared by the National Judicial Council or the State Judicial Council initially and are to be presented to the Executive and finalized at that stage, by mutual effective consultation, keeping in mind that expenditure on the demands of the Judiciary are no less important than other development expenditure and thereafter the budget as finally settled, is to be presented in Parliament or the State Legislature, as the case may be. A convention is to be made that the budget estimates as so finalized shall be pushed through Parliament or the State Legislatures without any downward revision.
4. A National Institute of Court Management is to be established to confer degrees and to train Court staff and Judicial Officers in court management.
5. A more effective use of information technology can enable the judiciary in reducing time on the process. The experience of the Supreme Court in containing the docket explosion in the nineties is instructive in this regard. All over the world, court management has become recognized as a specialized skill which needs to be adopted by the Indian judiciary.

It is rather interesting to note in this regard Judge Jonathan Lippman's conception of how best it is to allocate funds for the judiciary.

In a recent article titled "New York's Efforts to Secure Sufficient Court Resources in Lean Times" in the *Judges Journal*, he postulates that the judiciary must be able to justify allocation of funds by:

- (a) making "efficient use of resources despite ever-growing case-load complexity and volume";
- (b) adopting "effective accountability tools to measure and report on performance" and affirmatively welcoming every opportunity to report;
- (c) having its leaders demonstrate "a high level of expertise and professionalism in the management of court affairs;"
- (d) having its leaders show "a strong commitment to introducing structural reforms to improve public satisfaction with the courts;"
- (e) improving the "quality and professionalism of the Bench" so as to ensure the public's trust and confidence in itself.

Succinctly put, greater allocation of funds cannot by any measure be denied to the judiciary as long as it delivers on the counts mentioned above.

Intensive Use of the ADR Framework—Privatisation of Dispute Resolution

Alternate Dispute Resolution, to my mind, is essentially the privatization of the dispute resolution process, whose success ultimately depends up on the Arbitration and Conciliation Act, 1996, Section 89 of the Civil Procedure Code, 1908 and the Legal Services Authorities Act, 1987 as well as the Legal Services Authorities (Amendment) Act 2002, which provides for an institutional framework for the resolution of disputes without the intervention of the courts. But there is an urgent need for tightening this dispute resolution framework so as to reduce the burden on the courts.

We must take the Alternate Dispute Resolution mechanism beyond the cities. The Gram Nyayalayas as contemplated by the Law Commission should process sixty to seventy percent of rural litigation

leaving the regular courts in the districts and the sub-divisions to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have fair, quick and inexpensive system of dispute settlement. Only revision jurisdiction on civil matters and that too on questions of law would be left to the District Courts.

Since rent and eviction suits constitute a considerable chunk of litigation in urban courts, and that they take on an average three or more years to get adjudicated in the court at the first instance, the Law Commission has felt that an alternative method for these disputes is imperative. The Law Commission examined several alternatives and preferred to recommend the model of Conciliation Court along with a participatory model where a professional judge interacts with two lay judges and evolves a reasonable solution. There will not be any appeal against the decision and only a revision petition will be permissible on questions of law to the District Court.

The Commission has also recommended that the provisions relating to Conciliation in the Arbitration and Conciliation Act, 1996 should be suitably amended so as to provide for obligatory recourse to conciliation or mediation in relation to cases pending in the courts. The Commission further recommended that the scope and functions of the Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 be enlarged and extended to enable the Authority to set up conciliation and mediation fora and to conduct, in collaboration with other institutions wherever necessary, training courses for conciliators and mediators.

Whatever mechanism we adopt our ultimate aim must be to ensure that not more than fifteen per cent of the cases go for final adjudication. This is the trend in the legal systems of developed countries where most of the cases are resolved by alternate dispute resolution mechanisms like conciliation, mediation and arbitration. Pre-trial conciliation accounts for the disposal of a large number of cases.

Tribunalisation

Creating specialized tribunals for resolving a particular variety of disputes has become the order of the day. Tribunalisation was an

experiment that was initiated in the eighties to reduce the burden on the regular judicial system. They were created with the objective of ensuring expeditious adjudication by experts. But the experience of the last decade clearly showed that tribunalisation cannot be a panacea for resolving judicial arrears unless there is a supporting institutional framework to supervise the working of the tribunals. The malfunctioning (or rather the non-functioning) of Customs, Excise and Gold Control Appellate Tribunal forced the Supreme Court in *R.K. Jain v. Union of India*,³⁵ to observe:

It is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals leaves much to be desired. . . The Government of India should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making judicial review efficacious, inexpensive and satisfactory.

The following steps may be adopted to ensure that Tribunals achieve their objective:

1. Discontinuing with the practice of establishing Appellate Tribunals

The rationale for establishing appellate tribunals is no longer valid due to the decision of the Supreme Court in *L. Chandrakumar v. Union of India*,³⁶ wherein the Court held that the jurisdiction of the High Court under Articles 226 and 227 forms part of the basic structure of the Constitution and cannot be taken away by a constitutional amendment. Hence, the practice of establishing Appellate Tribunals should be discontinued.

2. Adjudication of Constitutional Issues

Some tribunals can adjudicate over constitutional issues (except the constitutional validity of the parent Act) even when certain members of the tribunals are non-judicial members. These members are not trained

³⁵ AIR 1993 SC 1769 at para 76.

³⁶ AIR 1994 SC 1266.

in law and thus there is an inherent anomaly in the system as it prevails today. Tribunals should be divested of their jurisdiction to adjudicate over constitutional issues or alternatively they must be adjudicated by judicial members.

3. Pendency of Cases at the Tribunal

There is a huge pendency of cases in most tribunals and this does not serve the ends of justice and defeats the very objective for which they have been set up. The tribunals today have become another parallel structure plagued with the same problems that prevail in the regular courts. There must be a statutory framework to ensure time bound disposal of cases.

4. Superintendence over Tribunals

Currently, High Courts are entrusted with the power of *superintendence over tribunals* by virtue of Article 227, but in practice they do not exercise this function. The Supreme Court in *L. Chandra Kumar's case* has suggested that there should be "*an independent supervisory body to oversee the working of the Tribunals.*" This recommendation should be implemented as soon as possible. It should be the duty of this supervisory body to ensure that the tribunals are able to discharge their functions in an efficient manner and also ensure their independence.

5. Seat of Tribunals

Many tribunals presently exercise original jurisdiction in lieu of the civil courts. However, their establishment is limited only to the four metropolitan towns. Since they replace the civil courts, permanent tribunals must be established throughout the country or alternatively, if there is not sufficient work, a Circuit Bench may be established. This is to ensure access to justice.

Criminal Justice Administration

Reform of the judiciary would be incomplete without special emphasis on reforming the criminal justice administration system since delay in a criminal right, affects the core fundamental rights of the

accused and also of the victim. The criminal justice delivery system in India has not achieved the ideals it was meant to achieve—of ensuring fair, inexpensive and speedy trial. Most of the fundamental principles of criminal law, such as the right to speedy trial, the right to legal aid, the right to fair trial, etc., have been declared to be fundamental rights by the Supreme Court through a process of judicial interpretation starting from the *Hussainara Khatoon case*.³⁷ The Indian Constitution does not expressly guarantee a right to speedy trial. This right has however been read into Article 21 by judicial interpretation. Our attempt should be to make the right to speedy trial a reality.

The single most important reason for arrears in the Criminal Courts is the lack of sufficient number of Courts. The Law Commission has made this point succinctly clear in its 120th Report. Unlike civil justice delivery system, lack of courts is not an administrative problem but a constitutional one. Every state must be mandated by a statute *to establish requisite number of courts based on population, litigation and other relevant criteria. This will provide the necessary imperative to make the right to speedy trial a reality in India.* It may be noted that this idea is not as far-fetched as it seems to be: the Constitution already provides the exact number of representatives from each State to the Council of States, based on population and other criteria.³⁸

The other factor for the delay is the lack of separation between the law and order department and the investigative department of the police. Furthermore, the investigative department works without any proper legal advice at the investigation stage. This has resulted in lack of professionalism, overwork and a resultant failure in conducting proper investigation. Both the 154th Law Commission Report and the Fourth National Police Commission Report recommended that the investigating agency be separated from the law and order department of the police. This would have several advantages:

- (a) It would bring the investigating police under the protection of the judiciary and would greatly reduce the possibility of political or other types of interference;

³⁷ AIR 1979 SC 1360.

³⁸ CONSTITUTION OF INDIA, SCHEDULE IV.

- (b) With the possibility of greater scrutiny by the court, the investigations are more likely to be in conformity with the law than at present, which is often the reason for failure of prosecution in the courts;
- (c) Efficient investigation will reduce the possibility of unjustified and unwarranted prosecutions and consequently a large number of acquittals;
- (d) It would result in speedier investigation and consequently quicker disposal of cases;
- (e) It would increase the expertise of investigating officers and would foster more *scientific* investigation of cases with the help of emerging technologies such as DNA testing.

The kind of independence and efficiency that is desired of the investigating agency can be obtained only if it is given a constitutional shape. Further, a concern similar to that of the investigation agency has been raised with regard to the prosecution machinery. It has been a common complaint that prosecutions are not being diligently and efficiently conducted, especially at the lower levels. Furthermore, criminal investigation is carried out with virtually no legal advice, and the prosecutor only steps in, once the investigation has been completed. This has been the cause for many legally flawed investigations and consequent acquittals. Moreover, as prosecutors are under the control of the state government, their integrity has been questioned several times. This issue has particularly come up in the context of withdrawal of prosecution. Independent status for a Directorate of Prosecutions may be the only way in which the independence and efficiency of the prosecution agency can be ensured.

In any event, taking a more holistic view, it must be realized that the onus to ensure the rule of law as a pre-requisite to socio-economic progress is not one to be discharged *only* by the Courts through judicial innovation – it lies equally at the steps of the State and its administrative machinery. Lauren Ouziel writes of the practice in the United States that:

[b]y accepting federal funds, states agree to the conditions of the federal law providing the funds; if the conditions assert a right to sue the state, the state, by accepting the federal funds, is deemed to have waived its sovereign immunity defense. Congress, in other words, has purchased the state's waiver of sovereign immunity, and where, as a result, federal law [that provides grants to states] may clearly express its intent to allow claimants access to court.

Though such federal laws were interpreted rather narrowly under a "clear statement rule" that mandated the Courts to look for a clear statement of congressional intent in the words of the statute itself, in the last several decades, the American courts have continuously sought to erode the rule in order to allow improved access to justice against the State.

V. A WORD ON COURT MANAGEMENT AND CASE MANAGEMENT

Permit me at this juncture to engage our attention to what is perhaps the most critical of necessary changes – that of enhancing the managerial competence of Judges and Courts. Krishna Iyer, J. as regards reforms in judicial administration stated:

It is significant that while Business Management has invaded for the better of all institutions which mean business, only the judiciary, the legislature and government administration have shied away from modern management techniques. Judicial Business Management, like other management skills, must be developed if our backward methods and archaic practices, which currently inflict enormous inconveniences, waste of time and money, delay and discontent and unscientific techniques, are to quit us. Indeed, a good deal of expeditious handling is easily possible if we run our justice system like any other sophisticated, socially responsible business. Now we drift, drag and dawdle. The Judiciary must try to live in the nineties of the twentieth century!

For this purpose, a two-fold paradigm to analyse and improve the justice dispensation mechanism is proposed: (a) by enhancing *court* management and (b) by introducing *case* management.

A. Court Management

Court management and administration is a science of beneficial utilization of available human, time and financial resources in the justice delivery/dispensation system. It deals with the active role of the judicial officers regarding the control of the workload with 'case management' as its priority. This recognizes the administrative role of the judicial officer besides his judicial functions.

According to the Federal Justice Center, Washington D.C., the role of a judge in court management is, "to anticipate problems before they arise rather than waiting passively for matters to be presented by the Counsel. Because the Attorneys may be immersed in the details of the case, innovation and creativity in formulating any litigation plan may frequently depend upon the Court."³⁹ Though the definition of "court management" emphasizes the role of the judicial officer, the concept of court management deals with the comprehensive management of the litigation monitored by the judicial officer with the help of lawyers, litigants and other administrative staff.

B. Case Management

Case management is a comprehensive system of management of time and events in a law-suit as it proceeds through the justice system, from initiation to resolution. The two essential components of case management are the *setting of a time table* for pre-determined events and suspension of progress of law suit through its time-table⁴⁰ It is dependent upon two rules: (a) that there is perfect classification of cases; and (b) that there is a target fixation (which includes time limits for each case).

Classification of Cases

The cases at present are dealt according to the traditional approach also called "first in, first out approach." This deals with the scheduling and handling of cases in the order of the filing date and the year in which they are filed. But, this leads to the situation where simple cases

³⁹ MANUAL OF COMPLEX LITIGATION (3d ed.,1994) quoted in LORD WOOLF'S, INTERIM REPORT Chapter V, para. 20.

⁴⁰ *Id.* at para. 18.

have to wait for the complex cases or else a situation where the complex cases are left with the Judiciary due to the early disposal of simple cases.

Based on the “early neutral evaluation” by the judicial officer, the cases can be classified as - *simple*, *medium* and *complex* - based upon the scientific technique of “differential case management”- an approach that recognizes that cases (whether civil or criminal) vary significantly in the resource requirements (both Court and Lawyers) and time required to reach a just disposition. Thus, the time and level of Lawyers’ effort and Court supervision for the disposal differs according to the facts of each case. During the early neutral evaluation, the Judge, based on the complexity of the dispute and the relief sought including the time and cost assessment should not only decide the nature of case but also should decide the forum of litigation i.e, the formal court or informal system of ADR. The simple cases thus classified can be placed under the jurisdiction of the ‘Fast track courts’ or on specified dates and the complex cases can be taken up by the regular courts.⁴¹ This will prove useful in mass litigation cases such as land acquisition, Motor Vehicles Accident Claim cases, etc. Further sub-grouping of cases will be useful in the quick delivery of justice. Suitable formats should be created in order to group the cases with stereotyped relief whereby particular number or identity can be issued; for example, cases related to maintenance of wife and children, rent control matters, land acquisition, minimum wages etc. This makes the identification and verification of the problem easier whereby quick relief can be granted.

Besides creating a new pro forma, the existing pro forma (if any) should be amended from time to time to include all the elements. For instance, the pro forma of Delhi Rent Control Act is considered as insufficient with regard to the details of facts etc. Wherever the pro forma is considered to be complete in nature, the Court should strictly

⁴¹ The 188th Law Commission Report presently placed before the Parliament talks about fast track courts for the resolution of commercial disputes valued at more than one crore. Due to the privatization and opening up of markets, the Report talks about establishing special commercial division with all the facilities of computerization and video conferencing etc. consisting of Retired High Court Judges specializing in the civil and commercial laws at High Court level. Thus, these disputes need not pass through the hierarchy of lower courts and thus delays leading to high costs can be reduced.

implement the use of such pro forma (incidentally, the forms prescribed in Civil Procedure Code are rarely utilized). This classification can be done by the Judicial officer based on the early evaluation with the help of experienced court officials specially assigned this task. Depending upon the complexity of the case, the Judge can decide what all tasks can be delegated to the subordinate judicial officer, including exploring the possibility of ADR. These forms can be fed into the computer and on the basis of allotted classification and the number allotted; one can easily trace the status of the case. Based on this classification, simple cases can be allocated to fast track courts and complex cases involving public importance, test cases, where a complex legal issue leading to lengthy arguments are required etc. can be passed on to the multi-track Courts. There should be flexibility with regard to the transfer of cases from fast track to multi-track and vice versa.

The number of cases listed before a judge per day should also be restricted for the effective functioning by the Judge. On an average fifty to sixty cases are listed in the Courts. Practically, no Judge can seriously hear and decide more than three to four cases in a day and thus the number of cases that are listed should be restricted. Call work of the listed cases that have not yet come for final disposal in the trial courts is considered to be one of the very time consuming and tiresome activities. This work can be delegated to experienced officials from the Court Registry whereby the Judge can take up regular matters.

Allowing too many interlocutory appeals is another reason for delay in disposal. Interlocutory Appeals should not be kept pending on the Court file unnecessarily. They should be disposed of well before the trial starts. There need not be separate arguments in Interlocutory Application and Civil Miscellaneous Appeal. Writing small and effective orders saves time. Written submissions should be asked to be submitted to both the Court and opponents even before the trial starts. In the event the matter is likely to take a day or more, no other case should be listed but the Court may consider having a caution list/alternative list in the case of delay occurring due to eventualities. Awarding costs to the parties and especially to the witnesses must be implemented mandatorily.

Target Fixation in the Disposal of Cases

Let me give an example of the vision in the most concrete manner

as possible: *Every case which has been filed in a court with original jurisdiction must be disposed off within eighteen months and in a Court with appellate jurisdiction within twelve months.* If that is the end goal, we require a clear strategy that is able to achieve such a goal.

That strategy should be based on two foundations: (1) setting a target regarding the number of cases, and (2) setting the target based on time limits. One should understand that target fixing should be based on the realistic assessment of the average complexity of cases before the Court (to be decided based on the total number of simple, medium and complex cases as classified above), competence of the Judicial officer (based on the experience, training and aptitude of the officer etc.), and available resources (availability of computers, administrative staff etc.). Individual Targets such as one more case than usual rate of disposal by one Judge per day should be set up. This would be possible only with better infrastructural facilities in place. Thus, with 14,000 judicial officers and 250 working days in a year, the cases that can be solved are enormous in number. Besides the system of the individual targets, institutional targets can also be fixed; for instance, every Sessions Court can set a target of disposing 250 cases in matters of criminal appeal, revision, bail or other miscellaneous petitions.⁴² In case of failure to reach the target, reasons should be provided.

Such target fixation may be on a realistic basis taking into consideration all the relevant factors and ground realities. Target fixation should also include a system fixing *time limit* for each and every stage from filing till disposition, for example: pleadings, interrogations, discoveries, witness examination, arguments and time taken for delivering the judgment etc. This should take into consideration the complexity of the case and the relief sought.

Methods like creating a monitoring record for the entire case, setting dead lines not only for the entire case but also in every stage, setting trial dates and adjustment of calendar etc. should be followed for target fixation. But, to achieve the above said goals of case management and

⁴² For the model Target Fixation and Time Scheduling Rules see American Bar Association Standards, 1985. Judiciary in the District of Columbia has framed Case management Rules that are to be followed by the Bar and the Court. But, while drafting such Rules one should take care that the socio-economic conditions of a particular society are taken into consideration.

targets necessary adjustment should be made in the internal management.

The major problem faced by Judiciary is inequitable distribution of the litigation and resources. Heavy case-load with a large number of judicial vacancies, large accumulation of either simple cases or complex cases in certain courts etc., has become the order of the day. To come to facts and figures – it is determined that in India there are only 10.5 Judges per million population, as compared to 75.2 Judges per million in Canada or 107 Judges per million in the United States. This means that a heavy burden on the judiciary exists; a load that can be gauged by the fact that in the Delhi High Court alone, almost eighty-five cases are instituted per Judge per month. In terms of vacancies studies reveal that, as on 30.11.04 there was a vacancy of nearly 26.02% in the District Courts in the country. The high rate of vacancy, which incidentally had touched almost 40% in 2001, translates into greater pressure on existing Judges, lesser disposal of cases, and hence dissatisfied litigants.

To arrest this alarming chain of events, an equitable distribution of resources and litigation burden should be developed in such a manner as to enable the courts to shift the more complex cases from burdened courts to courts dealing with simple cases. In a situation where this may not be possible due to jurisdictional restraints, judicial resources can be distributed based on the burden of litigation. The jurisdiction of civil courts should be extended so that in situations of docket explosion civil judges shall be empowered to deal with criminal cases. The High Courts and the District Judges should make continuous monitoring in this behalf.⁴³ What is needed is prevention of this lopsided growth in the arrears pattern by attacking the problem at the base of the pyramid.

CONCLUDING REMARKS

In prologue, permit me to make certain observations on access to justice that often escapes us. Foremost is the aspect of delay. It would not be untrue to state that besides the misuse of laws by the lawyers and

⁴³ Care should be taken with regard to the equitable distribution of other administrative staff along with the judicial officers. The administrative staff should also be distributed according to the work load and complexity of cases. For eg., the number of registry employees attached to a Judge of Delhi High Court is fourteen, whereas with regard to the judicial officer in the lower courts where there is heavy workload the number of employees attached is only seven.

the need for amending the stringent laws; one of the primary reasons for the accumulation of huge backlog is the non-use of even the existing procedural laws which may prove helpful in court management. There is, of course, no single remedy for this problem. The solution has to be multi-pronged, consistent and applied uninterruptedly for a number of years as part of a comprehensive programme.

Secondly, emphasis should be laid again on the need for training judicial officers. In this respect, the decision in *All India Judges Association v. Union of India*,⁴⁴ where the Supreme Court laid emphasis on the training to be imparted to the judicial officers, is crucial. The objective behind judicial training is to develop skills, knowledge, work culture and attitude in a judicial officer with a view to improve the quality and quantity of the output. Training the Judicial officers and Court staff in this context gains prime importance. As only a fraction of the litigants alone can afford reaching the appellate court, the justice delivery to the poor and vulnerable must be improved at the trial level. Thus, the training in court management techniques and legal and technological issues to the subordinate judiciary carries great emphasis. Updating of legal knowledge on new laws and their implications, including issues relating to IPR, cyber laws, and international trade law, the use of the latest technologies for better administration, utilization of the existing infrastructure for case management and other management practices etc. are to find place in the curriculum. Training should be imparted at the beginning of the judicial career and at every level of promotion. Training should also be made compulsory for the Judges in the Appellate Court. It is even urged that the training should be graded and the performance therein should be considered for promotions. The emphasis of training should be the fixing of targets in such a way that justice is not lost in the process of emphasizing quick justice. We must constantly remind ourselves that it is our solemn duty to learn our trade, to discover if things are better done in other countries, and to fight for the removal of blemishes from our own system of justice.

Thirdly, there is the issue of providing access to justice to those who reside in such areas that are not accessible even physically. Such people, in most cases are the rural folk and the tribals, residing in far-flung regions of Jharkhand, Uttaranchal, the North-East and such other

⁴⁴ (1993) 4 SCC 288.

regions wherein access to potable water or sufficient food itself is difficult, let alone access to justice dispensation mechanisms. It is therefore of utmost concern that strategies and programmes be developed by the judiciary and the administration to provide them relief in a manner that compares with those in more favoured situations.

Finally, we need to deliberate on the methodologies to be adopted for encouraging justice dispensation through the traditional forum of Panchayats. This age-old institution has found new vigour with the introduction of the 73rd Amendment to the Constitution, and must accordingly be considered as another pillar in the edifice that symbolizes justice. Strengthening the institution of Panchayats and empowering people at the grass-roots level to resolve their disputes amicably would solve many of the problems that are faced by conventional justice dispensation machinery in its attempt to percolate to the lowest levels. This institution is also perhaps the solution to the problem of access to justice identified with those people living in remote regions who are cut-off from the civilized world.

We have to prepare for the future. Let there be access to justice for all irrespective of their stature, caste, creed, or religion. Let equality as enshrined in our Constitution be enforced in the judicial sphere in letter and spirit.

LAW AND JUDICIAL SYSTEM FOR NEXT SOCIETY

Justice M.N. Venkatachaliah*

I. VISION OF THE NEXT SOCIETY

A. Demography and Polity of the Future Society

India it is rightly said, lives concurrently in several centuries. The mindsets of some place them in the medieval period. Those who believe in the *brave new world* share the thoughts and stimulus of the current century in the western world. According to some, the mid-point in the developmental history in the last 2,000 years is not the end of the first millennium but 1900, that is, the development of the last 100 years of the second millennium far outweighs those of the earlier 1900 years. Similarly, it is said that the mid-point of the twentieth century is not the end of the first fifty years but the end of ninety years. That is, the development of the last ten years far outweighs the development of the first ninety years.

Today the world is disparate. The top one-fifth of the world's rich has 86% of the world's GDP and controls 82% of the world's export markets. The bottom quintile has just 1% of both. Professor Jeffry Sachs in his article in the Economist titled *New Map of the World* says:

[T]oday's world is not divided by ideology but by technology. A small part of the globe, accounting for about 15% of the world's population, provides nearly all of the world's technology innovations. A second part, involving half of the world's population, is able to adopt these technologies in production and consumption. The remaining part, covering

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around a third of the world's population is technologically disconnected.

Today the largest single export from the United States of America is not aeroplanes or computers. They are entertainment material. The area of change is in the social impact of the technology and information revolution and emergence of internet and e-commerce. Elimination of distance began with the rail road expansion in the nineteenth century. According to Prof. Drucker:

The first ones to see the importance were the Rothschilds, who built the first long distance line from Vienna to Prague. And when the Austrian Chancellor went to the Emperor, who hated Rothschilds but had to give his consent to the plan, the Emperor just laughed and said 'Thank God, at last they're going to lose their shirt. We already have a stage coach that goes from Vienna to Prague three times a week, and it is always empty.' That railroad was sold out from day one.

World has come even closer with faster transport and communications. But the internet and e-commerce is revolutionary in its impact on the future course of industrial civilization. Professor Drucker observes:¹

It is something that practically no one foresaw or, indeed, even talked about ten or fifteen years ago: e-commerce - that is, the explosive emergence of the internet as a major, perhaps eventually *the* major, worldwide distribution channel for goods, for services, and, surprisingly, for managerial and professional jobs. This is profoundly changing economies, markets, and industry structure; products and services and their flow; consumer segmentation, consumer values and consumer behavior; jobs and labour markets. But the impact may be even greater on societies and politics and, above all on the way we see the world and ourselves in it.

B. Economy, Science and Technology

The Asian Edition of *BUSINESS WEEK* states that, "by some estimates, there are more Information Technologists in Bangalore (1,50,000) than

¹ See *Managing in the Next Society* 3.

the Silicon Valley (1,20,000)” and that “India’s ‘brain power’ is already reshaping corporate America.”² There is a virtual euphoria about the prospects of Indian economic growth in the coming two decades. The extrapolations suggest that while the present GDP of half a trillion will explode into fifteen trillion - that is - a surge of thirty times - in the next decade. It is also estimated that the exports of IT related services which are currently about three billion U.S. dollars will, in the next five years grow into 24 billion U.S. Dollars. The number of graduates with college degrees in engineering will rise from current 2,60,000 to 5,50, 000 in just seven years.

It is said if India can turn into a fast-growth economy, “it will be the first developing nation that has used its brainpower, not natural resources or the raw muscle of factory labour, as the catalyst” - not a small compliment. In comparative terms, China has shown greater potential for growth. It started opening up its economy in 1979 whereas India did so only in the earlier nineties. China has seen growth of an average of 8% over the past decade. India’s has been around 6%. Infrastructure such as highways, energy etc. is superior in China. The foreign investment in China is about fifty billion U.S. dollars and in India it is about four billion U.S. dollars. China’s export was about 266 Billion U.S. Dollars in 2002 and that was four times more than that of India’s. But India has its own advantages. It’s chaotic but robust democracy is one of them. The Indian population under twenty-five years of age is about 53%. One of the impressive plus points is the emergence of a culture of high profile technical and management education in India. There is an increased awareness of the need to absorb high standards that are needed to drive an internationally competitive economy.

The twenty-first century will be the most stunning century in human history. By 2040, the life expectancy of a human being will rise to a full 100 years. If I may recall it was just twenty years for an Indian in 1910; in 2000, it became eighty years for the urban female in Kerala. Several breakthrough in science and technology will bring about changes which will border on the fantastic. The thrust areas in the next decade are in Health care, Medical electronics, Oceanography, Nano-technology, Genetically modified food, Micro-robotics, Bio-technology, Energy,

² BUSINESS WEEK, Oct. 8, 2003.

Education and Space research. Similarly, spectacular breakthrough in the fields of renewable energy such as fuel cells and plasma energy will revolutionize the energy scenario.

C. Knowledge Economy and its Implications

Through out human history spectacular changes in the lifecycle of civilizations have followed in the wake of advent of new energy sources. Each such cross-over point has witnessed tremendous economic and social volatility. Employment patterns have changed, life-styles, mind set etc. We have seen this happen with the advent of steam power, with electricity, with information technology and currently with the knowledge economy.

II. JUDICIARY IN THE NEXT SOCIETY

Confucius said that it is a "curse to live in interesting times." Times ahead are not going to be merely interesting but surely exciting. Economic Development must go hand in hand with social opportunity. Health, Education, Human Dignity, Human Rights, Human Security are not the rewards of development. They are crucial to the very process of development. Amartya Sen said that these public goods are not the social outcome of economic reform but really economic outcomes of social reforms. The economic development without social opportunity will merely lead to ruthless growth which is *rootless, futureless, voiceless* and *jobless*.

Crucial to the convergence of social and economic development is the role of the legal system and the judiciary. If we fail to manage this crucial department of public institutions, we will certainly prove Confucius right.

I shall refer to four areas which need urgent attention in the judicial system. The first of course is the reformation of the criminal justice system with an emphasis on case-flow management. Second is the expeditious resolution of commercial disputes. Third is the challenges of the new Biology which will raise frontier issues in law and morality, law and ethics, law and environment. The fourth is the area of constitutional adjudication and Judicial Review.

A. Criminal Justice System

For paucity of space, I shall not refer to the substantive and procedural aspects of criminal law. I will confine my comments on the available alternative models of case-flow management by the use of "customer focussed models" and identify opportunities for a more streamlined system by the application of "Virtual Organisation" Philosophy, described as the process of application of principles of 'Supply-Chain Management' to this problem; equating the stake holders involved in the delivery of the service with the suppliers in a commercial organisation. The innovators of this system identify the 'key suppliers' in the criminal justice system supply chain - the police, the prosecutors, witnesses, defense lawyers. I had the opportunity recently to hear Michael M. Kaye and Marilyn Dyason who actually carried out the work in the Courts in U.K.³ The system with requisite changes appropriate to Indian conditions is a model which deserves consideration.

It is needless to emphasise that criminal justice system is not only the back bone of law and order but has a civilisational value and status. It is not insignificant that in several advanced countries even the impressive view of the appearance and architecture of buildings housing the criminal courts is an informed choice. They make a statement as to how important the community considers dispensation of criminal justice to orderly living. The criminal justice system is crucial to the survival of all other economic and social institutions. That area today is in a state of bad repair.

There is an increasing feeling that numerical proliferation of courts is the solution to the problems of arrears in courts. That in India judge-strength is just 10.29 per million population has become some sort of a negative slogan around which judicial reforms are built. We might have to pause here to think. Is the number of judges per - say a million population the appropriate yardstick? or should the number of judges be proportionate to the number of cases? A wag rattled his tongue uncharitably to comment that the first proposition is similar to the idea of responding to the break-out of an epidemic by opening up new grave yards. Contrary to the popular myth of excessive litigiousness in India, - use of courts in India by its people is comparatively lower. For instance,

³ *Applying Six Sigma in Public Sector*, 27 (1) QUALITY WORLD 33-35.

the annual rate of filing in India is just about 10% of that of Germany.

Many lawyers have argued that the judge strength should bear a proportion to the number of cases and not to the population. Some even say that in terms of the latter equation, India is more favourably positioned than some of the advanced countries. But the only thing that is lacking, they point out, is a proper system of case flow management and lack of appropriate auxiliary adjudicative systems and services.

B. Efficient Management of Commercial Causes

Equally indispensable is the speedy resolution of commercial causes. The present scenario of long delays deters economic and commercial activity and leads to institutional conflicts as to jurisdiction. With the growth of the economy, the adequacy of present systems to deal with arbitration, intellectual property disputes, patent actions, enforcement of commercial contracts, securitization and corporate insolvency, investor protection disputes needs to be re-assessed.

In a *Festschrift* brought out in honour of Professor A.C. Guest in 1997, the contributors explained the concept of commercial causes and discussed the adequacy of institutional machinery for dispute resolution. This is an area which needs urgent attention to prevent the increasingly undetectable instances of forum shopping and clutching at jurisdictions.

C. Challenges of New Biology: Ethical Issues and Dilemmas in Bio-medical Research and Experimentation

With the tremendous advances in medical science and technology, all branches of medicine and surgery have made tremendous progress. Indeed, some of the results of genetic re-engineering and Assisted Reproductive Techniques [hereinafter ART] border on the fantastic. The excitement started with the case of Louise Brown - the girl who became famous even before she was born-and the excitement has not abated. The frontier-line researches in ART have lead to breathtaking breakthrough into nature's hitherto safely guarded secrets. Genome mapping, Genetic recombinant engineering, ART, stem-cell research, DNA Finger Printing, human cloning etc. have opened up hitherto unimagined vistas in the practical application of the benefits of biomedical technologies for the benefit of mankind. Human fetal tissue

is used for a wide range of purposes. This idea of using fetal cells for transplants started with treatment of patients with loss of nerve cells in the brain and spinal chord. Since damaged nerve cells do not regenerate, attempts to trick neurons to repair and re-grow are yet to bear fruit. Attempts were then made to transplant neuron cells to re-establish damaged neural circuits. But the immunological complications that result, whenever any foreign tissue is transplanted into a human proved a barrier. Other potential uses of fetal tissue are the improvements in the treatment of diabetes, genetic optic nerve defects, spinal injury, Alzheimer's, acute leukemia and liver failure. Xeno-transplantation is yet another area of interesting research.

The area of special interest to gynecology is Assisted Reproduction, which is defined as "manipulating the gametes outside the body and transfer of embryos into the body." It is estimated that there are sixty to eighty million infertile couples worldwide (almost 10% of all the couples). Advent of ART has enhanced the possibility of child bearing and has made conception possible in cases where it was considered impossible earlier. ART requires enormous technological expertise and expensive equipments. They carry less than 30% success rate and tax the couples' endurance physically, economically and emotionally.

The ART presents many ethical issues and medical dilemmas. There have been legal issues - one such being the IVF mix-up, when black twins were born to a white couple after an apparent blunder at an IVF clinic. Then again if the embryo is placed in the wrong womb, the question arises "who are the real parents of the twins." It is said that IVF is used in about 27,000 cases in Britain annually. The fact is that even certain basic concepts such as 'motherhood,' 'legitimacy,' 'parentage' etc. need to be re-defined.

There are also, what some uncharitably call "court aided disasters." One such was from Oliver Wendell Holmes, the "magnificent Yankee" from Boston - 'a great judge who wrote 2,000 opinions in his long and illustrious career but signed on to the eugenics movement so enthusiastically' to uphold law of the State of Virginia, which took power to sterilize mentally defective persons. The court's decision triggered a wide sterilization move. Nearly 8,000 men and women in Virginia alone and more than 60,000 nationwide were sterilized under this move. So

much so that the Virginia legislature recently passed a resolution of apology for the incalculable damage done. A woman, Carrie Buck had challenged the Virginia Law before the U.S. Supreme Court for violation of the Fourteenth Amendment. The judge's description of the petitioner itself foretold the fate of the challenge. Justice Holmes called Carrie Buck, the petitioner, "as a feeble minded white woman who was committed to the State colony in due form. She is the daughter of a feeble minded mother in the same institution and mother of an illegitimate feeble minded child" and declared "three generations of imbeciles are enough." The principle that sustains compulsory vaccination, according to the judge was broad enough to cover cutting the fallopian tubes.

In another case, a lady sued her doctor for a failed tubectomy resulting in an unwanted child birth. An English judge was of the view that it was opposed to public policy to hold a legitimate child-birth actionable, for, the birth of a child was always a matter of joy and that at least a child should never know that his or her birth had been declared by a court to be the result of a mistake.

Another area of concern is "embryo ethics:" the question whether excess human embryos - "the frozen orphans" - should be adopted. In the process of assisting conception, doctors end up creating many embryos and what should be done to the ones which are not implanted. It is estimated that a large number of reduction procedure is carried out in the U.S. each year. The number, it is said is more than twice the number of Korean children adopted by U.S. citizens. In the famous American case of *Roe v. Wade*,⁴ very far reaching ethical issues were raised in the context of the right of abortion as part of the right to privacy claimed by a woman. The larger issues were 'when does life commence? At or after conception? Is the fetus a 'person' in law? etc. Court did not accept the Christian belief that life commenced at the very conception.

Other questions involved are "could there be damage to the embryos due to freezing?" "Ethically is it acceptable to ask people to adopt embryos when the adoptive parents cannot be told about the future health of these children? Will there be a new group of trial lawyers suing for "wrongful embryo adoption"? Who will be the target of such suits?

⁴ 410 US 113 (1973).

Surrogacy arrangements have also produced emotional and legal hassles. Another area of concern is pre-natal sex detection tests, which have contributed to the number of "missing women," upsetting the male: female ratio. Female infanticide is a particular scourge in India.

All these issues conceal a more fundamental debate. Is creation the handiwork of an all knowing Almighty? Is the world a moral order? Is the evolutionary process informed by a transcendental purpose? Is it ethical and safe to tamper with some of the fundamental framework of nature which is God's creation? On the other hand, the protagonists of the *brave new world* argue that there are only two limits on the scope of interference with Nature - Knowledge and Ability - the former in the form of Science and the latter in the form of Technology. Given these two there are, they argue, no limits on scientific experiments. This ethic neutrality will assume justiciable proportions though their adjudicative dispositions raise difficult problems.

The ultimate question is whether the judiciary is able to take on and handle with efficiency the issues that characterise the next society? What structural and functional changes that it must adopt and undergo?

D. Judicial Review

In a sense the power to nullify laws passed by the elected representatives of the people by an unelected, non-representative set of judges has its own anti-majoritarian implication. This plausible anti-majoritarian nature of judicial review is counter-balanced by judicial restraint whose chief proponent was Professor James Bradley Thayer. This philosophy of judicial restraint which was the hallmark of judges like Holmes, Cardozo, Frankfurter, Brandeis and Black was echoed in the early decisions and famous dissents of the Supreme Court.

But a more expansive statement of judicial review was expressed by Chief Justice Bhagwati:⁵

Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the

⁵ *S.P. Sampath Kumar v. Union of India* (1987) 1 SCC 124-30.

Constitution will cease to be what it is.

Justice Holmes said something different, "I do not think the United States would come to an end if we lost our power to declare an act of the Congress void."⁶

American Due Process

In distinct periods of American judicial history, the expression 'due process' acquired distinct connotations. The judges of *Lochner* era were all born before the industrial revolution. They had their own mindset. It almost tended to make the Supreme Court of United States the third house of legislature.

The turning point was indeed the effect of the appalling human conditions of the Great Depression. A learned author gives a graphic picture of those conditions:⁷

In November 1929 the bubble burst. The collapse of stock market prices measured the collapse of the entire economic structure. In the summer of 1929 the Dow Jones average for industrial stocks had been 381.17. In the summer of 1932 it was 41.22. Ninety percent of the value disappeared.

The plight of the farmers was worse. Corn was sold for seven cents a bushel, sugar for three cents per pound. Twenty-five percent of the land in Mississippi was sold at auction on the foreclosure of mortgages.

The plight of industry was no better. In the three-year period of December 31, 1930 to December 31, 1933, the gross national product fell from 194.4 to 56. Bankruptcy liquidation and reorganization were a chief business in legal profession. The average wage of the factory workers was forty cents per hour. Factory payrolls were cut in half. One of every four men available for work was unemployed. There were no labour unions, no unemployment compensation, and no social security.

⁶ O.W. HOLMES, COLLECTED LEGAL PAPERS 295-96.

⁷ ARCHIBOLD COX, COURT AND THE CONSTITUTION 144.

In one group of labourers were found clergymen, engineers, a school principal and a bank president. For factory workers the depression meant unemployment, bread lines, and soup kitchens. Municipal bankruptcies were common. The young hit the road. One young hobo was Eric Severeid, a banker's son, whose face and voice would become familiar to millions of CBS News programmes. The estimates of the number of youths who lives as tramps ran up to two million.

The judicial attitudes to the New Deal Legislations changed under circumstances which had their own dramatic overtones. That needed some one like President Roosevelt who gave a new promise of hope to the nation. He declared that "the only thing we have to fear is fear itself." The nation rallied behind him. These economic events had their own influence on judicial attitudes. Some writers even called it the demise of the "Due Process." In 1963, the U.S. Supreme Court had occasion to acknowledge these changes in judicial attitudes towards legislation:

The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for judgment of legislative bodies, who are elected to pass laws. As this court stated in a unanimous opinion in 1941, we are not concerned . . . with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to subject the State to an intolerable supervision hostile to the basic principles of our Government and beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

Those who blame the constitution for our ills seem to argue that our dismal political performance is by some constitutional compulsion. Again, Sir Alladi, set the right note. He said:

. . . it need hardly be pointed out that the proper functioning of the Constitution will to a large extent depend upon:

1. ancillary organic laws passed to implement the Constitution,
2. the utilisation of the principles of what I may style as the common law of India which has grown up under the British regime by the adoption in part of the principles of English Common Law as a matter of justice, equity and good conscience,
3. the acceptance of conventions in the working of our Constitution similar to those obtaining in other Constitutions,
4. Judicial decisions interpreting the Constitution, the Supreme Court being constituted the final arbiter of the Constitution.

Above all, it is the law-abiding spirit of the average citizen in India that I regard as the greatest asset in the proper working of the Constitution.

The constitutional adjudications therefore, have the urgent task of defining or redefining basic constitutional concepts in a changing and disparate world. Success is far more difficult to handle than failures. To ensure the most basic of all systems viz, parities of the electoral process, it is necessary judicially to define the minimal essential components of the constitutional concept of democracy and its essential concomitants, namely the electoral processes and prescribe the minimal requirements of an acceptable process. These tasks have to be accomplished, of course, with the assistance of Constitutional bodies such as the Election Commission of India. The efficacy of the ancillary laws and their plenitude to transform constitutional vision and promise to reality is justiciable within the judicial purview on the touchstone of how effective the ancillary laws are in realising the constitutional goals and transforming constitutional phrase into reality.

Out of the developed countries, about nineteen of them have a population of less than one crore and each of them has its own Parliament, Executive and Supreme Court. There is, therefore, adequate access for the citizens to these institutions. Some of the challenges of the next

society to the judicial system will be new ones - some others the old questions reappearing with renewed vigour.

Judicial policy is directed to the management of certain apparent contradictions in society. For instance: the exercise of individual freedom might, conflict with the interest of the society. This is one of the themes of the Preamble to the Constitution: the dignity of the individual on the one hand and the unity and integrity of the country on the other. Similarly, exercise of democratic power on the one hand and legal control of government on the other, pose seemingly irreconcilable problems. That is why it is said that 'judicial review has no support outside public confidence.'

When Sir Edward Coke remarked that all "causes" (should be) measured by the golden and straight met wand of the law, and not to the uncertain and crooked cord of discretion, he was referring to 'private opinion' masquerading as discretion. Unless the public law issues and judicial pronouncements are widely and carefully discussed law will not develop to serve the cause of justice.

JUDICIAL BACKLOG: STRATEGIES AND SOLUTIONS

Justice M. Jagannadha Rao*

I. JUDICIAL BACKLOG

The huge backlog in the Courts in our country has been the subject of a number of Reports, debates in Parliament and State Legislatures, in judicial conferences and the media. While the Supreme Court has been able to bring down its pendency to a little more than 20,000, the position in the High Courts and in the Subordinate Courts is not satisfactory and requires serious consideration.

A. The Disposals Never Get Publicity – Strategies for Clearing Backlog Necessary

It is rather unfortunate that every time the figures about backlog are referred to, namely that around thirty-five lakh cases are pending in the High Courts and about two crores in the Subordinate Courts, no reference is made to the number of fresh cases filed each year nor to the number of cases disposed of by these courts every year.

Available statistics culled out from various official Reports show that, in the High Courts, on an average, around fifteen lakh cases (around nine lakh main cases and six lakh miscellaneous cases) are disposed of annually. In the subordinate courts, around 1.35 crores of cases are disposed of every year. The backlog of thirty-five lakhs of cases in the High Courts and two crores in the subordinate courts is the result of the excess cases filed each year over the cases disposed of. It is also important to notice that the official figures of about thirty-five lakh cases pending in the High Courts include miscellaneous petitions also.

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If any comprehensive plan for clearing the backlog is to be prepared, it would be necessary to keep in view two separate strategies, one for clearing the existing backlog and another for the annual additions to the backlog, something like the following:

- a. So far as the backlog in the Subordinate Courts is concerned, additional courts must be created and additional judicial officers must be appointed – to remain for a period of five years or more, till the backlog is cleared.
- b. So far as the backlog in the High Courts is concerned, additional number of ad hoc judges under Article 224-A of the Constitution must be appointed to remain for a period of five years or more, till the backlog is cleared.
- c. So far as the current annual excess addition of cases in the Subordinate Courts is concerned, courts must be created on a permanent basis to clear the additional workload.
- d. So far as the current annual excess addition of cases in the High Courts is concerned, the strength of the High Court has to be increased, depending upon the extent of additions last year.

B. Subordinate Courts – Backlog and Disposals

Statistics are available from the Tables set out by the Justice Jagannath Shetty Commission (First National Judicial Pay Commission, 1999); Indian Law Institute Project Reports and Annual Reports of the Ministry of Law and Justice and articles published in various journals/newspapers. For Subordinate Courts, available figures are as follows:

(SUBORDINATE COURTS) CIVIL & CRIMINAL

Year	Filing	Disposal	Pendency
2000	1,48,50,713	1,36,62,203	2,04,06,476
2001	1,42,04,341	1,31,03,274	2,13,41,570
2002	1,45,73,509	1,30,33,059	2,19,30,561
2003	1,23,74,620	1,17,65,773	2,19,84,683

CIVIL

Year	Filing	Disposal	Pendency
2000	37,30,152	36,17,017	68,72,253
2001	38,41,634	36,93,184	69,72,670
2002	41,13,935	34,68,402	67,34,446
2003	29,16,007	29,25,164	63,50,454

CRIMINAL

Year	Filing	Disposal	Pendency
2000	1,11,20,551	1,00,45,176	1,35,34,223
2001	1,03,65,787	94,10,088	1,43,68,940
2002	1,04,59,574	95,64,657	1,51,96,115
2003	94,58,613	88,40,609	1,46,34,229

Note : Figures for 2003, in all columns, are a little less than in previous years because of lack of data from a few States.

From the figures furnished by the Dept. of Justice, Govt. of India, for 2000, 2001, 2002 and 2003, the following conclusions can be drawn:

- So far as the filing of cases (civil and criminal), they are about 1.45 crores and disposals are about 1.30 crores each year, but the backlog still remains at about 2.19 crores. This means that while the old cases do get disposed of up to about 1.30 crores every year (civil and criminal), the fresh filings of about 1.45 crores leaves a backlog again of about 2.19 crores. The excess filings each year over disposals are about twelve to fifteen lakhs every year. This is how the backlog was formed and it is likely to increase.
- If the average per judicial officer is about 1,150, we can work out how many judicial officers are necessary to meet the annual excess of about twelve to fifteen lakhs. If the continuing backlog is about two crores, then we can work out how many judicial officers are necessary to clear the backlog.

- In these four years, 2000 to 2003, so far as pendency of civil cases is concerned, the figure stands at about sixty-three to sixty-five lakhs while the pendency of criminal cases stand at about 1.35 to 1.50 crores every year. This means that the criminal cases require greater attention.
- The excess filings each year over disposals, in civil cases, are on an average about one to two lakhs while the excess filings each year over disposals, in criminal cases is about nine to ten lakhs.
- This means that, for the purpose of tackling the year by year increases, we need *five times* the number of new Criminal Courts as compared to new Civil Courts.
- If the continuing backlog of civil cases is about sixty-eight to seventy lakhs and that of criminal cases is about 1.50 crores, we require about *double* the number of judicial officers to clear the backlog of criminal cases than those required to clear the civil cases.
- A *separate* computation of requirement of Judicial officers can be made-
 - (a) to clear year by year excess filings over disposals; and
 - (b) to clear the continuing backlog of cases.

Thus, it can be seen that cases have increased faster than the increase in the number of judicial officers. For instance, the increase in cases between 1985 and 2003 is 84% while the increase in judicial officers during the same period (from 9,232 to 13,000) has been only 40%.

C. High Courts (Including Miscellaneous Matters)

Year	Backlog	Filings	Disposals
1993	20 lakhs		
1998	32 lakhs	14.95 lakhs	13.65 lakhs
1999	32 lakhs	13.68 lakhs	15.32 lakhs

In the High Courts, the backlog is increasing by about two lakhs each year (including miscellaneous matters). This is the position notwithstanding disposal of about fifteen lakhs cases by the High Courts.

D. Average Disposal Rates in High Courts and Subordinate Courts

The average disposal per High Court Judge is at 1,500 (final matters) per year or about 2,300 main and miscellaneous matters. The average for a judicial officer in the Subordinate Courts is 1,150 cases per year.

E. Fast Track Courts

Fast Track Courts

1,734 Fast Track Courts have so far been established while those notified is about 1,366. The disposal figures for the period between 2000 and 2003 are 3.70 lakhs.

It is to be noted that the above mentioned 1,734 Fast Track Courts has been established at a cost of 502.90 crores (about 1,370 have started functioning). These Courts are to continue for five years up to 2005. They have disposed of some of the older criminal cases, of 3.70 lakhs during 2000-2003. These courts must be made permanent.

The method of filling up the posts in the Fast Track Courts with *retired* District Judges appears to be not satisfactory. The officers should be members of the regular judicial service of the State judiciary and after such posting the consequential vacancies of District Judges can be filled by promotion. Recruitment can be made at the lowest level. All Judges must be from the regular cadre, amenable to the disciplinary control of the High Court under Article 235.

F. Need to Appoint Ad Hoc Judges in Certain High Courts under Article 224-A to Clear Backlog in Respect of Criminal Appeals

There are some High Courts in which Criminal Appeals of the year 1984 or there about, are still pending. In some other High Courts, criminal appeals are pending for more than five years. On account of the long pendency of these criminal appeals in the High Courts, a certain practice has grown of releasing the convicts on bail if the appeal has been pending for three years or more. Likewise, in the Sessions Courts,

if the trial is not taken up for several years, accused who are under-trials are let out on bail. While it is true that an accused cannot be incarcerated for long number of years pending the criminal proceedings, a permanent solution has to be found so that such practices can be stopped.

The number of under-trials in jails is about two lakhs and accounts for 70% of those detained and the State Governments are spending around Rs.400 crores per annum on them. In such circumstances, a plan should be adopted for appointing ad hoc Judges under Article 224-A of the Constitution to clear the backlog of old criminal appeals and bring all High Courts to a stage where criminal appeals are pending for not more than two years. Under Article 224-A, retired Judges from other High Courts can also be appointed. The procedure for appointment is simpler than the procedure under Article 217.

II. DISPOSAL OF CRIMINAL CASES BY THE SUBORDINATE JUDICIARY (2000-2001)

The Report of the National Crime Records Bureau for 2000 shows that there were 60.23 lakh Indian Penal Code [hereinafter IPC] cases pending and disposals were 9.33 lakhs. Other non-IPC cases (i.e. under special and local laws) were 67.17 lakhs and disposals were 25.18 lakhs. According to the Report for 2001 of the same Bureau the number of IPC cases pending were 62.21 lakhs and the disposals were 9.31 lakhs. The number of non-IPC cases pending was 70.44 lakhs and the disposals were 26.60 lakhs. In fact, about 35 lakh criminal cases per year were disposed off by the subordinate courts during 2000 and 2001 out of an annual disposal of about 1.30 crores.

III. THE RATE OF CONVICTION (2000-2001)

The common belief is that the percentage of convictions in India is around 6%. This is not correct. According to CRIME IN INDIA, 2000, the average conviction rate works out at 41.8% for IPC cases¹ and the average conviction rates with regard to offences under special and local laws is about 81.4%.² The Bureau's statistics for the year 2001, points

¹ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA, 2000, 180-81.

² *Id.* at 185-86.

out that the average percentage of convictions in IPC cases is 40.8%³ and for other cases it is 80%.⁴

IV. NEED TO INCREASE THE NUMBER OF COURTS

A. Proposals by the Law Commission

The Law Commission, in its 120th Report, 1987 stated that the number of judges per million population in India was 10.5 (which is now said to have gone up to something between 12% and 13%), whereas there are, per million, 41.6 Judges in Australia, 75.2 in Canada, 50.9 in England and 107 in USA. The argument that the requirement of the number of courts is not to be assessed on the basis of population is not correct. Population is certainly one of the most important factors to be kept in mind for the purpose of finding out permanent solution to the problem.

B. Directions by the Supreme Court

The Supreme Court in *All India Judges Association v. Union of India*,⁵ has stated that the number of courts per million which stands at 10.5 (or at 13) should be increased to fifty per million in a phased manner within five years. In the light of this directive, if there are 13,000 subordinate courts and around 700 High Court judges – in all 13,700 catering to a population of 1,000 million (or 100 crores), the average comes to about 8% and not 10.5 or 13%. If this percentage has to be raised to fifty per million, we should have 50,000 judges in the subordinate courts rather than 13,700. This is not possible. At any rate, the number has to be increased year after year, over a period of five years. But some effort must be made to reach a figure of 25,000 or 30,000 in the next five years. It is not clear what action has been taken or is proposed to be taken by the Central and State Governments to conform to this directive.

C. A Broad Proposal to Increase Courts

Estimate of Required Number of Courts to Clear Backlog

³ Table 22A.

⁴ Table 25A.

⁵ 2002 (4) SCC 247.

(i) High Courts

In the High Courts, the annual institution is about fifteen lakhs (including miscellaneous matters) but there is a backlog of thirty-five lakhs (including miscellaneous matters) and the number of High Court Judges now in office is unable to dispose of even the current annual institutions of fresh cases. In the last ten years, the backlog in High Courts has increased from twenty lakhs to thirty-five lakhs, half of which are more than three years old.

The average disposal for a High Court Judge is 1,500 (final matters) or 2,300 (including miscellaneous matters). Taking into account the backlog of thirty-five lakhs in the High Court and the extra increase of about two lakhs every year, the requirement of judges should be worked out mathematically. Current annual filing of about fifteen lakh requires 640 judges at 2,300 cases per High Court judge (main and miscellaneous). The backlog of thirty-five lakhs (main and miscellaneous) requires an extra 1,480 High Court Judges (other than the above 640 Judges). For disposal in one year but if it is spread out over five years, we require about 300 extra High Court Judges who can, once for all, finish the arrears. This figure is apart from the present strength.

So far as High Courts with huge backlog such as Allahabad, Madras, Kerala, Calcutta, Bombay, Punjab and Haryana, separate strategies for strengthening the number of Judges, has to be worked out.

(ii) Subordinate Courts

In the light of the directive of the Supreme Court in *All India Judges Case*,⁶ that the number which is at 13,000 should be increased in such a manner that 10.5 judges per million population becomes fifty judges per million, it is necessary to increase the number of judges from 13,000 to about 65,000. This is well-nigh impossible having regard to the finances available. But at least over the next five years, efforts should be made to reach a target of 30,000 Subordinate Courts having regard to the fact that each year around 1.75 crore cases are filed in the Subordinate Courts.

⁶ *Id.*

Estimate of Funds Required to Clear Backlog

- (i) If the fixed investment for setting up a new courtroom in the High Court is around Rs.1 crore and the annual running expense is around Rs.50,000 it would require Rs.300 crores of fixed investment and Rs.175 crores of annual expenditure for five years, for the appointment of 300 High Court Judges to clear the backlog.
- (ii) In the subordinate courts, the total requirement of funds for additional courts for clearing the backlog would require a one-time investment of Rs.1800 crores and an annual expenditure of Rs.700 crores.
- (iii) In all, for the High Courts and Subordinate Courts, the total investment for clearing the backlog would be around Rs.2,100 crores and the running annual expenditure will be about Rs.875 crores per annum, for five years.⁷

V. FIVE YEAR PLANS AND THE JUDICIARY

A. The Proposal of the Law Commission, 1988

In its 125th Report, the then Chairman, Sri. D.A. Desai, observed that, "it is time to frankly annihilate a myth that expenditure on administration of justice is non-plan expenditure . . . One can say with confidence that expenditure on administration of justice must be now treated as plan expenditure."⁸ Thus, the Commission has stressed on the need to bring the judiciary under the Plan.

B. Statement of Government in Supreme Court in 1993 that Judiciary has been included in Plan

It was in 1993, in the *Second All India Judges Case*,⁹ that the Government of India clearly accepted that expense on judicial administration is a Plan subject. In this judgment, Sawant J. observed, "[w]e now understand that judiciary has been included as a plan subject

⁷ See also Surendranath, THE HINDU, July 22, 2003; FINANCIAL EXPRESS, June 9, 2003.

⁸ 128 LAW COMMISSION OF INDIA REPORT, THE SUPREME COURT- A FRESH LOOK 21 (1988).

⁹ 1993 (4) SCC 288.

by the Planning Commission.”¹⁰ He further stated that the plea of financial stringency should not come in the way of granting funds to the judiciary and for upholding the rule of law. To quote, “[t]he alleged financial burden that would be thrown on the State exchequer on account of . . . is *negligible*, considering the enormous advantage that the administration of justice and society derive.”

So did Ranganath Misra, C.J., say in the *First All India Judges Case*, “[t]he efficient functioning of the Rule of law under the aegis of which our democratic society can thrive, requires an efficient, strong and enlightened judiciary. And to have it that way, *the nation has to pay a price*.”¹¹

C. Court-Fees to be Spent on Judiciary

In the *First All India Judges Case*, the Supreme Court also gave directions that all court-fees that are collected must be made available for the courts expenditure. It appears that, in the figures available with the Government of India, the amount collected by the States/Union Territories under the head of ‘Court-fee’ is mixed with other collections as to ‘taxes’ and the exact figure as to the extent of court-fees collected by the States, is not available. It is also not clear if the States are allocating the court-fee collections for the purpose of justice administration.

D. Provision by the Planning Commission and the Centrally Sponsored Scheme (1993-94)

Instead of providing an unconditional method of offering financial support to judicial administration, the Central Government came forward in 1993-94 with a centrally sponsored scheme under which funds are released only for infrastructure (not for recurring expenditure or maintenance), and that too, provided the State Governments provide a matching grant.

*The Centrally Sponsored Scheme, 1993*¹²

Referring to the said scheme, the Annual Report of the Ministry of

¹⁰ *Id.* at 310.

¹¹ 1992 (1) SCC 109.

¹² See Chapter III, Part ‘C’, *Plan Funds for the Judiciary* in MINISTRY OF LAW AND JUSTICE, GOVT. OF INDIA, ANNUAL REPORT 2003-2004.

Law and Justice, 2003-2004 states as follows:

A Centrally Sponsored Scheme relating to development of infrastructure facilities for the judiciary is being implemented by the Department of Justice from the year 1993-94. The Scheme is being implemented with a view to augment the resources of the State Governments/UT Administrations. The Scheme includes construction of court buildings and residential accommodation for Judges/Judicial officers covering High Courts and Subordinate Courts. The expenditure under the Scheme is *shared* by the Central and State Governments on 50:50 basis. *The Central share is restricted to funds made available by the Planning Commission.* The State Governments are required to provide matching share equivalent to the amount released as Central Share.

The above statement shows that the central allocation is limited to the allocation made by the Planning Commission. The grant is also conditional on the States coming forward with an equal 100% allocation. The Report further states that from 1993 to 2002-2003, an amount of Rs.559.73 crores has been released to various States/UTs and the States/UTs have provided Rs.1,162 crores on various works under the Scheme till Dec. 2003. (Some States have been unable to provide the matching grant).

Meagre Plan Allocations in the Ninth & Tenth Plans

During the *Eighth Plan* (1992-97), the Centre spent Rs.110 crores on improving infrastructure, such as constructing court rooms. In the *Ninth Plan* (1997-2002) the Centre released Rs.385 crores. This was 0.071% of the Centre's Ninth Plan expenditure of Rs.5,41,207 crores. During the Tenth Plan (2002-2007), the allocation is Rs.700 crores, which is 0.078% of the total Plan outlay of Rs.8,93,183 crores.

These meagre allocations of 0.071% and 0.078% by the Planning Commission in the 9th and 10th Plans respectively, coupled with the formulation of a centrally sponsored scheme with a condition that the utilization of the Central Grant is permissible only if a matching grant is provided by the States, is very unfortunate. When the Government undertook before the Supreme Court in the year 2002 that it had included

judiciary in the Plan expenditure, it was not expected that the Planning Commission would make such meagre allocations coupled with the formulation of a centrally sponsored scheme which makes the utilization of the Central Grant conditional upon a matching grant being provided by the States.

A provision which is less than 1/10th percent of the Total Plan outlay makes one feel that the allocation of such an insignificant percentage *amounts to making no provision at all*, worth mentioning, in the context of the grave need to establish more courts and immense pressure on Courts and public criticism as to the heavy backlog.¹³

VI. NEED TO INTRODUCE JUDICIAL IMPACT ASSESSMENT AND FINANCIAL MEMORANDUM TO BILLS

Another important problem concerning court arrears and budgets is that there is no 'judicial impact assessment' being made while introducing any legislation in Parliament or the State Legislatures.

A. Articles 117 (3) & 207 (3)

Under Articles 117 (3) and 207 (3) of the Constitution, a Bill must contain the expenditure to be incurred from the Consolidated Fund of India, for the purpose of recommendation by the President or Governor, as the case may be. The rationale of this requirement is that the President must know beforehand, the additional financial burden which will be imposed upon the exchequer by virtue of the proposed enactment.

B. Rules of Procedure and Practice of Business: Financial Memorandum

In addition to these constitutional safeguards, under the respective Rules of Procedure and Practice of Business in the House of People and the Council of States (and in the State legislatures), every Bill is to be accompanied by a Financial Memorandum which spells out in detail the recurring and non-recurring expenditure which is likely to be incurred from the Consolidated Fund of India if the Bill is enacted into a law. If no expenditure is involved from the Consolidated Fund of India, there is no need for a Financial Memorandum to accompany the Bill. Because

¹³ See Surendranath, *supra* note 7.

of this, where expenses are to be borne by the State Governments due to litigation which is likely to arise by virtue of some provisions of Parliamentary enactment, such as, where new offences (or rights) are created by Parliamentary legislation, such instances escape the attention of the law makers since they are not shown as expenses to be incurred out of the Consolidated Fund of India. Where a recommendation of the President is sought under Article 117 (3) and a Financial Memorandum is attached to the Bill, so far as the likely increase in the workload of the Subordinate Courts is concerned, that is not reflected in the Financial Memorandum and hence the expenditure necessary for the Courts is not given due importance by the Ministries sponsoring the central legislation. The increase in the expenditure for Subordinate Courts located in the States on account of Parliamentary legislation must also be stated in the Financial Memorandum attached to Bills introduced in Parliament.

Again, under Article 207 (3), a similar legal position prevails with respect to Bills introduced in the State Legislatures. The Financial Memorandum attached to Bills introduced in the State Legislatures must also reflect the likely expense on the Consolidated Fund of the State for Courts.

Where any authority or agency is created under any proposed legislation, or any additional workload of civil cases or criminal cases are likely to be added to the burden of that authority or agency, the expenses for its establishment and maintenance must be provided for in the budget of the sponsoring Ministry.¹⁴

C. Judicial Impact Assessment in U.S.A.

In the U.S.A., Warren Burger, Chief Justice of the U.S. Supreme Court emphasised the need for judicial impact assessment to be made in regard to each Bill and for adequate budgetary support being provided. This, he stated in 1972, in his address on the State of the Judiciary. Thereafter, Congress passed the Congressional Budget Act, 1974 and established the Congressional Budget Office to estimate the budgetary impact of legislative proposals with a view to assessing whether the proposed legislation is likely to increase or decrease or has no affect on

¹⁴ See T.K. Viswanathan, *Judicial Arrears*, THE HINDU, Nov. 20, 2002.

the burden of the Courts. In a related development, the National Academy of Sciences established the National Research Council for the purposes of estimating the changes in workload that the Courts would experience with the adoption of new legislation. In 1990, the Federal Courts Study Committee, created by the Congress through the Federal Courts Study Act, 1988 recommended that an office of Judicial Impact Assessment be created in the judicial branch. The American Bar Association passed a resolution in 1991 calling upon the U.S. Congress to mandate, by legislation, the preparation of Judicial System Impact Assessments to be attached to each Bill or Resolution that affects the operation of the State or Federal Courts; and also to establish a mechanism within its budgetary process to prepare Judicial System Impact Statements determining the probable costs and affects of each Bill or Resolution that has an identifiable and measurable effect in the dockets, workload, efficiency, staff and personal requirements, operating resources and currently existing material resources of appellate, trial and administrative law courts. In 1992, the Wisconsin Judicial Conference Resolution cited the overpowering need for the legislature to recognize the workload burdens being placed on the judiciary when passing legislations and endorsed the creation of Judicial Impact Statements by the State Legislatures to measure and expose the effect of legislation on the judiciary.¹⁵

VII. IMPACT OF THE 340 PARLIAMENTARY LAWS ON THE COURTS
ESTABLISHED BY THE STATE GOVERNMENTS, WITHOUT
ADEQUATE FINANCIAL ASSISTANCE BY THE UNION GOVERNMENT

A. Shetty Commission Report, 1999

Several statutes like the Indian Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, the Transfer of Property Act, the Contract Act, the Sale of Goods Act, the Negotiable Instruments Act etc. which contribute to more than 50% to 60% of the litigation in the trial courts are Central enactments referable to List I or List III and these laws are administered by the Courts established by the State Governments. The number of Central laws which create rights and offences to be adjudicated in the subordinate Courts are about 340.¹⁶ It

¹⁵ *Id.*

¹⁶ See Recommendation 151 in Appendix 13. III FIRST NATIONAL JUDICIAL PAY COMMISSION REPORT 46 (1999).

is obvious that the Central Government must establish Courts at the trial level and appellate level and make budgetary allocation to the States to establish these courts to cut down backlog of cases arising out of these central statutes. The Central Government must estimate and pay for their recurring and non-recurring expenditure of the State Courts to the extent the Courts spend time to adjudicate disputes arising out of central statutes. The obligation is a joint and several one, and there is no logic in coming forward with a conditional scheme.

B. Supreme Court Directive (2002) to Central Government

The obligation of the Central Government has been declared by the Supreme Court, in *All India Judges Assn. v. Union of India*.¹⁷ The Court stated that while the States should mobilize resources to meet the expenditure of the Courts, "(if) any need arises, and the States approach the *Finance Commission* or the *Union of India* for allocation of more funds, *there is no doubt that such a request shall be favourably considered.*"

In view of the clear observations made above by the Supreme Court, it will be necessary for the Union Government to make adequate provision or make grants to the States for the expenditure on the judicial administration, in the light of the fact that more than 340 Central legislations creating rights and offences, are being administered by the Subordinate Courts established by the States. The Union Government has an independent obligation and it should not insist on matching grants by the States.

C. Entry 11A of Schedule VII of the Constitution Require Central Government to Pay for Establishment and Maintenance of Subordinate Courts

The provisions of Entry 11A of Schedule VII of the Constitution assume utmost importance in the context of the question whether the Central Government should take greater responsibility for the disposal of cases in the subordinate courts. By the 42nd Amendment, Entry 11A was introduced in List III and the subject of 'Administration of Justice: Constitution and Organisation of *all Courts*, except the Supreme Court

¹⁷ 2002 (4) SCC 247.

and the High Courts' has been brought under the Concurrent List (List III). This subject of 'administration of justice etc.' was previously in Entry 3 of the State List, (List II) and that Entry has been dropped from the State List by the 42nd Amendment.

In view of the altered situation, it is clear and, in fact, it appears to have been accepted by the Union Government that it is also obliged to make separate financial provision. That is indeed how the centrally sponsored scheme came into being in 1992-93. But, that scheme, as pointed out above, is wholly insufficient.

D. Article 247: Central Government to Establish Additional Subordinate Courts to Administer Parliamentary Laws

Article 247 of the Constitution enables Union Government to establish Courts and appears to have so far not been resorted to by the Union Government so far as the creation of trial courts located in the States. This Article states, "[n]otwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any *additional courts* for the better *administration of laws made by Parliament* or of any existing law with respect to a matter enumerated in the Union List."

The Article is specially intended to establish courts to enable Parliamentary laws, whether in List I or List III to be adjudicated by the subordinate courts where the judicial officers are part of the State Judicial Service and are under the control of the State High Court. That is the reason for the non-obstante clause.

Once the legislative power of the Parliament extends to making Parliamentary laws for the establishment of additional Courts for the better administration of laws made by Parliament, then its executive power also extends to that subject matter. Article 247 also makes it clear that it is the obligation of the Central Government to establish Subordinate Courts to administer the laws made by Parliament under List I and List III.

Thus, it is submitted that the Union Government should make adequate provision for the recurring and non-recurring expenditure on Courts to cover the expense of justice administration involving more than 340 Central laws on subjects in List I and List III as these account

for about 70% of the trial Court litigation. The concept of a centrally sponsored scheme for conditional matching grants appears to be out of tune with the requirements of the Constitution.

VIII. ALTERNATIVE DISPUTE RESOLUTION AND SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908

The resolution of disputes by alternative methods of dispute resolution has come to stay in all countries. In our country, the Lok Adalat system of adjudication by bringing about a consensus between the parties, has disposed of millions of cases. Otherwise, these cases would have had to go for adjudication before the Courts.

A. Section 89 of the Code of Civil Procedure

With a view to mandate ADRs, Section 89 was introduced into the Code of Civil Procedure with effect from July 1st, 2000, consequent to the recommendations of the Arrears Committee Report of Justice Malimath and the recommendations of the earlier Conference of Chief Justice and Chief Ministers. This Section requires that, as soon as pleadings are completed, the Court must require the parties to consider adopting one or the other methods of ADR, namely, arbitration, conciliation, mediation or Lok Adalats. The Code has not prescribed any procedure for this purpose and further, as far as mediation is concerned, Section 89 states that the mediation shall be as per Rules which are to be 'prescribed.' This Section, therefore, requires ADR Rules and Mediation Rules to be prescribed.

B. Recommendations of Committee for Draft ADR and Mediation Rules – Pending in the Supreme Court

As no rules were available for the ADR and Mediation procedures, the Supreme Court appointed a Committee in *Salem Advocates Bar Association Case*,¹⁸ for framing Rules for ADR procedures and Rules for mediation and for case-management. The Committee, published a Consultation Paper accompanied by Draft Rules and after receiving responses, it has submitted its final Report to the Supreme Court proposing to harmonize the draft Rules for ADR and Mediation with

¹⁸ *Salem Advocate Bar Association, Tamil Nadu v. Union of India* AIR 2002 SC 2096.

the provisions of the Arbitration and Conciliation Act, 1996 and the Rules for Conciliation made there under. The Supreme Court is likely to finalise these Rules shortly on the judicial side.

C. Allocation of Rs.10 crores for ADRs

It is heartening to note that very recently, the Planning Commission has allocated Rs.10 crores for ADR. In fact, the Draft Rules prepared by the Committee aforesaid, recommended the formation of panels of conciliators and mediators by the High Courts for purposes of resolution of disputes in civil matters in the Subordinate Courts and in the original side of the High Courts. The Committee reported that there is bound to be greater response to conciliation and mediation from the litigants if there is considerable State funding for the expenses of experts who are put in charge of the conciliation and mediation procedures.

D. Panels of Mediators/Conciliators: Expense for Training to be borne by Government

Today, in several countries, conciliation and mediation have produced very encouraging results of adjudication of civil disputes as compared to arbitration. In USA, about 90% of the cases are settled by mediation. Arbitration across the world and in India too, is still dilatory and expensive and the award is not final as it is subject to further proceedings in Courts by way of applications for setting aside awards. Successful mediation and conciliation will put an end to further litigation once and for all. Therefore, lawyers and Judges, at all levels, have to be trained in techniques of conciliation and mediation and be paid for their services by the States. More diploma courses in ADRs have to be started in every University. The Committee has recommended that the expenses for training the conciliators/mediators must be borne by the State.

E. ADR Teaching in Law Schools

ADRs must be made a compulsory subject in law schools as recommended by the Law Commission in its 184th Report on Legal Education and Amendments to the Advocates Act.

IX. STANDARDS OF LEGAL EDUCATION

The last decade has seen an unusual spurt in the number of law

schools in the country. According to some figures there were fifty-one law colleges in Andhra Pradesh, fifty in Karnataka, ninety-three in Madhya Pradesh, fifty-one in Maharashtra and Goa, forty-six in Uttar Pradesh, twenty-nine in North East, thirty-three in Gujarat, twenty-six in Orissa, twenty-three in Rajasthan etc. Several of them are located in Mufussil towns where the quality of teaching is very poor. Very few of these colleges are considered to be good. However, the seven National Law Universities have provided us with some of our best students. In its 184th Report, on Legal Education, the Law Commission of India made several recommendations for toning up legal education.

X. THE NATIONAL JUDICIAL ACADEMY

The National Judicial Academy, Bhopal has become fully functional under the new Director, Prof. (Dr.) N.R. Madhava Menon and a common curriculum is now proposed for all the State Judicial Academies. A curriculum has also been finalized for the National Judicial Academy. The Academy has started a variety of programmes. Several batches of judicial officers have been going to Bhopal for training in various branches of substantive and procedural laws. The National Judicial Academy is even involved in training the trainers. It is a welcome feature that a number of retired and sitting Judges of the Supreme Court and High Courts and eminent faculty participate in various interactive learning sessions with the trainees. A Training Calendar has been prepared for the whole year. Efforts are being made to bring more faculty members into the Academy. A library is underway.

High Court Judges are also visiting Bhopal to get acquainted with new subjects like intellectual property, human rights and so on, in order to update themselves with the latest developments in new branches of law. It is hoped that with the establishment of the National and State Judicial Academies, there will be substantive improvement in the standards of the subordinate judiciary.

XI. HOSTILE WITNESSES, PLEA BARGAINING AND COMPOUNDING OF OFFENCES

A. Hostile Witnesses

The phenomenon of hostile witnesses has become very common

these days particularly where the accused are powerful, whether it be by reason of their money power or muscle power. In several sensational cases, the accused are getting acquitted by influencing or threatening the victims or witnesses. It appears that, consequent to various Reports of the Law Commission, a Bill has been introduced in the Rajya Sabha to deal with the problem. The Bill provides for summary procedure for perjury to be taken against witnesses who deviate from their previous statements. Such previous statements under proposed Section 164A of the Cr.P.C., according to the Bill, have to be recorded before Magistrates, wherever the sentence of imprisonment could be for seven years or more. It is time that some legislation is brought into being urgently, so that the guilty may be punished by the Courts appropriately, without witnesses being coerced or threatened by the accused.

B. Plea Bargaining and Compounding of More Offences

The above said Bill also proposes to introduce the system of plea bargaining in the case of number of offences. The experience in other countries has shown that this procedure results in a substantial reduction of the quantum of punishment, and there will be a substantial reduction on the burden of the Courts. The Bill also provides for the compounding of more offences. This can also lead to faster disposal of criminal cases.

XII. STRIKES BY LAWYERS AND RULES FOR CONDUCT OF COURT PROCEEDINGS WITHOUT OBSTRUCTIONS

The decision of the Constitution Bench of the Supreme Court in *Harish Uppal (ex. Captain) v. Union of India*,¹⁹ in two separate concurring judgments, adverted to Article 145 of the Constitution and Section 34 of the Advocates Act to say that the High Court has power to frame rules including rules regarding the conditions on which a person (including an advocate) can practice in the Supreme Court or High Court or Courts subordinate thereto and held that such rules would be valid and binding on all. It said that, such rules which deal with the proper functioning of Courts have nothing to do with the rules under which the Bar Council can take action against an advocate.

The proper functioning of the Courts within its precincts granting

¹⁹ 2003 (2) SCC 45.

full accessibility to lawyers and litigants to enter the Courts cannot be subjected to the Rules, if any, that may be made by the Bar Council of India. Bar Councils can frame Rules with respect to the conduct of lawyers in relation to their dealings with litigants but cannot be allowed to control the functioning of the Courts. The proper functioning of the Courts is a matter for the High Court and it is not for the Bar Councils to make Rules to control the judicial work.

THE NEED FOR SUBSTANTIVE AND PROCEDURAL REFORMS IN THE SUPREME COURT

Fali S. Nariman*

Our Constitution is so structured as to ensure judicial consistency at all court levels, except at the highest level and this is one aspect of judicial governance which has dismayed many people. The subordinate courts in every State are bound by the decisions of the High Courts and each High Court in turn is bound to follow the law declared by the Supreme Court.¹ But the Supreme Court consists of individual justices who do not all think alike and are not averse to saying so. Emerson once said, “a foolish consistency is the hobgoblin of little minds.” Even the fiercest critics of our Highest Court cannot accuse its incumbents of having “little minds.” And that is where the trouble begins. How are twenty-five justices drawn from different parts of the country expected to be consistent, not merely with themselves, but with a continuing body of Justices whom they have never known and whose thoughts and aspirations they do not always share? The problem of judicial inconsistency is a human one like the judicial process itself.

One of the difficulties about this manner of judging is that it bristles with human problems. It deals with events which are unsavoury, and with clashes of personality thrown up by some of the momentous decisions such as *Kesavananda Bharati*,² a case which split the Court down the middle. It shook the institution as no other case has done. I believe the Court has never been the same since then. In that somewhat confused but epochal decision rendered in 1973 almost every single judge spoke for himself and did not look kindly at his colleague who

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¹ CONSTITUTION OF INDIA, Article 141.

² *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

spoke differently. The case presented the sorry spectacle of a Bench of thirteen judges who could not agree (simply because they would not agree) as to what the majority had said! The final order was signed by only nine judges out of a total of thirteen. At that time paraphrasing Kipling it was observed, "if you can keep your head above you when all others are losing theirs, may be you do not realise the seriousness of the situation!"

Sociologists have ascribed the reason for uncertainty in the law in the Highest Court of the Land to (what they describe as) "the plumbed depths of judicial psychology" i.e., the tendency of Apex Court judges to overrule!

Judges of the Highest Court in almost every country produce a recurrent proportion of successful appeals. The subconscious motivation is said to be role-justification. I am not a sociologist and dare not plumb the depths of "judicial psychology." Suffice it to draw attention to a stark fact: that out of the decisions of the High Courts in the country which are admitted in the Supreme Court either by way of a certificate granted by the High Court or by way of special leave under Article 136, a large percentage is successful. This is also true elsewhere. That a final appellate court allows a substantial percentage of appeals in every country reflects a truism: that judges are decision-makers and that law itself, notwithstanding the legal ethic of certainty, is, very often, a matter of personal opinion. Uncertainty in the law is then a by-product of the law itself.

And what about the rule of stare decisis? i.e., the rule of judicial precedent. Judgments in recent times indicate that many of our Justices would prefer to loosen the shackles of stare decisis. Their Lordships are in distinguished company. Mr. Justice Cardozo once criticized judges enslaved by precedent by comparing them to a type of medical practitioner, "who would rather that the patient died by rule than lived contrary to it." Long ago Lord Radcliff expressed the view (extra-judicially of course) that, "if a Judge of reasonable strength of mind thought a particular precedent was wrong, he must be a great fool if he could not get around it."

In that excellent work entitled *FINAL APPEAL*, a study of the House of Lords in its judicial capacity, Mr. Louis Bloom-Cooper says that the

common law cannot escape from its precedents any more than an individual can deny his own ancestry. He however added that individual tribunals can in specific instances, "often disregard the more pernicious manifestations of judicial ancestor-worship." Our reports, especially the more recent ones, are abound with instances of such, "disregard of judicial ancestor-worship." This is all part of the structure of judicial governance.

With these known inherent defects in the system of judicial governance, a few suggestions are forwarded.

The first suggestion for reform is inspired by an article by a man called Joseph Epstein who has drawn attention to a fact of modern life, namely, that the attention span of human beings is fast shrinking: it is perhaps due to the influence of Television. News, comments and sound bites can be digested by the public only if they take no more than sixty seconds. People have simply lost all patience for lengthy dissertation. And believe me they have also lost all patience and tolerance for long speeches and long judgments.

The first reform I would recommend would be a self-imposed rule for both lawyers and judges - for lawyers, they must speak less and only after intense preparation. As to how well prepared one can be, let me cite one example: a story related to me by my good friend Mr. Srinivas Murthy of Hyderabad. Justice Subba Rao had told him that in a case presided over by Justice Gajendragadkar (sitting with him were Justice Subba Rao and Justice Bachawat); that the great Advocate Vishwanath Sastri was arguing in his inimitable manner; when Justice Bachawat reminded him that the proposition he was then canvassing for was directly contrary to what the Privy Council had said in a case which Justice Bachawat recollected and mentioned. Pat came the reply from Vishwanath Sastri, "Yes, My Lord, and that is the only decision of the Privy Council that has been adversely commented on in Halsbury's Laws of England in Volume such and such."

This was too much for Justice Gajendragadkar. He said, "let us suspend the proceedings, send for the decision of the Privy Council, and send for the volume of Halsbury mentioned by Mr. Sastri." The books were brought and sure enough there was the judgment of the Privy Council as Justice Bachawat had recollected; and equally surely

there was a passage in Halsburys Laws of England which commented adversely on the opinion of the Privy Council.

As for Judges, I would suggest they write less after carefully pondering over what is drafted/or dictated, conscious of the mandate of the Constitution that whatever a Judge of the Supreme Court says is regarded by one and all as the law of the land. It was said of the great Justice Oliver Wendell Holmes that he used to write his opinions standing all the while. When he got tired of standing he knew how his readers would feel when they read what he had written.

The judgments of the Supreme Court are far too lengthy and sometimes difficult to understand simply because the judges have no time to write briefly and precisely. You all may remember the confession of the man who wrote long letters. He said, "I would have written a shorter one, if only I had more time." But if law is to be meaningful, and to be easily understood, judges must find more time to write more briefly, more precisely, with a consciousness that whatever is pronounced in a judgment or order of the Highest Court is read very closely by lawyers and judges throughout the land. Besides, in many cases that come up for decision, in this Court it is not necessary to lay down any law: they can be, and often are disposed off on the facts of the case. Then why on earth are they reported? The moment a judgment comes in print, the High Courts and Subordinate Courts read into the words that are written far more than what the judges ever intended.

I would suggest that in order to save judicial time in a three-tier Court system, it is essential that the Supreme Court itself undertake the task of separating the wheat from the chaff. The Judges of the Supreme Court should acknowledge, by a Court order, that it is not every pronouncement of the Supreme Court that declares the law. Remember that it is only the Supreme Court that can say so. For this too there is a precedent: in my early days in the Bombay Bar, the first page of every typed judgment was a format page which had printed the following in the left hand corner:

- (1) "Is the judgment to be reported"? (Yes/No)
- (2) "Is the judgment to be shown to Newspapers"? (Yes/No).

Perhaps with Article 19 (1) (a), the latter is not possible. But it is

for the Supreme Court to say which of their judgments and orders declare the law and which do not. Every pronouncement of the Highest Court whether in form of a two line order or otherwise is assiduously picked up by the Newspapers and by the Law Reports and printed, and once printed they acquire a potency far greater than ever intended.

There is one other aspect. Even though the judges of the Highest Court has his or her own technique and his or her own style in writing judgements Sir Ninian Stephen, one of Australia's most distinguished Chief Justice and later its Governor-General said that judgments are delivered in cases mainly for the parties to the cause, but sometimes also for expounding the law where it needed to be expounded and in this regard it was essential that the judgment be clear and be widely understood. For this purpose, he suggested that Judges themselves should add an opening paragraph to their judgments explaining in a few words what the case was all about and what was decided.

If we read the judgments of the U.S. Supreme Court, we inevitably find that they have adopted this role-model. The first paragraph briefly explains what the case is about, from which Court it has been brought and whether the Supreme Court of the U.S. affirms or set asides the judgment. This is something that could well be introduced in important judgments that are delivered by the Supreme Court, especially, when sitting in a Constitution Bench.

Frankly, the law laid down in Bench decisions of two judges is quite often hopelessly inconsistent with some other Bench decision of two judges; and precious judicial time is wasted in the High Courts and in the Supreme Court trying to reconcile them. Accordingly, I am all for a three Judge Bench hearing all matters in the Highest Court. But I do know that in a regime, where every one must have his last chance to approach the country's Highest Court, (which I believe is a great safeguard for all citizens) it is just not possible to have Benches of three judges to hear all matters as otherwise there would be innumerable delays.

If Benches of two judges must hear SLPs, the order pronounced must never be reckoned as laying down any law, but this, only the Supreme Court can say. In fact, I would suggest that decisions of Benches of two Judges even in final hearings must never be regarded as laying

down any binding law for the purposes of Article 141, but only apply inter-party. In fact, some of the early judgments of the U.S. Supreme Court were disrespectfully characterised by newspapers in the United States as having the same validity as railway tickets - stamped - "valid for single journey only."

It is only the decision of Benches of three or more judges that can be truly said to have authoritatively laid down binding law and that too, for two reasons. Firstly, Benches of two Judges often take the line of least resistance. A two Judge Bench is quite often what I would call a "compromise Bench" and is no good at all for authoritatively laying down the law for the guidance of Courts in the Country. Secondly, a three judge Bench would give greater room for the individual justices to express their views regardless of whether or not colleagues agree, and then the majority decision will be the binding one.

I can never forget what Chief Justice Chandrachud once told me in the *Needle Industries Case*,³ way back in the nineteen eighties. The case came up for adjudication for a second time before a three Judge Bench of the Supreme Court in 1981. In the first round, it was heard by a Bench of two Judges, who after having listened to arguments for over two weeks, reserved judgment. And after ten months, the Bench said that the matter should be placed before a larger Bench obviously because the two Judges could not agree. An impressive Bench of three Justices was then constituted with Chief Justice Chandrachud, Justice Bhagwati and Justice Venkataramiah. When this Bench commenced hearing, the Chief Justice was quite angry with me and he said, "You, Mr. Nariman, you should have told the Bench that this was not a matter for two Judges but for a Bench of three Judges and this would have saved precious judicial time." He was right and this is what I now do whenever I feel that the occasion demands a larger Bench, but not always successfully!

Having said all this, let me set the record straight. I do not for one moment believe that the ample jurisdiction of the Supreme Court under Article 136 should ever be curtailed. Article 136 is the search light provision in our Constitution - searching into and rectifying injustices in individual cases. Despite great inconvenience to the Justices where

³ *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.* AIR 1981 SC 1298.

they have to read each and every matter of which not more than 20 or 25% are ultimately admitted, Article 136 is (for me) a most precious Justice - Jurisdiction. In the thirty odd years that I have continuously practiced in the Supreme Court, I am convinced that the jurisdiction is a very important safeguard for citizens of this country and I can tell that the confidence that is inspired through out the country by the Apex Court exercising this jurisdiction (or declining to exercise it after due consideration) is truly phenomenal. If law is laid down and if occasionally it is laid down wrongly, this can be corrected. But it is the rare perception of experienced Judges that picks up injustices in the long rigmarole of the SLPs, which injustices are ultimately rectified and remedied by the Highest Court. I for one would give full marks to the Supreme Court for its handling of SLPs. I wish more people and more politicians visit the Supreme Court on Mondays and Fridays to see for themselves the enormous work that Judges do.

My third suggestion concerns the tenure and age of retirement of Judges of the Higher Judiciary. The way to avoid the mad race of High Court Judges to get on the Supreme Court competing with each other, sometimes most unfairly is to restore the position of the Supreme Court as a persuader; to persuade High Court Judges to join the Judges of the Apex Court.

There should be no sense of elevation to the Highest Court ("Promotion" is a service word and I avoid it). The High Court Judge should be persuaded to join the Supreme Court, not be "elevated" to it. This could only be achieved by increasing the age of retirement of High Court Judges from sixty-two years as at present and raising it to the age of retirement of Supreme Court Judges (sixty-five years).

Recently, I have introduced a Private Member's Bill in the Rajya Sabha, which if leave be given by the House to introduce, would provoke scope for a discussion on this matter. It is titled 'The Constitution (One hundred and Third Amendment) Bill, 2004.' And hopefully as a Private Member's Bill is supposed to do, it will evoke a response from the Treasury Benches which in effect means the Law Minister.

I am against the present selection of High Court and Supreme Court Judges exclusively by a Collegiate of five of the senior most Judges of the Supreme Court because I believe that this tends to become a closed-

club selection; this is a complaint often heard in whispers outside the corridors of the Supreme Court.

In the first place, I see no reason why all the judges of the Highest Court should not be consulted when a proposal is made for appointment of a High Court Judge or an eminent advocate as a Judge of the Supreme Court. I respectfully suggest that the closed circuit network of five Judges should be disbanded. Mere seniority of the Judges may certainly mean more wisdom. But if there is to be a collegial appointment (as under the present system) it must be after a consensus from amongst all the judges of the Supreme Court.

Let me make one thing clear - disciplining of High Court Judges (i.e., all measures short of impeachment) in my view must be left entirely to the judges of the Highest Court and there should be no interference by anyone, neither by the Bar nor by the Bar Associations nor by the politicians. And this does not require any special law; the Chief Justice of India as Head of the Judicial Family has ample means of persuasion at his command to do this.

But on appointment of Judges to the Supreme Court however, there must be more inputs from outside the select coterie of five Judges. It is not that (since 1993) good Judges are not appointed to the Supreme Court under the present system, but sometimes better Judges are overlooked or ignored, often it is those who will not call on or kowtow to the Judges of the Highest Court.

Without mincing words let me illustrate this by an instance from Bombay itself. I have said this before and I have written about this before as well. And without naming names, instances are not worth mentioning. Justice Pendse who retired some years ago is now busy arbitrating with great success. One Bombay newspaper reported that his income in the year after he retired was a whopping Rs.1.30 crores. He was truly an outstanding Judge who disposed off cases with the same speed and efficiency as did the late Justice J.C. Shah.

Justice Manoj Kumar Mukherjee when he was in the Supreme Court repeatedly told me when I mentioned the instance of Justice Pendse that Pendse was in his opinion the best High Court Judge in the country. I told him to please mention this to the Chief Justice. He assured me

that he had done so.

Yet, I regret to say that Pendse was successfully prevented from coming to the Supreme Court for two reasons, firstly, because he was a “naughty boy” since when he was asked to go from Bombay to Karnataka as Chief Justice he declined (for personal reasons), incurring the displeasure of the then Chief Justice of India; and secondly, the “Bombay Lobby” i.e., the Judges of Bombay in the Supreme Court were against him. This phenomenon was and is regrettable and we must avoid it.

The Chief Justice can always ask his colleagues from Calcutta, Bombay or Allahabad or other High Courts as to the merit or demerit of someone from that High Court. But my plea is do not always rely on such assessment. It can be warped or tainted particularly when you know a person too well, you can give an exaggerated opinion of some of his/her qualities – good or bad!

Another aspect I would like to advert to is the acute sensitivity of the Supreme Court to the appointment of only retired Judges to Tribunals which is often regarded by critical members of the public as, “the Judges looking after their own.” This I believe is good and it is in fact essential to have the Supreme Court to oversee all actions of the Government, whether or not first vetted by Commissions or Tribunals, but I do believe that sometimes the Court does go too far.

When faced with the appointment by the former Government of the Commerce Secretary as Chairman of the newly constituted Competition Commission under the then recently enacted Competition Act; the former Chief Justice of India did not enquire as to his technical qualifications for the job but was only reported to have made the following remarks, “it is a direct encroachment on judicial functioning. It is a direct onslaught on the High Courts. A few years later, the government may replace all the twenty-six judges of the Supreme Court with bureaucrats. You must restrain your hand.”

The Government complied and it cancelled the proficient and technically qualified Secretary’s appointment. The result has been that the Competition Act passed by both Houses of Parliament, and assented to by the President has remained a dead letter for more than a year now. And Government is simply too embarrassed to do anything about it.

The Court, whether the High Courts or the Supreme Court can never be excluded under our Constitution, that is what the Constitution itself ordains. But in a regime of less control where the government has to play the role of the facilitator, when providing a regulatory mechanism, it is important that the regulator should be a technocrat.

In the United Kingdom, from where we take our judicial system, the Chairman of the Commission for technological convergence is not a Judge, but a renowned economist. And the Competition Commission in the United Kingdom is headed again not by a Judge but by a distinguished Queen's Counsel, who has special expertise in this particular field. I would request the Hon'ble Judges of our Court to please appreciate that in this technological age, the order of the day is greater expertise.

I believe that the fact that there is no judge on the Competition Commission does not vitiate its composition so long as it does not directly engage in adjudicatory functions. I have proposed that when the Commission has to discharge such functions, the case could be referred to an appellate body presided over by a Judge. The Competition Act may require amendment and some fine-tuning. But as drafted, it did not justify the somewhat exaggerated overreaction just quoted.

Why cannot the Supreme Court of India oversee a decision of a Tribunal or Commission manned only by technocrats? Why must they only oversee a decision of a tribunal manned by Judges? Why should a tribunal or commission set up under a statute be required to be manned by Judges? After all arbitral awards of non-Judges are scrutinised by the higher Judiciary – why can decisions of Tribunals manned by persons who have never been judges, not be similarly scrutinised and vetted?

I would submit that the “dignity” of the Supreme Court is in no way offended by it being required to oversee a decision of a tribunal manned only by non-legal experts. In fact, just as the technocrat would learn and must learn something from the Judges, the Judges too would learn and must learn something from the technocrats.

Suggestions for reforms; both substantive and procedural in the Supreme Court is not the preserve only of Judges and lawyers. Suggestions can be made and must be made also by members of the

public and should be listened to because both the judiciary and the profession exists for the community at large and we must harken to the criticism or complaints of that community. Even though these are voiced frequently by journalists and by the electronic media, wide are the powers of contempt; initiation of contempt proceedings for scandalizing the Court should only emanate from a Bench presided over by the Chief Justice himself. Civil contempt is different as it is a necessary power to ensure compliance with the Orders passed by the Supreme Court or compel performance of undertakings given by party-litigants to this Court. But the jurisdiction in what is known as criminal contempt – contempt for utterances and publications that are said to undermine the judiciary and judicial administration, Courts must proceed with caution. Howsoever provoked the Single Judge or a Bench of two or three Judges may be it should be administratively provided that the contempt occasioned by “scandalizing” the Court must only be initiated in the Chief Justice’s Court – both in the Supreme Court and in the High Courts. This would ensure consistency and would breed a new sense of confidence.

Let me be frank, contempt proceedings taken in recent years have been most ill-advised, they have stultified useful criticism and suggestions for fear of offending the sensitivity of the Court. We are now living under the shadow of what is popularly regarded as a judicial regime, which cannot countenance any criticism against itself. This perception is erroneous. But this is the popular conception of people like Arundhati Roy (and she has many sympathizers). And we must work to change this perception.

Judges like to quote and Supreme Court Judges simply love to quote with approval, the celebrated dictum of Lord Atkin. But the trouble is that sometimes they do so while sentencing the contemnor to jail; as Justice Thomas (a fine upright Judge) regrettably did. The Lord Atkin quote reads, “the path of criticism is a public way: the wrongheaded are permitted to err therein . . . Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

The purple prose (in the speech of the great Lord Atkin) was composed way back in 1936 in an age that was always respectful for

those in authority. No longer. I would suggest that the relevant words must now read as follows, "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny of outspoken comments of ordinary men." The word "respectful" stands deleted as it is too vague and too nebulous.

It is this concept of respect (or disrespect) that recently occasioned in one of our Courts, a sorry spectacle, when a party in person who raised his voice when arguing (as we advocates also sometime do) being physically and forcibly removed from the precincts of the court room. In my entire career at the Bar, I have never seen this happen before and hope we will never see this happen again. We lawyers often give cause for provocation, and we lawyers are perhaps the most guilty; but both sane and the not so sane are frequent visitors to courts of law in this country as in many others: a little tact can often save the day.

It is recorded in the memoirs of Sergeant Sullivan, leading counsel in the Irish Courts of Old, that a particular disgruntled litigant came into Court every single day and went to each and every Courtroom disturbing the work of the Judges by interjecting and asking permission "to keep his hat on." He had a psychological fixation that the top half of his head had been removed and since his brain would be exposed to the elements he had to cover his head! The Judges were sometimes nasty and rude to him. But ultimately the Chief Justice resolved all these problems by a single expedient. He administratively ordered that when the lists were read out in each court every single morning "so-and-so versus so-and-so, so-and-so versus so-and-so, so . . .," at the end of the list Court Master would say, " . . . And Mr. Murphy may keep his hat on!"

When Professor Allan Dershowitz, a distinguished Professor of the Harvard Law School said that the decision in *Bush v. Gore* was a "corrupt" decision, mark the words "corrupt," he was not hauled up for contempt though his comment was outspoken and certainly not respectful. Yet, the Supreme Court of the U.S. suffered him to say so.

I would respectfully suggest that Judges whether of the Supreme Court or of the High Courts are not fragile flowers that wilt either in the heat of argument or in the heat of criticism, howsoever trenchant and caustic. The contempt power should not be used to discipline either the

lawyer, or the press or the public.

Because of the vagueness of the contours of the contempt jurisdiction the power to punish for scandalizing the Court or the administration of justice (a topic on which everyone must be entitled to comment upon and criticize) must never be invoked by a single Judge or even a Bench of two Judges; it must always be exercised in the Court of the Chief Justice by a Bench of at least five Judges - both in the High Courts and in the Supreme Court. Because when Judges speak in contempt cases they speak for the Court and it is important that what they say is representative of the thinking in the Court as a whole.

And most importantly, the power to commit for contempt should never be conferred on Commissions or Tribunals even if they are manned by retired Judges of the Highest Court. Judges when they retire love to have the full panoply of power which they enjoyed as sitting Judges. The contempt of court power is too serious and fraught with too many grave consequences to be left to ad hoc institutions howsoever important except the established High Courts and the Supreme Court of India. Even if so conferred on tribunals, since they are not "Courts" any criticism of the Members of such tribunal cannot in my opinion have the protection of Article 19 (2).

CONCLUSION

If I have been too heavy with the black brush, I do apologize. But you can never make suggestions unless you are both frank and critical. Lest I be misunderstood, in conclusion, let me say that I have consistently practiced in the Supreme Court longer than almost anyone today at the Bar, ever since the year 1972.

And I can and do frankly say that I am proud of the Judges of the Supreme Court both past and present. Whether some of us are critical of this or that judgment does not at all deviate from the fact that the members of the Bar are truly appreciative of the collective contribution of the Judges of the Supreme Court; they have kept all politicians, lawyers and the public in place, just as they have kept all governments (Central and State) in place. Above all and most importantly, they have kept the country together. If there is one outstanding feature of our written Constitution which is truly a basic feature it is the concern of the

Founding Fathers for the unity of India. I would like to end this piece by citing two passages from two cases that I appeared in – in the first I won and in the second I lost.

In the case in which I won (*Jehovah's Witnesses Case*⁴) I believe that the judgment on freedom of conscience of citizens, a fundamental right guaranteed under Article 25 of the Constitution was a truly inspiring one, whether you agree with the ultimate verdict or not. It was a triumph for individual liberty. But what I liked most about this case was the concluding part of the judgment of Justice Chinappa Reddy who spoke for the Court. He wrote, "We only wish to add: our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it." Whenever I read this passage I think of what a fine manifesto this would make for a truly secular political party. The second passage (occurs in a case in which my client was recently the loser (in June 2004). I cite it to show how conscious the Judges of the Supreme Court are to the constitutional scheme of things; to the great Federal structure of our Constitution. Justice Ruma Pal speaking for herself (and Justice P. Venkatarama Reddi) concluded the judgment in the *SYL Canal Case*,⁵ with these ringing words:

We conclude this chapter with a reminder to the State of Punjab that (quote) "Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end."

The quote most appropriate was taken from a Judgment of the year 1910 of the great Justice Holmes in a suit between the then two warring States of the American Union – the Commonwealth of Virginia and the State of West Virginia.⁶ The words were true when they were uttered in 1910; they are equally apposite and relevant when repeated in India in 2004. With these words, I salute the Supreme Court in which I have continuously practiced for over thirty-three years.

⁴ *Bijoe Emmanuel v. State of Kerala* AIR 1987 SC 748.

⁵ *State of Haryana v. State of Punjab* (2004) 12 SCC 673.

⁶ 55 L.Ed., 353.

JUDGES AS LEARNERS: REFLECTIONS ON PRINCIPLE AND PRACTICE

Livingston Armytage*

INTRODUCTION¹

It is timely and useful to survey the context and experience of judicial education and training around the world since its inception less than fifty years ago. It is interesting to observe that while justice may be as old as Socrates, research indicates that the notion of formalised judicial education was first introduced in the early 1960s. Earlier, training was either unstructured or unformalised in on-the-bench judicial apprenticeship and mentoring. Since then, the steady spread of a more formalised approach can be observed throughout the jurisprudential world, across common law and civil systems, across continents and nations of diverse tradition, ideology and culture, in developed and developing economies, and transitional and post-conflict states.

In developed countries, the institutionalisation of judicial education is very recent, and commenced with the establishment of the *École Nationale de la Magistrature* in France in 1958. Shortly after, the National Judicial College was established in the United States in 1963 and the Federal Judicial Center in 1967 under the leadership of Chief Justice Warren Burger. The first sentencing workshop was conducted by Lord Parker in the United Kingdom also in 1963, and the Judicial

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¹ The views expressed in this Paper is built on earlier researches of the author published in:

ARMYTAGE L., EDUCATING JUDGES – TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING (1996); Armytage L., *Judicial Education on Equality*, 58 MOD. L. REV. 160-86 (1995); Armytage L., *Need for Continuing Judicial Education*, 16 U. NEW SOUTH WALES L. J. 536-84 (1993); Armytage L., *Evaluating the Impact of Judicial Education*, 4 J. JUDICIAL ADMINISTRATION 35-63 (1994); Armytage L., *Pakistan's Law & Justice Sector Reform Experience - Some Lessons*, 2 LAW, SOCIAL JUSTICE AND GLOBAL DEVELOPMENT J. (2003).

Studies Board commenced operation in 1979. The Canadian Judicial Council conducted its first training session in 1972, and the Canadian Judicial Institute was established in 1988.² The Australian Institute of Judicial Administration was established in 1975, and the Judicial Commission of New South Wales in 1986. The Commonwealth Judicial Education Institute was formed in 1994.³

In developing countries, the trend is similar. For example, in Pakistan, judicial education was initially recommended in 1959, though it was not until 1988 that the Federal Judicial Academy was established. In the Philippines, the Philippines Judicial Academy was established in 1996 under the leadership of Chief Justice Hilario G. Davide, Jr. In Mongolia, the National Legal Training Centre commenced judicial training in 2000. In Uzbekistan, the judicial leadership is presently considering introducing a system of judicial training.

Over the past decade in particular, this trend has been embraced by international development, and it has become increasingly common for multilateral and bilateral donors to sponsor judicial education and training projects as sub-objectives of broader programme strategies to strengthen governance systems and the rule of law around the world. Most recently, in the "9/11" environment, this trend has increased exponentially as an element in radically restructured global strategies to improve safety and security and to counter terrorism. Unprecedented investments are now being directed into this sector by international donors.

A case-study to illustrate this growth is Papua New Guinea, [hereinafter PNG] a small country of some six million people, which confronts many of the challenges of new states establishing systems of governance and economic wellbeing, including a serious law and order problem. Granted independence in 1975, PNG received its first major foreign aid in 1990 with a ten million dollar three year grant to strengthen the Constabulary. In 2002, this aid was restructured into a law and justice

² Canada has been notable in the development of social context education. See, e.g., MAHONEY KAND MARTIN S., *EQUALITY AND JUDICIAL NEUTRALITY* (1987); Mahoney K., *Gender Bias in Judicial Decisions* 1 *THE JUDICIAL REV.* 197-217 (1993).

³ ARMYTAGE, *supra* note 1, at 12-18.

sector-based programme integrating police, prosecutions, policy, courts, prisons and ombudsman, valued at A\$100m. In 2004, this programme was again restructured into what is called the Enhanced Cooperation Programme, estimated at a value of more than A\$1B. This represents a massive growth into the sector in little more than one decade. Judicial education and training comprise an element of this development. This example is hardly unique, when we consider similar but much larger investments being made in Iraq and Afghanistan at the present time.

To illustrate this growth in another way, there are now many more projects of judicial education and training than ever before. The World Bank estimates that it is financing some 600 projects relating to legal and judicial reform, ranging from Mongolia to Guatemala, Togo, Zambia and Cambodia.⁴ It describes judicial training as a critical element in promoting sustainable economic development, through consolidating judicial independence, with the objective of not only improving knowledge, but also changing attitudes towards impartiality, integrity and potential bias.⁵ These span many aspects of law development and structural reform, including and often supported by judicial education and training. Other major multilateral donors such as the Asian Development Bank and United Nations conduct similar programmes. Numerous bilateral agencies of national governments, such as USAID (United States), DFID (UK), JICA (Japan) and GTZ (Germany) manage robust bilateral aid programmes. Some smaller agencies, such as DANIDA (Denmark), focus relatively heavily in judicial education in particular. Over just the past decade alone, I personally have worked in judicial development and training programmes involving some twenty countries.⁶

Clearly, judicial education has experienced an extraordinary growth in recent years, described by one commentator as an explosion.⁷ It is already a public international investment valued in billions of dollars. Subject to positive results or return on this massive investment becoming evident in the short to medium term, this is likely to increase potentially

⁴ WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM (2004).

⁵ WORLD BANK, LEGAL AND JUDICIAL REFORM: STRATEGIC DIRECTIONS (2003).

⁶ United States, Australia, Pakistan, Nepal, Bangladesh, Palestine, Tonga, Fiji, Cambodia, Mongolia, Haiti, PNG, Maldives, Philippines, China, Vietnam and India, among others.

⁷ Sallmann P., *Comparative Judicial Education in a Nutshell*, 2 J. JUDICIAL ADMINISTRATION 245, 252 (1993).

significantly in the immediate future.

So, it is most judicious to reflect on the wealth of this experience with the view to distilling some lessons learnt and guidelines for ongoing endeavour.

I. RATIONALE

Recognition of the need for judicial education is now firmly established in many jurisdictions around the world. There are various reasons for the emergence of judicial education. The major rationales for judicial education include independence, improved service delivery, social accountability, and institutional capacity-building.

Most important, there is a doctrinal imperative to strengthen the capacity and independence of the judiciary as a formative institution in its society. Judicial education provides the judiciary with the means to consolidate its independence. This is of paramount concern where the judiciary is constitutionally responsible to dispense justice by interpreting and applying the law of the land to any matters in dispute which are brought before the courts. Central to this role of dispensing justice is the need for fairness: that the law is being applied fairly and evenly to both parties in any dispute. Not only must the courts be fair; but they must also appear to be fair in order to establish credibility and secure the confidence of the community in its integrity. Credibility rests on visible independence: independence from any vested interest whatsoever – whether that be governmental, commercial or personal. With judicial independence comes the need for accountability and transparency on the part of the judiciary. Judicial education and training provides the means for the judiciary as an institution to consolidate develop and perform this crucial, yet fragile, role in society. Recognition of this need is reflected in the observation of Nicholson:⁸

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.

⁸ Nicholson R.D., *Judicial Independence and Accountability: Can They Co-Exist?*, 67 AUSTRALIAN L. J. 404, 425 (1993).

As a part of the building of independence, judicial education assists the judiciary to professionalise and to improve service delivery, by improving its competence. This provides the judiciary with a visible means of social accountability to address mounting consumer dissatisfaction with judicial services, which historically was a prominent “driver” for the introduction of judicial education in developed countries in the post World War II period.

Moreover, the rationale for a judiciary to invest in training of trainers is to develop its own capacity to manage judicial competence and standards in a sustainable manner.

Mission and Objectives

The mission of any continuing judicial education is to improve the quality of judicial performance by helping judges to acquire the tools for professional competence. The concept of competence illuminates the issue of what makes a good judge. It includes mastery of theoretical knowledge, developing problem-solving capacity, cultivating collegiate identity, relating to allied professionals, conceptualising the judicial mission, maintaining an ethical practice and self-enhancement. At an operational level, the goals and objectives of judicial education are to meet the education, training, and development needs of judicial officers. These needs are defined through a variety of analysis techniques and then addressed through the provision of specific education services.⁹

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

⁹ Educational theorists have developed a number of models to describe this process, most almost universally built on the classic approach of Ralph Tyler. In the arena of continuing professional education, Houle's Triple-Mode Model is most frequently endorsed as providing a conceptual means to strengthen professional performance. Houle identifies two basic goals of professional education which are: [T]he mastery of new theoretical knowledge and practical knowledge and skill relevant to a profession, and the habitual use of this knowledge and skill to solve the problems that arise in practice. Catlin D.W., *An Empirical Study of Judges' Reasons for Participation in Continuing Professional Education*, 7 (2) THE JUSTICE SYSTEM J. 236-56 (1982); HOULE C.O., CONTINUING LEARNING IN THE PROFESSIONS (1980); TYLER R.W., BASIC PRINCIPLES OF CURRICULUM AND INSTRUCTION (1949); ARMYTAGE L., EDUCATING JUDGES (1996).

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."¹⁰ Further, they outline the objectives of judicial education to be:¹¹

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.

Continuing judicial education is now accepted as an "integral and essential part" of the judicial system of the United States.¹² 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.¹³ In relation to the development of judicial education, Catlin has observed:¹⁴

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.

Recognition of the need for continuing education by the judiciary - as a profession - comprises three principal components, being:

¹⁰ NATIONAL ASSOCIATION OF STATES JUDICIAL EDUCATORS [NASJE], PRINCIPLES & STANDARDS OF CONTINUING JUDICIAL EDUCATION (1991); NASJE, COMMENTARY ON PREAMBLE, 3 & 6.

¹¹ *Id.*

¹² Riches A.L., *Judicial Education - A Look at the Overseas Experience*, 64 THE AUSTRALIAN L. J. 189, 190 (1990).

¹³ Hudzik J.K., *The Continuing Education of Judges and Court Personnel*, JUDICIAL EDUCATION NETWORK 5 (1989).

¹⁴ Catlin is the founding head of the Michigan Judicial Institute.

- new judge transition - 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;
- continuing education - to facilitate the ongoing professional development of judicial officers and to keep them abreast of change; and
- on going development - to a considerably lesser degree, to address other career or personal development needs.¹⁵

Since 1986, all states have provided some form of education for judges, and judicial education was well established. Most state programmes are in fact mandatory. The average number of training leave days allowed for education and training is approximately five per year. 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."¹⁶

Judicial education has also become increasingly accepted in Britain over recent years, where the Judicial Studies Board has observed that:¹⁷

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 organised means of enhancing performance.

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 twenty-five to thirty years." He added, "judges have accepted, appreciated, and benefited from training in a way that has confounded the sceptics."¹⁸ This is confirmed by Partington,

¹⁵ See, e.g., Wood J., *The Prospects for a National Judicial Orientation Program in Australia*, 3 J. JUDICIAL ADMINISTRATION 75-96 (1993).

¹⁶ 75% of these programmes are state-based, 17% are for the federal judiciary, and the remainder are nationally-conducted.

¹⁷ JUDICIAL STUDIES BOARD, REPORT FOR 1983-1987, 13.

¹⁸ JUDICIAL STUDIES BOARD, REPORT FOR 1991-1995, 4.

"twenty years ago, a majority of judges would have denied there was any need for training. Today only a minority would share that view."¹⁹

In Australia, judicial education is similarly established and, in the words of Sallmann, "heralds the advent of potentially significant changes in the Australian judicial culture."²⁰ Traditionally, judicial education was non-existent in any formalised sense and relied heavily, in the words of one senior judge, on "the gifted amateur."²¹ More recently, in the words of Chief Justice Mason:²²

[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.

II. JUDGES AS LEARNERS

Judicial education and training is built on the foundation of educational theory or pedagogy which is refined, first, through the application of principles of adult learning, secondly, through the practice of professional development and, thirdly, through the formulation of a distinctive model of judicial learning.

A. Adult Learning

In broad terms, judges epitomise adult learners. Adult learning is a complex phenomenon. Learning is the process whereby knowledge is created through the transformation of experience. While it shares commonalities with childhood learning, there are at the same time

¹⁹ Partington M., *Training the Judiciary in England and Wales: The Work of the Judicial Studies Board*, CIVIL JUSTICE QUARTERLY 319, 322 (1994). This is supported by calls outside the judiciary for more education; see, for example, Holland A., *Training Judges*, NEW L. J. 895 (1993).

²⁰ Sallmann P.A., *Judicial Education: Some Information and Observations*, 62 AUSTRALIAN L. J. 981 (1988).

²¹ Kennedy G.A., *Training for Judges?*, 10 U. NEW SOUTH WALES L. J. 47, 48 (1987).

²² Mason A., *The Role of the Judge, Inaugural Judicial Orientation Program*, Sydney, 1994 (as yet unpublished paper).

substantial differences. The adult's independent self-concept, ability to be a self-directed learner, readiness, and orientation to learning are interactive factors that help explain not only the great diversity among adult learners, but also many of the commonalities.²³

The education of judges, as adults, is different to that of children, and places particular importance on the need for autonomy and relevance in the adult learning process. There is a broadly-held consensus among educational theorists, commentators and practitioners that adults do learn in a manner which is distinctive to children. The principles of adult learning should lie at the foundation for any programme of judicial education. These principles recognise the distinctive nature of adult learning which Knowles has defined as being characterised 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.²⁴ Put another way, Brookfield argues that adults learn throughout their lives:²⁵

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.

The application of learning theory, specifically humanistic and developmental explanations of learning, provides a range of useful insights on the process of judicial learning, for example, in the observations of Cross, "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 to offer to goals of teaching ego, intellectual or moral development."²⁶

²³ KOLB D., *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* (1984); DARKENWALD G. & MERRIAM S., *ADULT EDUCATION: FOUNDATIONS OF PRACTICE* (1982).

²⁴ KNOWLES M.S., *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* 43-44 & 57-58 (1980) (note earlier 1970 edition bi-lined *Andragogy versus Pedagogy*, 39); *see also* KNOWLES M.S., *THE ADULT LEARNER: A NEGLECTED SPECIES* 55-59 (2d ed., 1973).

²⁵ BROOKFIELD S.D., *UNDERSTANDING AND FACILITATING ADULT LEARNING* 91 (1986).

²⁶ CROSS K.P., *ADULTS AS LEARNERS* 233-34 (1981).

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."²⁷

B. Continuing Professional Development

Judicial education has much to learn usefully from the practice of continuing professional development because 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.²⁸ This has been frequently endorsed by subsequent theorists.²⁹ Houle demonstrates that professionals' reasons for participation in continuing education generally tend to be more refined than those of adults at large, 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.³⁰

²⁷ JOHNSTONE J.W. & RIVERA R.J., VOLUNTEERS FOR LEARNING 3 (1965). Cross observes that nothing in the myriad of surveys since has changed that general conclusion. CROSS, *supra* note 26, at 91.

²⁸ Houle advances two central propositions: first, that there is commonality between the continuing education of many professions. HOULE, *supra* note 9, at 14-15; and second, that professional education is distinctive to adult education. *Id.* at 49-73, & 121; see also CERVERO, R.M., EFFECTIVE CONTINUING EDUCATION FOR PROFESSIONALS 15-16 (1988); Grotelueschen A.D., *Assessing Professionals' Reasons for Participating in Continuing Professional Education*, in PROBLEMS AND PROSPECTS IN CONTINUING PROFESSIONAL EDUCATION 34-35 (Cervero R.M. & Scanlon C.L. eds., 1985).

²⁹ See, e.g., CROSS, *supra* note 26, at 45-46, 82; BROOKFIELD, *supra* note 25, at 171; CERVERO, *supra* note 28, at 77.

³⁰ HOULE, *supra* note 9, at 121. Grotelueschen endorses this conclusion. Grotelueschen, *supra* note 28, at 34-35.

Cervero agrees that the study of professional learners builds on general adult learning theory to develop its own distinctive practice:³¹

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.

Schon, in developing a model of professional knowledge, argues that the context of a professional practice is significantly different from other contexts for the purpose of learning and education. Schon identifies the characteristics of professional practice. He argues that professionals:³²

[S]hare 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.

Cross describes professional people as being among the most active self-directed learners in society. This is due in part to the patterns of learning developed in attaining and retaining membership in 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-orientated 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."³³

³¹ CERVERO, *supra* note 28, at 15-16.

³² Schon 1987, 32-33.

³³ CROSS, *supra* note 26, at 193.

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 properties—"It is specialised, firmly bounded, scientific and standardised."³⁴

Cervero argues that continuing professional development should be 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 recognising 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."³⁵

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

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

³⁴ Schon 1983, 23.

³⁵ Smutz W.D. & Queeney D.S., *Professionals as Learners: A Strategy for Maximising Professional Growth* 183-205, 186 (Cervero R.M., et al. eds., 1990).

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 - in the United States, at least - created educational needs distinct from other professionals.³⁶ These distinctive features related in particular to the motivational factors in continuing learning. Judges ranked personal benefits, professional advancement and job security significantly lower than other professionals such as physicians and veterinarians.³⁷ 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."³⁸ 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 in itself.

³⁶ Catlin D.W., *The Relationship between Selected Characteristics of Judges and their Reasons for Participating in Continuing Professional Education* 125 (1981) (unpublished doctoral dissertation, Michigan) (on file with Michigan State University); see also Catlin D.W., *An Empiric Study of Judges' Reasons for Participation in CPE*, 7 (2) *THE JUSTICE SYSTEM J.* 236-56 (1982). Catlin's research has revealed that judges' reasons for participation are complex and multidimensional. Three underlying factors emerged from analysis of judges' reasons for participation which, in order of importance, were judicial competence, collegial interaction, and professional perspective. Catlin found 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 it is wrong to assume that participation is primarily a function of programme content in formulating curricula and designing programmes.

³⁷ Compare the empirical findings of Catlin with those of Cervero relating specifically to physicians and veterinarians specifically: Cervero R., *A Factor Analytic Study of Physicians' Reasons for Participation in Continuing Education*, 56 *J. MEDICAL EDUCATION* 29-35 (1981).

³⁸ Catlin, *supra* note 36, at 125.

The lack of importance of personal benefits, professional advancement and job security has "serious implications" for purposes of planning education programmes; comparisons between groups suggest that for judges the concept of judicial competence is a much broader factor than professional service; in addition, judges operate in an environment where there is a lack of any distinctly identifiable patient or client relationship.³⁹

Added to this, the circumstances characterising 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 tend to be "left brained;" that is, logical, analytical, problem-solving, controlled, conservative and organisational.⁴⁰

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 programme of continuing judicial

³⁹ *Id.* at 126.

⁴⁰ HERRMANN N., *THE CREATIVE BRAIN* (1989) (arguing that judges tend to learn in a distinctively "left brained" style - characterised for being logical, analytical, problem-solving, controlled, conservative and organisational; additionally, judges tend to be intensely autonomous and self-directed in their preferred learning practices); see also comparison of left-mode and right-mode characteristics in KOLB, *supra* note 23, at 49, 141; *Application of the "Myers-Briggs Type Indicator" to Lawyer Types*, A.B.A. J. 74-78 (July, 1993). 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, *supra* note 23.

education, and have significant implications on both the content and the process of any programme of continuing judicial education.

D. 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.

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 extraordinarily 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 which lack these features.

Preferred Learning Styles and Practices

There is emerging evidence of judges as a profession exhibiting preferred learning styles, and utilising 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.

Doctrinal Constraints of Judicial Independence

It is 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 recognise 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 discomfort for some judges 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.

Reasons for Participating in Continuing Education

Judges' reasons for participating in judicial education have been discussed above, and further below.⁴¹ In effect, the learning needs, practices, preferences and constraints of judges are quite distinctive, for a number of professional, educational and doctrinal reasons. More specifically, the learning needs of judges are in certain respects quite particular, relating both to the nature and content of the learning, and to the education process supporting that learning.

E. Model of Judicial Education

These considerations give rise to the need to develop a distinctive model of judicial education. This model should be based on foundations of adult learning and professional development, and also reflect the distinctive characteristics of judges as learners.

Judicial learning is a complex process. Judges, as professionals, exhibit characteristics, styles and practices as learners which are distinctive, significant and have direct important implications for educators. As has been seen, these arise from:

- doctrinal imperative to preserve judicial independence;
- process and criteria of judicial selection, and the nature of tenure;
- formative nature of the judicial role and the environment surrounding office;

⁴¹ Armytage L., *The Need for Continuing Judicial Education*, 16 U. NEW SOUTH WALES L. J. 536 (1993).

- judges' learning needs and reasons for participating in continuing education; and
- preferred learning styles and practices.

As already discussed, the pursuit of competence is a crucial element in the rationale to consolidate judicial independence, and it provides a means of professional accountability to society.

The process of selection determines appointment to judicial office, and establishes a particular threshold of pre-existing competencies in legal knowledge and skills. This threshold defines the point-of-departure for ongoing judicial induction and in-service training, in terms of knowledge of the law and practice. The nature of judicial tenure also has implications of systemic influences affecting individual judges' motivation to learn.

The essence of judging is a highly complex, intellectual, problem-solving process which resists procedural description or predictable outcomes. In practice, judges place greater value on self-directed learning than perhaps any other professional discipline.

There is emerging evidence based on clinical experience that judges exhibit preferred learning styles, and utilise preferred learning practices developed over the course of their careers. Judges - at least in developed jurisdictions - are characterised as being rigorously autonomous, entirely self-directed, exhibit an intensely short-term problem-orientation, and are exceptionally motivated to pursue competence for its own sake in their learning practices 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 which defines the threshold for any ongoing programme of continuing education.

Judges' reasons for participating in judicial education have also been documented, notably in certain developed jurisdictions, disclosing that judges as a professional group place high importance on the reasons for participation which are related to keeping abreast of new developments in the law, being competent in their judicial work, matching their knowledge and skills with the demand for their judicial

activities and improving their ability to better respond to the questions of law presented to them.⁴² Judges' reasons for participation were found to be multidimensional and more complex than might previously have been believed. Three factors emerged from representing the underlying dimensions of the respondents' reasons for participation. They were, in order of importance, judicial competence, collegial interaction, and professional perspective:

Judicial Competence

The need to maintain an acceptable level of competence and develop new judicial skills, to develop proficiencies necessary to maintain quality performance, and to keep abreast of new developments are all regarded as very important reasons. The emergence of the judicial competence factor in these findings suggests that judges do place significant importance on maintaining and developing their professional skills and keeping abreast of the law.

Collegial Interaction

Relates to the need for interaction, exchange of ideas and thoughts, and to be challenged by the thinking of colleagues. This suggests that programme design must allow adequate time for judges to constructively interact and learn from their colleagues through a variety of structured educational experiences including problem-solving workshops, and small group discussions.

Professional Perspective

Items included in this factor are associated with the professional role of the judge, such as to assess the direction of their profession and to maintain identity with their profession. This suggests that judges participate to reinforce their identity in that profession, and that judges see the opportunity to develop a perspective of their professional role, review their commitment to their profession and develop leadership capabilities in their profession through participation in continuing judicial education.

These considerations affect the application of educational theory

⁴² Catlin, Armytage, op cit.

to judges in a number of significant ways. For example, in some developed merit-based judicial systems, 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 individualised learning. In other systems, these considerations may affect the application of educational principles in different ways, though this remains to be assessed and documented.⁴³

III. REVIEW OF EXPERIENCE – LESSONS LEARNT

The purpose of this section is to review relevant international experience in the form of some case studies on institutionalising judicial education in various countries, with the view to promoting a judicial education approach capable of providing career-long continuing judicial education around the world.

The study distils the empirical experience of programmes of judicial education and training in a selection of brief case studies of Australia, Britain, Pakistan, Philippines and Mongolia on the establishment of judicial education institutions in those countries that have, for diverse reasons, decided to make efforts to significantly improve judicial education. These case studies are extracted in Part VI to this Paper. It identifies some critical elements of developing programme strategy and approach to ensure that the judicial training institution does provide training services which are effective in supporting the judiciary to perform its role. Observations on this experience are then used to develop a strategic approach enumerated in guidelines on the establishment and institutionalisation of judicial education.

As illustrated in these case studies, judicial education is now starting to play a significant and dynamic role in improving judicial competence and thereby the quality of justice through the promotion of rule of law: free and fair trial, the consolidation of judicial identity and independence, and the consolidation of legal rights.

⁴³ It remains to be seen through empirical analysis what impact on the nature of judicial education contextual variables such as jurisdic model, appointment procedure, tenure and prior professional experience, judicial role and position may have.

This experience demonstrates that the rationale for investing in judicial education and training is two-fold: (a) to develop the professional competence of the judiciary to perform its duties and, thereby (b) to improve judicial service delivery. In doing so, courts around the world have responded to consumer dissatisfaction with quality of services by addressing the need to become more accountable and to make an effective commitment to enhance performance.

The survey of available curricula reveals that programmes of continuing judicial education generally comprise two major components: first, *pre-service* or *induction training* meets the need to train and educate new judges to assume office, to facilitate the transition from advocate to adjudicator, and to bridge the gap between inexperience and experience. Second, *in-service* or *continuing education* meets the further need to facilitate the ongoing professional development of more experienced judges to keep abreast of change and to acquire specialised competences.

Analysis of this experience indicates that the mission of judicial education is usually to improve the quality of judicial performance by helping judges to acquire the tools for professional competence. The notion of competence, as the goal of judicial education, is central to professional development. Judicial competence can be variously defined but, for practical purposes, it involves three distinct components (a) mastery of legal *knowledge*, (b) development of professional *skills*, and (c) acquisition of judicial *disposition*. In all case studies, the goal of judicial education is to enhance the quality of justice by raising the professional competence of judges to deliver service to their communities.

Challenges

Notable throughout this experience has been the commonality of challenges confronting the proponents for judicial development and training, which have included:

- a. developing effective partnerships with the executive;
- b. instilling judicial leadership, ownership and engagement;
- c. building sustainability with adequate resourcing;

- d. collaborating with educators to develop technically sound programmes;
- e. integrating training with broader sector-wide strategies; and
- f. investing in rigorous monitoring and evaluation.

As has been said, in order to address these challenges, judicial education and training should be *judge-led* and *court-owned*. There are three overarching reasons for this: (a) within the *doctrinal* context, there is an imperative to consolidate judicial independence from erosion or dependence on the executive arm of government or other external interests; b) within the *pedagogical* context, judge-led training brings educational authenticity and crucial know-how to the process; put most simply, judges know their training needs better than anyone else; (c) within the *development* context, the paramount reason is sustainability; investing in Training-of-Trainers [hereinafter ToT] will instill the capacity of judiciaries in transitional jurisdictions to direct and conduct their ongoing training needs in the medium to long-term.⁴⁴ In addition, any programme of judicial education should be developed to address the distinctive learning characteristics of judges as professionals in order to be educationally effective.

Analysis of case study experience leads to the emergence of certain common themes which may have application for courts around the world. In summary, these themes include the following:

Independence and Autonomy

It is essential to ensure that the judicial training institution is led by the judiciary rather than the executive to avoid the constraints in independent decision-making. Similarly, there is a need to delegate as much financial autonomy (accompanied by accountability) as possible

⁴⁴ Recognition of the importance of judicial training being court-owned and judge-led arises from the work of Ralph Tyler and C.O. Houle in the arena of continuing professional education. More specifically relating to judicial training, see Catlin D.W., *An Empirical Study of Judges' Reasons for Participation in Continuing Professional Education*, 7 (2) THE JUSTICE SYSTEM J. 236-56 (1982); HOULE, *supra* note 9; TYLER R.W., BASIC PRINCIPLES OF CURRICULUM AND INSTRUCTION (1949); ARMYTAGE L., EDUCATING JUDGES: TOWARDS A NEW MODEL OF JUDICIAL LEARNING (1996); Armytage L., *Judicial Education on Equality*, 1 MOD. L. REV. 180 (1995).

in order to consolidate judicial independence, elicit ownership and buy-in from the judiciary, and enable the institution to deliver the training which the judiciary perceives it needs. Constraints in the independence and financial autonomy of institutions have limited the scope of training services available to the judiciary in Mongolia, Pakistan and additionally the Philippines. While it is recognised that there is usually a shortage of financial resources available for training purposes, it may be observed that independent judicial training institutions are more likely to be actively supported by donor bodies in the interests of good governance.

The impact of a lack of independence is seen in the constraints which exist in judicial autonomy to determine its own programme of training. In practice, the judicial training institution must not only secure the endorsement of the judicial leadership to its proposed programme of training activities, but this must also be agreed by representatives of the executive. This places the judiciary in an unsustainable position of subservience in the decision-making process. The legacy of this subservience is all-pervasive and should be avoided from the outset through the establishment and composition of court-owned and judge-led governance structures if at all possible.

Ownership

As seen in Australia and Britain, the viability and utility of any programme of judicial education rests on it becoming accepted by the judiciary as being court-owned and judge-led. There are many useful structures, mechanisms and processes to strengthen this sense of ownership which have been developed around the world. These include judicial leadership in the governance structure, representation and participation in oversight committees and courts' education committees, and active consultative processes in assessing needs, planning activities, and establishing a core faculty of judge trainers.

Governance Structure

In addition to embedding the leadership and representation of the judiciary, experience in the Philippines, Britain and Australia indicates that representation of community interest and educational expertise in the governance structure is appropriate in informing policy-based decision-making.

Judicial Leadership through Training Faculty

It is a universal feature of experience that judges prefer other judges to act as their trainers because they are recognised as having the relevant experience and insight on the subject. Judge trainers are seen as authentic and as practitioners, rather than theorists. They do however need training in presentation skills, and ToT courses are offered by the training institutions. A further problem which is encountered in Pakistan is enabling talented judges to serve on the core faculty of trainers by amending the judicial service rules so that judges can serve as training faculty without losing seniority.

Resources and Financial Viability

It is a relatively universal feature of judicial education around the world that there is a shortage of financial resources. Such shortages are likely to define the operating environment of those training institutions. That said, the critical issue is how those resources are allocated and managed. The Philippines Judicial Academy [hereinafter PHILJA], like the Federal Judicial Academy [hereinafter FJA] in Pakistan, the National Legal Centre [hereinafter NLC] in Mongolia and other institutions, is constrained by this problem. The solution to the challenge of financial constraint is found in the strategic outlook and managerial direction of available resources to ensure that priorities are identified and addressed in an educationally effective manner as outlined later in this Paper. Moreover, because of endemic shortages of resources available for judicial training, resort should be made to existing resources whenever available and appropriate, as is the case in Mongolia where the NLC training facility is shared with lawyers. A related issue is ensuring adequate resources are available for distant courts to participate in training programmes. While it is doubtless cheaper to establish a single centralised body to provide training services, this approach transfers the invisible burden of funding the recurrent logistical costs of travel and accommodation of training judges to provincial or distant courts, and often creates a significant invisible barrier to participation in practice for courts with no training budgets, as is the case in Pakistan. The solution to this problem is to ensure that recurrent funding for travel and accommodation is adequately provisioned. This provisioning should be centrally allocated to the training institution to ensure coordination

in the application of funding. This will enable the national judicial training programme to, for example, provide allowances for the travel/accommodation of distant judges and prevent funding being spent on unrelated provincial purposes.

(i) Organisational Mission and Structure

It is important that the mission of the training institution specifies its purpose with sufficient direction to promote judicial competence, and identifies specific objectives and services in order to guide and inform the management and operations of the institution. In the Philippines, a lack of clear definition and delegation of responsibilities impedes efficient management and the expeditious delivery of training services.

(ii) Participation Policy

Approaches to participation vary from country to country. For example, the Australian approach to participation is voluntary, supported by active encouragement from the leadership, and an emphasis on designing practical training services which entice judges to attend because it makes their job easier. Other countries, such as the United States, have mandated participation. While this is clearly a policy-based decision for the judicial leadership, it may be considered by the judicial authorities that it is more culturally-appropriate at this time to mandate participation.

(iii) Accessibility and use of Information Technology (IT)-Based Delivery Media

As seen in Pakistan and the Philippines, active steps are required to ensure the accessibility of any centrally-based training initiative in terms of enabling the participation of judges from regional areas by dismantling financial disincentives, delivering training in decentralised activities, and using web-based instructional media to overcome problems of distance.

(iv) Sensitisation

A common feature confronting the introduction of judicial training

programmes is an initial reluctance of some judges to recognise the need for or benefits of judicial training. Deeply held sensitivities relating to judges' perceptions of the need and usefulness for continuing education must be addressed on judges' terms, and this may take time. Moreover, judicial training must be shown to be led by the judiciary itself, rather than externally imposed by the executive as this undermines judicial independence and is likely to be obstructed by judges themselves. This was certainly the case in both Britain and Australia where there were also suspicions that it may be an intrusion on independence by the executive. Experience in both countries has demonstrated that these sensitivities can be satisfactorily overcome during the establishment period through the provision of court-owned and judge-led practical training which helps judges to do their job on a day-to-day basis.

(v) Practicality

Competency-based approach - As observed recently in Pakistan, as elsewhere, there is an increasing trend towards the development of competency-based judicial training which in addition to transmitting information on law and procedure, develops the practical skills and professional attitudes of good judging and is directed towards improving both personal and institutional performance.

IV. MODEL GUIDELINES OF PRACTICE

From this review of the international experience, it is possible to offer some guidelines for the consideration of a court introducing programmes of continuing education. These include:

1. Develop and standardise programmes of induction training and continuing judicial education which are court-owned and judge-led, and provide a range of conferences, seminars, workshops and paper-based and electronic publications that are practical, address the needs of judges for competency and skills-based development, and improve judicial performance.
2. Develop strategic and activity plans to define the goals and objectives of its programme of judicial education, and the priorities, structure and content of its curriculum and services.
3. Establish a governance structure, or council, for the judicial

training body to be chaired by the Chief Justice, and include representatives of the judiciary, educational experts and community interests.

4. Consider whether continuing judicial education should be voluntary, court-endorsed or mandatory.
5. Involve members of the judiciary in the planning, establishment, management and evaluation of the judicial training programme.
6. Conduct a comprehensive training needs analysis, which includes active consultation with representatives of the legal profession, business community and representatives of civil society.
7. Undertake an assessment of the resources available and needed to establish and implement the programme of continuing judicial education, including fixed infrastructure, human resources and recurrent budget requirements.
8. Use existing resources wherever relevant and appropriate.
9. Apply the principles of adult and professional learning in the design and delivery of training services.
10. Develop a ToT programme for judges.
11. Design and implement a system for monitoring and evaluating the effectiveness of judicial training and its contribution to judicial performance.
12. Convene a special conference of the judicial leadership and relevant stakeholders to consider these recommendations and to develop a plan of implementation.

V. OBSERVATIONS

In exploring the options to institutionalise judicial training, particularly in transitional jurisdictions around the world, there are a number of key decisions which need to be addressed by judicial

authorities and these are:

A. Juristic Model

While there are many different approaches to delivering programmes of judicial education and training, a review of the international experience indicates that there are in essence two major models. These models are based on the underpinning systems of justice within which they operate, viz. the continental civil system and the British-based common law system.

Continental Civil Model

This Model includes many hybrid varieties but is structured around a careerist approach to judicial appointment, that is, new judges are appointed from the ranks of law graduates for the term of their careers. Their induction is preceded or supported by an extensive institution-based training period prior to initial appointment as a magistrate or junior judge. As they acquire experience and seniority, they return to the training institution for further training ahead of promotion within the judicial hierarchy. This approach in training is establishment focused, institutionally directed, mandated and prescriptive, tightly structured, based on a comprehensive curriculum, and usually includes examinations and formal assessments. A classic example of this approach is found in France with the establishment of *L'Ecole Nationale de Magistrature* in 1958. Other countries using variations of this approach include Germany, Italy, Japan and Thailand.

The strengths of this approach are that it is highly structured, comprehensive and quality assured. The disadvantages are that it is very expensive in requiring extensive infrastructure and institutional capacity-building, it may be rigid and non-responsive to changing conditions and needs, and it is classroom-based and theoretically-focused rather than practical and applied in its approach.

Common Law Model

This alternative approach is based on systems of judicial selection from the ranks of experienced lawyers who are either appointed or elected to a judicial office, and usually remain in that office without promotion

until retirement or completion of term. This approach builds on substantial levels of pre-existing professional legal competence, as the usual qualification for selection. It focuses on providing usually short transitional orientation or pre-service training to the judicial role, and in-service continuing education usually in updating on recent developments. Examples of this approach are found in the British Judicial Studies Board, the Judicial Commission of New South Wales, and the Philippines Judicial Academy. Variations of this approach relate to its prescriptive or elective nature: (a) in the United States, most states have *mandated* continuing judicial education as compulsory for purposes of ongoing licensure as a judge; (b) In New South Wales, however, ongoing training is formally voluntary, but it is *endorsed* by each court with the effect that it is informally mandated; and (c) In Britain, it is strictly elective and relies on *voluntary* participation.

The strengths of this approach are that it is accessible, practical and court-focused, structured around supporting relatively experienced in-service judges performing their duties in court. It also requires considerably less infrastructure and resources and as a result is much cheaper to supply. The disadvantages are that it provides a much less comprehensive framework of structured training and pre-qualifying promotion to support the development of judicial competence, and inexperienced judges may lack sufficient technical and professional guidance and support in performing their role.

The selection of model depends on the fundamental structure of the judicial system in each country and the process for judicial appointment. These in turn affect the mission and objectives of each judicial education. In the careerist approach, it is the mission of judicial training to develop the candidate to the required level of competence prior to appointment or promotion; in the common law approach, it is the mission of judicial education to facilitate transition to the judicial role from a base of pre-existing professional competence as a lawyer, and to support in-service continuing professional development. There are various arguments about which approach is better, which go beyond the scope of this Paper. Yet, interestingly, many of the issues and challenges of practice are observed to remain the same, irrespective of model.

B. Leadership

Experience indicates that it is fundamentally important that the judiciary as an institution directs the process of its ongoing training, education and development. This requires the championship and commitment of the Chief Justice to lead this development. It may also require the support and endorsement of the Ministry of Justice. Analysis of governance structures for judicial training around the world discloses that this leadership is generally established in the governance structure of the judicial training institution, most commonly through the chairmanship of its peak decision-making body as an indication of the importance and sensitivity of the endeavour. Other experienced and respected members of the judiciary should be members, representing various interests within the judiciary. Other members should include the government, educational experts and representatives of the community, or civil society, that the judiciary serves.

C. Ownership

Similarly, it is important that the judiciary have an adequate opportunity to participate actively in its own professional development through active membership of oversight committees, consultations regarding needs, and contribution to the faculty of instructors. Any suggestion that this training is being imposed from the outside risks demoralising the judicial constituency and creating barriers to effective learning. As already mentioned, there are a number of mechanisms, structures and procedures which will promote and consolidate ownership and leadership. These include:

- leadership of and representation in the governance body;
- establishment of judicial policy and quality oversight committees;
- formation of education programme committees in each court;
- participation in training needs assessment consultations;
- conducting training as part of the judicial faculty; and
- providing feedback on services as part of monitoring and evaluation.

D. Client Focus

In order to ensure that the curriculum of training focuses on developing competence and practical aspects of judicial service delivery, representatives of the community and court should be included in the governance structure of the institution.

Experience demonstrates that while judges are insightful in their perceptions of their own training needs, this presents only half of the assessment. A doctor asks a patient to describe his/her symptoms, but this does not complete the diagnosis. Similarly, the assessment of judicial training needs is usefully extended to the clients of the judiciary who can provide valuable feedback of their perceptions of the quality of judicial service. Provided this task is handled with appropriate sensitivity, valuable insights of need can be provided by representatives of the legal profession, business community, and civil society. For example, judges in Australia did not recognise that they used technical jargon which is impossible for lay people to understand and needed to use plainer language. This gave rise to valuable training in communication skills. Similarly, judges in England did not know that they are regarded as being slow, arrogant and out of touch with community values. This in turn gave rise to extensive training in case management skills, communication skills, and taking steps to get back in touch with prevailing social values.

E. Needs

The single most dynamic element in determining the educational content of any programme of judicial development is the nature of the training need it is intended to address. The needs are defined in terms of key competencies - the *knowledge*, *skills* and *disposition* required for judges to perform their duties effectively. For this reason, a comprehensive training needs assessment or analysis should be conducted from the outset. Articulation and prioritisation of these needs will then inform the objectives for the education programme.

The needs assessment should be inclusive and participatory, and involve three principal constituents: (a) members of the superior and subordinate judiciary; (b) relevant educationalists and other respected academics; and (c) community representatives and civil society,

representing both “clients” and “non-clients” of the courts, business, alienated poor as represented through NGOs and other interest groups. The methodologies of these assessments will usually combine a number of elements including:

- face-to-face interviews of key stakeholders;
- standardised surveying on all/sample judicial officers;
- clinical observations of judicial performance in courts;
- analysis of court performance data; and
- expert consultations and appraisal.

The benefits of investing in a comprehensive needs assessment comprising all or a combination of these methodological elements is foundational in building the training programme and will directly inform its nature and content.

F. Mission and Objectives

As discussed earlier, once the training needs of the judiciary are identified, the judicial training institution should determine its mission, objectives and priorities as the basis for developing its curriculum of courses and publication services.

A review of the experience in other countries discloses a commonality in the overall mission of programmes of judicial education, but some quite marked refinements in specific objectives dependent on the specific needs being addressed. The universally recognised mission of judicial education is to enhance the competence of judges and thereby to improve the performance of courts to provide services applying the law and resolving disputes. Beneath this overarching mission, objectives may vary but are likely to aim at building competence by improving the knowledge, skills and outlook of judges. Examples of some programme objectives are to focus on orientation and induction training, or to conduct seminars to improve legal knowledge or workshops to develop judicial skills or computer literacy. Priorities are those matters identified by the judiciary as needing to be addressed first in its training programme.

Reference has already been made giving examples of different objectives and priorities in different institutions focusing services. Experience around the world commonly demonstrates that training institutions determine initial priorities at induction level training for subordinate courts through face-to-face training. These priorities tend to evolve as the institution becomes more established and starts to address other priorities such as the in-service needs of more experienced judges, the needs of more remote judges, and the higher level needs of senior and specialist judges.

This 'competency-based' approach to training and development has as its ultimate objective the improvement of institutional performance of the courts as a whole. Clearly, improvements in court performance require the support of training programmes which do more than just give judges information about the law. In addition, these programmes need to develop the skills and attitudes of good judging which equip judges to do their jobs effectively. In practice, there may be more needs than resources or opportunities to address them. In these cases, it is usual to set priorities to guide the focus of the training response. Determination of these priorities is a policy-based task which should be made by the appropriate decision-makers responsible to the judicial leadership.

An example of training objectives and priorities decision-making is recently provided by Pakistan's Federal Judicial Academy expanding its education programme from conducting lectures on legal information into developing a workshop programme on judicial skills development. This policy-based decision has resulted in the expansion of the training programme with the following curriculum of new training packages:

- Legal research skills
- Computer research skills
- Decision-making skills
- Judgment writing skills
- Communication skills
- Assessing evidence skills

- Case management skills
- Backlog reduction skills
- Alternative dispute resolution skills.

Other examples of setting objectives include the decision of the Philippines Judicial Academy to reduce the preponderance of its face-to-face conference activities by introducing a distance-learning strategy to enable judges to participate in training remotely, using IT web-based media. In Australia, the initial priority for the focus of training services was to newly appointed magistrates because as a matter of policy the Judicial Commission of New South Wales determined that it would offer the largest and most immediately apparent benefits by addressing the needs of new appointees in the subordinate courts. It was only after the subordinate courts' induction programmes were firmly established after five years, that the Judicial Commission reviewed this policy and priority, and expanded its services to the superior courts on a continuing professional development basis.

G. Resources

The next most influential factor in the institutionalisation of any judicial training programme is the resources available to address training needs. This will be affected by which judicial model is appropriate: careerist or common law, or a hybrid of the two as may be appropriate. The former clearly requires substantially more resources in the form of infrastructure and a permanent training establishment. Are these available, or can they be shared from existing resources? A detailed resource assessment, including fixed and recurrent budgets should be prepared within the context of what is feasible. In Pakistan, for example, the Federal Judicial Academy has a hostel with a capacity for fifty-two participants to undergo courses of up to three months. Similarly, the Philippines Judicial Academy offers hostel facilities. But many other countries, such as Britain or Australia, have not considered it necessary to make such investments to date.

The case study experience demonstrates that another crucial resource is the availability of judges to serve as trainers. As has been seen in Pakistan, an invisible barrier may obstruct the availability of good judges to perform this role until judicial service rules have been

modified to count faculty service for purposes of seniority.

As has been discussed earlier, particularly in relation to the experience of the Philippines and Pakistan, the lack of resources generally available for training programmes impels an approach which makes best use of what resources are available. In Mongolia, for example, judges and lawyers are trained together. As a guiding principle, active use should be made of appropriate resources and materials which may already exist in other institutions, for example, universities and related training institutions.

H. Curriculum

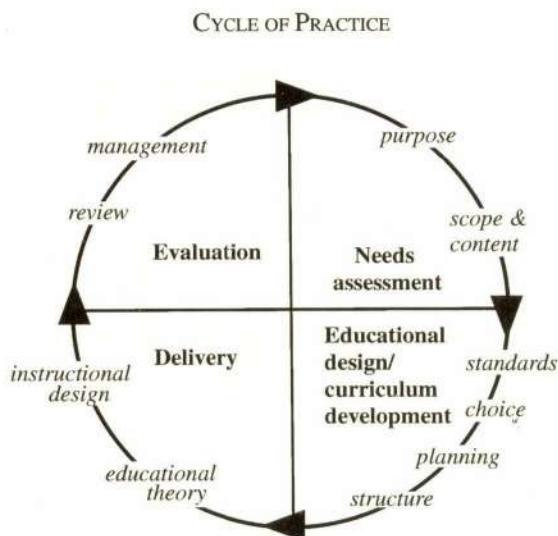
The curriculum of any programme of judicial education will vary according to the learning needs, educational objectives and programme priorities of each judiciary.

Curriculum design provides a framework to help judicial educators to plan what is to be taught, to whom and why, and implies that decisions have been made about the subject matter, the relationship between segments of knowledge, skills and abilities, and their organisation and sequence. The value of curriculum development in continuing judicial education is that it offers a plan of the proposed learning outcomes and the means of reaching them. This enables educators to identify whether segments of the programme are missing or operating ineffectively.

A curriculum strategy should be devised to match and rank training services to those needs which have been identified in a planned manner, rather than throwing ad hoc training in a piecemeal way at one topic after another. This strategy could usefully include the introduction of an establishment plan, the setting of educational goals and objectives, a perpetual cycle of annual training plans comprising pre-service and in-service programmes, the formulation of policies and standards, and a career-planning stairway that offers an appropriate framework of promotional incentives and rewards for aspiring judges.

To assist in the development of effective practice, a cycle of model practice for judicial education is proposed below. This cycle builds on principles of adult learning, professional development, and judicial education to integrate managing the education process. This cycle is

perpetual, and consists of four quadrants, each comprising additional spokes: (i) *needs assessment* – identification of purpose, scope and content of training required, (ii) *curriculum* – setting of strategies and priorities, application of resources, and design of curriculum approach (iii) *delivery* – development of capacity through training-of-trainers, presentation of courses, publication of materials; and (iv) *evaluation* – ongoing monitoring, refining and updating in light of feedback and change. Reference to this cycle of practice management should assist judicial policy-makers and educators alike in addressing the planning issues associated with judicial education in a methodical and systematic fashion.



Curriculum planning using a planning matrix also provides a means to plan and structure training services to meet categories of educational need in a methodical way, by classifying those services in terms of the nature of educational need which they are planned to meet.

This planning process can operate effectively through the formulation of a matrix of educational services. This matrix is defined by content (subject matter) and pitch (level of application). This approach defines content as consisting of five categories: law, procedure, management and administration, judicial skills, conduct and ethics. Pitch is categorised as induction, update, experience-exchange, specialisation

and refresher. By combining both axes, a matrix of twenty-five service options is created which facilitates the identification and characterisation of services being provided by the institution within an overall framework.

This matrix configuration commends itself for identifying the range of potential services which can theoretically be provided, and by highlighting those which actually are provided. This promotes planning, monitoring and ultimately evaluation. For example, an absence of any programming specifically designed for experienced judicial officers, or an absence of skills development generally, becomes readily apparent and can then be ratified or rectified at a planning level.

MATRIX PLANNING

Content Pitch	Substantive law	Court Procedure	Judicial skills	Ethics and conduct	Judicial administration management	Inter disciplinary
Induction - orientation						
Update - change						
Networking - problem solving						
Specialist - advanced						
Refresher						

I. Training of Trainers

As has already been discussed, another foundational issue is the application of principles of adult education, and the need to ensure the educational effectiveness of judicial training. The challenge of ensuring educational effectiveness applies at all levels in the planning, design and delivery of training services. As has been seen, these considerations affect the application of educational theory to judges in a number of significant ways and, in summary, any model of formalised continuing

judicial education should be based on foundations of adult learning, but must also reflect the distinctive characteristics of judges as learners.

ToT is a major element in any successful programme of judicial education and training. Just as we have seen that judicial education builds the capacity of the judiciary in terms of its independence, competence and accountability, more particularly, ToT instills the means for sustainability by enabling the judiciary to train its own members. A good judge may be a fine role-model, but s/he is not automatically a good trainer of other judges. It is relatively straightforward for judges to write and present papers on the law; it is not necessarily so straightforward to impart experience effectively, and to develop the skills and disposition of judging in others. Just as judges are not usually experienced trainers, so educators are not usually familiar with the distinctive training needs of the judiciary. This means that the judiciary, as an institution, should consider how, and who, it wishes to invest in its training programme, and it additionally requires the provision of a comprehensive ToT programme to establish the expertise to deliver the training required.

The purpose of ToT is to provide a faculty of judicial trainers with the capacity - the knowledge, skills and understanding - to train other judges effectively. This capacity is required at two levels: (a) directing and managing the education programme, and (b) delivering training services in the form of training activities and publications.

The TOT component will build on and develop the existing experience and expertise of the FJA which completed a programme of training in 2002. The proposed ToT will be divided into two segments (a) Curriculum Development and (b) Presentation Skills.

The ToT will be conducted using the experience of the existing faculty of the FJA in order to expand and develop expertise among themselves, and will also include the new faculty members and occasional trainers of the FJA and the subordinate level under the oversight of the provincial High Courts.

Module 1 - Curriculum Development

Objective: To introduce and develop capacity to (a) assess needs for

judicial education/training, and (b) develop curriculum and materials building on the existing experience of existing professional staff.

<i>Workshop 1</i>	Needs Assessment # 1 <i>Techniques and findings</i>
<i>Workshop 2</i>	Needs Assessment # 2 <i>Induction training: topic inventories, priorities</i>
<i>Workshop 3</i>	Needs Assessment # 3 <i>Continuing education: topic inventories, priorities</i>
<i>Workshop 4</i>	Curriculum Development # 1 <i>Resource analysis, educational strategy and policies</i>
<i>Workshop 5</i>	Curriculum Development # 2 <i>Session planning and materials.</i>

Module 2 – Presentation Skills

Objective: To introduce and develop formal and informal presentation skills, building on the existing experience of existing professional staff.

Each workshop (3-4 hours) explains and demonstrates the practice of adult learning by using training-by-doing active learning techniques. In each workshop, participants make presentations which are *video-recorded* for the purpose of review, critique and feedback.

<i>Workshop 6</i>	Introduction <i>Understanding the principles of adult learning</i>
<i>Workshop 7</i>	Presentation Skills – Lecturing techniques <i>Communicating effectively</i>

<i>Workshop 8</i>	Presentation Skills – Workshop techniques # 1 <i>Participatory learning and questioning</i>
<i>Workshop 9</i>	Presentation Skills – Workshop techniques # 2 <i>Using teaching aids, power-point and materials</i>
<i>Workshop 10</i>	Workshop Session Planning Brainstorming, group discussion, Q+A, Debate, problem-solving case-studies, solo/duet exercises
<i>Workshop 11</i>	Presentation Skills – Workshop techniques # 3 <i>Designing skills training curricula:</i> * Case management skills, Assessing witness credibility; Legal research skills; Judicial decision-making skills; Judgment writing skills.
<i>Workshop 12</i>	Presentation Skills – Workshop techniques # 4 Revising/ representing skills development workshops

Trainers' Handbook

The quality assurance and sustainability of the ToT will be consolidated by the publication of a *Judicial Trainers Handbook*. This handbook would provide a custom-designed, comprehensive and culturally-appropriate resource for faculty members. The content of this handbook should include the following sections:-

- Learning objectives
- Learning and training theory
- Characteristics of adult learners
- Learning styles

- Learning by doing
- Four steps of learning
- Planning your session
- Presentations techniques
- Traditional techniques
- Workshop facilitation techniques
- Large groups methods
- Small groups
- Papers, handouts and materials
- Some golden rules
- Questions
- Hearing and listening
- Non-verbal communication
- Presentation aids
- Common problems for presenters

Transforming Method and Content

A professional approach to judicial education involves both the content and the method of training. Traditionally, much of whatever judicial training was being provided has concentrated on substantive law. In some cases, this is much needed. But, in many systems particularly those which are merit-based, the training needs of judges include the development of skills and attitudes - sometimes called social context education - as much as information on the law. Moreover, delivery has often been very 'Socratic' - by this, we mean it has focused on delivering information on or about the law, mainly in a lecturing format. With the introduction of a new professional approach to judicial training based on the theory and principles of adult education, a more useful and effective means of delivering educational services will commence. In terms of content, this will focus not just on substantive law, such as information of important statutes and law, but also on the skills and disposition of judging. In terms of method, lecturing will be heavily supplemented by the introduction of small-group seminars and workshops which will build on the active participation of judges in techniques of active learning, such as problem-solving case-studies, scenarios and simulations, and panel discussions to develop professional

skills and judgment which build on their foundation of information and knowledge. It is important to stress that this training approach will be considerably more practical rather than theoretical, and active rather than passive.

Distance Learning – Publications, Bench Books and Web-Based Support

Additionally, it is often important to develop a strategy of 'distance learning' which will overcome the challenges of geography and inaccessibility, specifically the direct and opportunity costs associated with the centralised delivery of training based in capital cities. This distance strategy should commence with the introduction of a publications programme, comprising the writing of a first bench book, or practice manual for judges, focusing on court practice and procedures to provide them with practical assistance in performing their day-to-day role as judges. In addition, the institution should usefully start to publish a regular newsletter or digest on important current issues on law and practice, possibly, for example, extracts of the most useful papers from its new seminar programme for the lasting benefit of all judges, including those in distant regions who were unable to attend the proceedings. Later, detailed consideration should be given to extending this distance programme with the production of other training media which could include audio-tapes, video-tapes, computer-based packages and even satellite broadcasting.

Judicial Training Inventory

The services offered by any programme of continuing judicial education is determined by need. With the above curriculum approach, the ToT will facilitate participants to identify, organise and prioritise training services from the following generic inventory of training needs.

- *Substantive law and court procedure*

- To be assessed depending on the prior training,
 - experience and duties of judges
 - Criminal law and procedure
 - Civil law and procedure

- *Judicial skills*

How to conduct a hearing trial
Control of courtroom
Note-taking
Legal research
Admitting evidence
Statutory interpretation
Judgment writing and giving reasons
Principled and uniform sentencing
Administering natural justice, due process and fair trial
Protecting human rights and civil liberties
Resolving disputes and alternative dispute resolution
(ADR)

▪ *Judicial management and administration skills*

Case management
Administering courts: filings, fixtures, hearing lists and queuing
Record management
Registry management and practice
Team leadership between judicial and court officers
Judicial information technology and computer skills
Managing complex litigation and commercial disputes

▪ *Judicial disposition – social context - outlook, attitude and values*

Judicial role, powers and responsibilities
Judicial independence, impartiality, integrity and outlook
Judicial review
Judicial conduct and ethics
Gender/race equality

▪ *Generic management and administrative skills*

Communication skills – written and oral
Time management
Computer skills
Coaching and mentoring

▪ *Inter-disciplinary*

To be assessed depending on the prior training,
experience and duties of judges

Forensic scientific evidence: psychiatry and pathology –
in criminal prosecutions

Financial accounting – in complex commercial disputes

Medico-legal fundamentals – in injury cases.

Learning by Doing

As judicial educators, we understand that adults “learn best by doing.” Consequently, our preferred approach to developing institutional capacity is to guide and assist them in delivering training services - whether courses, publications or other support services for the judiciary - actively at the operational level. This implies that considerable practical support is initially required at the formative stages of establishing a new programme of continuing judicial education to assist in conducting training needs assessments, developing the curriculum strategy, and delivering courses and workshops with evaluation and the provision of constructive feedback.

J. Monitoring and Evaluation

It is in the interests of all stakeholders that a system for monitoring the performance and results of judicial training is introduced in order to (a) provide a means for feedback to refine operations; and (b) demonstrate an effective contribution to improving judicial service delivery. Yet, the application of this principle in practice is recognised by its breach.

A system to monitor the judicial training programme is required to ensure that it delivers what is intended, and provides mechanisms to review and refine activities in the light of feedback and experience. The design of this system hinges on the specific goals and objectives of the programme, once endorsed.

Because no single indicator can comprehensively measure professional development with validity and reliability, a range of indicators were required to measure the impact of the programme. These

indicators measure specific outputs and then "triangulate" an assessment of their outcomes on the performance of the judiciary. Because qualitative measurements are variable, preference to selection of quantitative indicators will be made wherever possible.

The process recommended a two-tiered building-block approach to performance indicators be adopted to assess the programme in terms of its process and its impacts.

Process Indicators

These measure the implementation of the programme in terms of its efficiency and effort. These indicators are "internal" to the programme and evaluate whether it is doing what it set out to do. Typically, these indicators should include the following:

The lead indicator relates to central project activity and efficiency, and is activity-based, such as conducting a specified number of training courses on time and within budget. While a criterion for success of the programme relates to judges learning and competence, any direct assessment of improvements in the levels of knowledge, understanding, skills and attitudes of individual judges may be difficult and expensive.

For this reason, it may be more appropriate to select secondary indicators relating to participants' reaction to the program and training. These secondary indicators usually include *participation* in training as an objective; a visible, quantitative measure of project output and efficiency. Similar indicators may relate to publication and distribution of materials.

While it may be difficult to directly measure increased judicial competence, it is useful to measure (a) participants' *satisfaction* in terms of whether they perceived that the training added to their knowledge, understanding, skills and attitudes; and (b) any existence of their *intentions* to make improvements in service delivery as a result. While these indicators are inferential in measuring qualitative perceptions of programme value, they do enable ongoing refinement and fine-tuning of project effort (formative evaluation). More importantly, they provide the means to measure the will to improve systemic performance, which

is essential to improving performance in terms of service delivery (summative evaluation).

Impact Indicators

These measure the effectiveness of programme outputs in terms of their results or outcomes. They are “external” to the programme, and describe objectively visible measurables and how they contribute to enhancing service delivery for indigenous people.

Ultimately, the lead impact indicator may be the performance of the courts to dispose of disputes in a timely and cost-efficient manner. It is not, however, easy to select any single indicator of measurement. Official statistics abound, but they do not necessarily describe all relevant considerations. While invariably anecdotal and qualitative, client satisfaction of service may ultimately synthesise all other indicators.

A number of techniques could be used to collect data using these indicators for purposes of evaluating the intervention. These techniques include:

- Comparative surveys – self, peer and external assessment
- Interviews of key stakeholders and representatives of court users
- Observation and expert appraisal
- Courts’ performance data.

Ultimately, a variety of performance indicators were selected with which to “triangulate” measurements of the contribution of the programme to enhancing the quality of court services to the community. These indicators combine process and impact evaluation techniques, subjective and objective criteria, and quantitative and qualitative data.

VI. CASE STUDIES

The case studies outlined below were selected from diverse judicial systems and legal traditions to define the key issues from actual

experience that inform the development of any good judicial training programme over time. Each case study features different experiences and generic lessons which are nonetheless universally relevant in illustrating choices made and lessons learnt by such institutions. The lessons from these experiences inform the observations and recommendations in this Paper.⁴⁵

The case studies are narrated in chronological order relating to the establishment of judicial training institutions in each country, and reflect an evolutionary trend in the development of experience in judicial training around the world from which lessons will be distilled for the consideration of judicial authorities in transitional jurisdictions.

A. Australia

An assessment of the Australian experience in introducing judicial training is illuminating for judicial authorities in other countries specifically in relation to issues of judicial ownership, judicial leadership through participation in the training faculty, participation policies, and resource rationalisation.

Context:

Australia is a parliamentary federation of seven states, with a multicultural population of twenty million people who are predominantly Caucasian. The economy is a prosperous western-style services-based model, with a GDP purchase power parity per capita of USD27,000.

Justice System:

Constitutionally, the federation and each state make law and administer justice in a court system based on the British common law approach. The judiciary comprises approximately 1,000 judges and magistrates sitting in a two-tiered court hierarchy comprising the apex

⁴⁵ The author gratefully acknowledges the generous assistance provided by the Federal Judicial Academy of Pakistan, the Philippines Judicial Academy, Ms. Mary-Fran Edwards of the Mongolia Judicial Reform Programme; the Australian Institute of Judicial Administration, the Judicial Commission of New South Wales, and the Judicial Studies Board of the United Kingdom, the United States Agency for International Development, and the Asian Development Bank in researching this paper.

High Court and the Federal Court of Australia, together with state Supreme, District and Local Courts. These courts are supported by an extensive tribunal system for the resolution of administrative and special civil disputes.

How and Why the Country and/or Judiciary Decided to Reform or Build a New or Significantly Revamped Judicial Education Mechanism

Judicial education in Australia is relatively well established, but nonetheless recent in its origins. Traditionally, judicial education was non-existent in any formalised sense and relied heavily, in the words of one senior judge, on "the gifted amateur." During the 1970s, various courts took initiatives to conduct conferences and seminars usually on a national, biennial or ad hoc basis. It has however gathered considerable momentum and, "heralds the advent of potentially significant changes in the Australian judicial culture."

The origins of judicial education in Australia can be traced to the formation of the Australian Institute of Judicial Administration [hereinafter AIJA] by judges in 1975, and by a call in 1983 from Justice Michael Kirby for the introduction of formalised judicial education to assist new appointees in the transition to the Bench and to keep judges abreast of change, following similar recent developments in France and the United States.

An additional driving factor related to the standards of judicial conduct and competence which had not been, until then, a matter of particular public concern.⁴⁶ However, criminal charges, trials and a commission of inquiry into the conduct of a Justice of the High Court, criminal charges against a District Court Judge and the conviction of a former chief magistrate led to closer scrutiny of judicial standards and to the New South Wales Government taking steps to be seen to address these misadventures through the establishment of the Judicial Commission.⁴⁷

⁴⁶ HOULE, *supra* note 9, at 14, 271.

⁴⁷ SHETREET, JUDGES ON TRIAL - A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY (1976); *see also* Shetreet, *The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986*, 10 U. NEW SOUTH WALES L. J. 4, 7 (1987).

History of the Establishment and Development Process to Date

Early calls for judicial education were met with a mixed response within the judiciary. It was not until the establishment of the Judicial Commission of New South Wales [hereinafter Judicial Commission of NSW] 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. Subsequently, there have been major increases in the provision of judicial education in all states. In 1994, the first judicial orientation course was conducted on a national basis by the AIJA and Judicial Commission of New South Wales. This course was opened by Chief Justice Mason, who observed:⁴⁸

[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.

Looking back almost twenty years, the establishment of judicial education now seems straightforward in Australia.⁴⁹ But, at the time, its introduction was quite controversial. Many judges considered that it was not necessary, indeed an insult to their competence.⁵⁰ Others saw it as an intrusion by the executive into their independence by prescribing continuing education. These concerns were mingled with other larger problems relating to falling public confidence in the judiciary over complaints of high costs of litigation, trial backlogs, and alleged instances

⁴⁸ Chief Justice Sir Anthony Mason, Opening address at the Inaugural National Judicial Orientation Programme, Sydney (Oct. 3, 1994) (unreported). See also Mason, *supra* note 22.

⁴⁹ Nicholson (Justice of the Supreme Court of Western Australia), *Judicial Independence and Accountability: Can They Co-exist?*, 67 AUSTRALIAN L. J. 404, 425 (1993). Judicial education is now an accepted part of judicial life in many countries . . . Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.

⁵⁰ LORD HAILSHAM, *HAMLYN REVISITED: THE BRITISH LEGAL SYSTEM TODAY* 50-51 (1983).

of corruption. Overall, there was a crisis in public confidence in the courts which took some years to resolve.⁵¹

The most significant factor in facilitating resolution and acceptance within the judiciary was the very visible judicial ownership of the Judicial Commission, defined through the chairmanship of the Chief Justice and the inclusion of all other heads of jurisdiction on its governing body. It rapidly became clear that the Commission was the creature of the judiciary rather than the executive, and this was emphasised at all operational levels through elaborate consultative mechanisms, such as standing judicial oversight committees and education committees in each court, to ensure judicial leadership and participation in all operational planning and the delivery of educational services.

In the twenty years since the introduction of judicial training in Australia, there has been a steady building in the ownership and acceptance of the practical value of continuing professional development for judges. In the early days, as outlined, quite a number of judges were guarded in their attitudes, feeling that judicial education was unnecessary, ineffective or intrusive. Over the years, as they have explored and discovered the practical utility of this training in helping them to perform their jobs more easily and better, so a growing commitment has become steadily evident. Ultimately, this underscores the Australian approach which focuses on ensuring that the training is useful and practical in helping judges to do their jobs better.

Summary Description of the Organisation, Mission and Management Infrastructure

Judicial education is now provided in Australia on a national and state basis by the Australian Institute of Judicial Administration, the National Judicial College of Australia, and the Judicial Commission of New South Wales, as outlined below.

⁵¹ For example, see the work of Justice McGarvie (then Justice of the Supreme Court of Victoria; now Governor of Victoria). McGarvie, *The Foundations of Judicial Independence in a Modern Democracy*, J. JUDICIAL ADMINISTRATION 1, 33 (1991); *The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence*, 1 J. JUDICIAL ADMINISTRATION 236-77 (1992); Nicholson, *Judicial Independence and Judicial Organisation: A Judicial Conference for Australia?*, 2 J. JUDICIAL ADMINISTRATION 143-61 (1993).

Judicial education is delivered at both the national and state levels for constitutional as much as judicial reasons. Australia is a federation and, under its constitution, law is made at two levels, federal and state, and is administered by two levels of courts. The establishment of the AIJA reflected a national initiative to provide education to all judges. But in practice the reach of its services was limited by resource and logistical constraints. What then followed was the largest state, New South Wales, establishing the Judicial Commission to address the more localised training needs of its own state-based judges. In due course, this was followed in the next largest state, Victoria. This has resulted in quite patchy service delivery at the national level. The more recent establishment of the National Judicial College of Australia [hereinafter NJCA] was intended to even out delivery of available training for judges particularly in smaller states. This has brought with it a new challenge to rationalise resources and services, which is presently ongoing.

Interestingly, this evolution was slightly different in the United States, which is also a constitutional federation. Here again the initiative to institutionalise judicial training was seen in the establishment of the National Judicial College [hereinafter NJC] in Reno, Nevada, which was designed to provide training to all and any judges *nationally*. In due course, the states similarly started to introduce their own training bodies to provide more focused training for the particular needs of their *state* judges. Moreover, the training needs of the *federal* courts were then separately addressed through the formation of the Federal Judicial Center in Washington DC. In the following years, the relevance of the NJC has been more or less completely superceded by the superior reach and focus of the state-based providers, resulting in the NJC exploring other mandates, for example, the provision of specialist training in particular areas not covered by other providers, and training to foreign judges whose countries lack the facilities to provide their own or who alternatively wish to survey the U.S. experience.

Judicial education in Australia is voluntary. Publicly, the courts express strong views against mandatory training, mainly for purposes of distancing what it sees as intrusive and 'politically correct' calls by either the public or the executive for the courts to change their approaches and attitudes on controversial public issues. Privately, the courts increasingly recognise the value of relevant judicial education, and

informally encourage their judges to actively participate. This involves courts taking steps to dismantle barriers against participation by, for example, providing official relief from sitting obligations, and ensuring participants receive normal salary, benefits and entitlements on training days. Over the years, conducting training has migrated from a weekend and evening activity to part of the mainstream business of the courts. Experience indicates that expecting judges to undergo training after hours and through weekends is attractive only to the most committed, and is a perverse recipe for the most needy going untrained.

(i) Australian Institute of Judicial Administration

The principal objectives of the AIJA include research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems.

Supervision of the day-to-day management of the Institute is the responsibility of the AIJA Board of Management. The Board consists of President, Deputy Presidents together with three elected Council members. The Institute is a private organisation, sponsored by government, and membership is by subscription.

Historically, much of the focus of the AIJA has been upon case-flow management as a means to improving judicial administration, and the Institute has published widely in this area. In the area of education, the Institute runs a number of regular activities in the area of judicial education including annual programmes for court administrators, court librarians, magistrates and judges. It has also been involved in developing courses in relation to a number of specialised areas including gender awareness programmes, courses relating to cultural awareness, court technology and case management.

Each year, the AIJA runs a number of courses, conferences and seminars designed for judges, magistrates, tribunal members, court administrators, lawyers and others with an interest in judicial administration. All education activities are conducted on a fee-paying basis. These activities include:

- Sheriffs' Seminar
- Annual Conference
- Annual Magistrates' Conference
- Annual Oration
- Technology for Justice Conferences
- Guest Lectures
- Annual Tribunals' Conference
- Special projects– Indigenous Cultural Awareness, and Technology for Justice.

A major initiative involves the Regional Judicial Orientation Programme, which is a five day residential course for judges from Australia, New Zealand and the Pacific region, featuring training on:

- Courtroom Issues
- Judicial Conduct
- Time Management
- Psychological and Physical Health
- Using Computers as a Research and Management Tool
- Judgment Writing
- Assessing the Credibility of Witnesses
- Problems in Evidence
- Court Craft
- Social Awareness Issues
- Sentencing
- Alternative Dispute Resolution
- Common Pitfalls in Decision Making

The AIJA also publishes reports on commissioned research, collections of papers from important conferences and seminars, the *AIJA News*, and the *Journal of Judicial Administration*.

(ii) National Judicial College of Australia

In the early 1990s, calls were made for the establishment of a body dedicated to providing judicial education for the whole Australian judiciary for the following reasons:

Currently judicial officers in Australia attend a diverse range of judicial education programmes but the availability varies greatly between jurisdictions. A national approach to judicial education would address the needs of judicial officers throughout Australia. A national college would ensure that education for judicial officers was planned and coordinated at a national level, both increasing quality and avoiding duplication.

The National Judicial College of Australia was established in May 2002 as an independent entity, and reports annually to the Council of Chief Justices and to the Standing Committee of Attorneys General. The objectives of the NJA are:

- to provide professional development for judicial officers (federal judges and magistrates, and judges, masters, and magistrates appointed by participating State and Territory governments); and
- to conduct occasional courses for non-judicial officers, such as senior court administrators and tribunal members.

The governing body is comprised of a council of six members, headed by a State Chief Justice, together with judicial representatives from other states. This council is supported by regional coordinators to assess programme needs, and a consultative committee to ensure that the Council has the benefit of the views of stakeholders and of all geographical regions of Australia. The work of the College is supported by a Director and a personal assistant to the Director. The College reports annually to federal and state attorneys-general, and to the Council of Chief Justices.

At the official launch of the College in August 2002, the first chair of the Council of the College, Chief Justice John Doyle of South Australia, said the following about the need for judicial education in Australia:

The case for a National Judicial College for judicial education is self evident. Members of the Australian judiciary can benefit from programmes of professional development that focus on their legal skills, their practical judicial skills, and their approach to their work and which help them to maintain fitness and enthusiasm for the work. The work of the judiciary is demanding. Judges are expected to have professional legal skills of a high order. Some of these practical skills are peculiar to the judicial role, some are skills that are also required in other professions. Additionally, the administration of justice involves much more than professional and practical competence. There is a qualitative aspect to the administration of justice which calls for judicial officers to have a real enthusiasm for their work, a strong belief in the importance of justice, and a commitment to the administration of justice in the fullest sense of the word. Experience tells us that most judicial officers can benefit from programmes of professional development that help them.

(iii) Judicial Commission of New South Wales

New South Wales has the oldest and most extensive programme of judicial education in Australia and has adopted the more recent American approach of providing state-based education for judicial officers. This programme is provided by the Judicial Commission, which was established in 1986 in response to calls for a formal mechanism to review sentences and sentencing practice, and to give effect to judicial accountability. The Commission's principal functions are to:

- assist the courts to achieve consistency in sentencing;
- organise and supervise an appropriate scheme of continuing education and training of judicial officers; and
- examine complaints against judicial officers.

The Judicial Commission's education programme aims to promote

excellence in judicial performance by providing judicial officers with information on law, justice and related areas; and assisting in the development of appropriate judicial skills and values. It also responds quickly to important legal developments through conferences, seminars and publications.

The Judicial Commission offers an extensive conference and seminar programme ranging from induction courses for new appointees to specialist conferences. It provides special seminars on topics of importance to judicial officers. It also regularly conducts conferences to keep judicial officers up to date with current developments and emerging trends. Computer training courses aim to facilitate effective use of computers in the context of the court system, and to enable access to on-line legal databases.

Curriculum and Curriculum Development Processes

Detailed curricula of current courses conducted by the National Judicial College of Australia, and the Judicial Commission of NSW, together with its Policy of Judicial Education, are available on inquiry.

Commentary and Lessons Learnt

Analysis of the Australian experience identifies a number of useful lessons for the consideration of the judicial authorities in other jurisdictions. These relate to judicial ownership, judicial leadership through participation in the training faculty, participation policies, and resource rationalisation.

(i) Judicial Ownership

The issue of judicial ownership of its own training has been a critical element in the successful establishment and institutionalisation of judicial education in Australia. High levels of suspicion initially existed in the judiciary at the prospect of executive interference in the internal affairs of the courts and the external imposition of a mandatory programme of training. In Australia, these quite universal concerns were addressed through a number of structures, mechanisms and procedures including (a) vesting real decision-making control in the leadership of the judiciary as constituted in the governance structures of those

institutions; (b) the installation of standing judicial oversight committees; and (c) the formation of education committees in each court.

At a more operational level, judges are normally notified of training opportunities through their respective courts, and this is seen as an important institutionalising mechanism for demonstrating court endorsement and, thereby, ownership and authenticity. Notification is usually through a memorandum of the Chief Judge. While it is recognised that many older judges still prefer conventional paper-based media, this is increasingly through electronic bulletins as the judiciary becomes progressively more electronically literate.

Another important and influential means of ownership is through the use of judges on the faculty of trainers.

(ii) Judicial Leadership through Training Faculty

The issue of training faculty warrants some comment. Generally, judges prefer that other judges act as their trainers because they are recognised as having the relevant experience and insight on the subject. Judge trainers are seen as authentic and as practitioners, rather than theorists. They do however need training in presentation skills, and ToT courses are offered by the training institutions. There are also many interdisciplinary subjects where other experts are recognised as being qualified, for example, DNA profiling, forensic ballistics, mental illness or off-balance sheet accounting. Additionally, the professional staff of the training institutions, who may be educational rather than judicial experts, will act as trainers where appropriate.

(iii) Participation Policy

The Australian experience demonstrates the value of eliciting voluntary participation in training rather than to mandate it through rules. This is contrary to the approach in the United States where more than 90% of states invest in mandated judicial training. In the Australian experience, the best educational approach is seen to be through voluntary motivation to participate. This imposes an obligation on the education provider to deliver really relevant and useful training in an accessible way. It also requires institutional support of judicial training by dismantling any barriers against participation, for example, the perverse

incentives of expecting judges to regularly surrender their private time to attend training activities at their own cost. This has involved courts increasingly treating training as a mainstream part of their business, which is conducted during business hours, with judges receiving full entitlements to salary and costs during participation.

(iv) Resource Rationalisation

Australia is presently addressing the challenge of rationalising available judicial education resources and services. Arguably, the success in introducing programmes of judicial education, notably in New South Wales, has created demands by the judiciaries in smaller states which has unexpectedly resulted in an oversupply of providers. While better resourced than some other countries, the reality remains that many courts in smaller states are relatively less well serviced than in others. Providers are now rationalising their respective roles to avoid duplication, as has also occurred in the United States in regard to the evolving role of the National Judicial College. It is within this context that one of the useful new roles of the NJCA is to consolidate a national calendar of training from all providers, and to make this available to all judges.

B. Britain

An assessment of the British experience in introducing judicial training is relevant for the judicial authorities in other jurisdictions because it highlights an important issue relating to facilitating the introduction of formalised programmes of judicial development, and to addressing the existence of certain judicial sensitivities pertaining to the need to be trained.⁵²

Context:

Britain is a constitutional monarchy with a bicameral parliament, comprising an elected lower House of Commons, and an hereditary appointed upper House of Lords. It has a population of sixty million people. The economy is highly developed, industrial and services-based, and the GDP purchase power parity per capita is USD25,500.

⁵² The English experience is outlined by Partington, *Training the Judiciary in England and Wales: the Work of the Judicial Studies Board*, CJC 319-36 (1994).

Justice System:

Britain is the cradle of the common law approach to adversarial justice and judge-made law, which is replicated in various hybrid forms around the world. At the apex of the judicial hierarchy is the judicial bench of the House of Lords; the Supreme Courts of England, Wales, and Northern Ireland - comprising the Courts of Appeal, the High Courts of Justice, and the Crown Courts; and the Magistracy, many of whom are lay appointees, that is, unqualified in law.

How and Why the Country and/or Judiciary Decided to Reform or Build a New or Significantly Revamped Judicial Education Mechanism

Traditionally, senior judges in Britain - as distinct from magistrates - have been appointed from the ranks of practicing lawyers, and their experience was seen as providing all of the required qualifications for performing their judicial role.

More recently, however, the judiciary has been seen as being 'out of touch' with the community and as failing to reflect the values of society it was commissioned to serve. Public criticism of the professions generally, and the judiciary specifically, became increasingly vocal in the latter part of the twentieth century. This criticism related to inadequate service systems to care for the needy, the community which the judiciary is charged to serve. The judiciary was criticised by consumers as being expensive, slow, incompetent and inefficient. This criticism imposed considerable pressures on judiciaries around the world to carry out their duties at the highest possible standards of competence, and it is arguably within this context that the concept of systematised continuing professional education evolved, as much in Britain as elsewhere.

History of the Establishment and Development Process to Date

In Britain, judicial education is administered by the Judicial Studies Board which found its origins in a one-day sentencing conference organised by Lord Parker in 1963. The Judicial Studies Board [hereinafter JSB] was set up in 1979, following a review by Lord Justice Bridge, with the object of providing a range of education services to the judiciary, magistracy and lay magistracy particularly in the criminal jurisdiction. In 1985, its role was extended to cover the provision of

training in the civil and family jurisdictions and the supervision of training for magistrates and judicial chairmen and members of tribunals. The British approach to judicial education is markedly less formalised than is the case in the United States, and conducts a range of judicial orientation and updating programmes which historically was predominantly designed for 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 (sic) 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 organised means of enhancing performance.

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

Summary Description of the Organisation, Mission and Management Infrastructure

The JSB identifies the *mission* of judicial training as being, “to convey in a condensed form the lessons which experienced judges have acquired from their experience . . .” The *objectives* of the Board are:

1. to provide high quality training to full and part-time judges in the exercise of their jurisdiction in Civil, Criminal and Family Law;
2. to advise the Lord Chancellor on the policy for and content of training for lay magistrates, and on the efficiency and effectiveness with which Magistrates’ Courts Committees deliver such training;

3. to advise the Lord Chancellor and Government Departments on the appropriate standards for, and content of, training for judicial officers in Tribunals;
4. to advise the Government on the training requirement of judges, magistrates, and judicial officers in Tribunals if proposed changes to the law, procedure and court organisation are to be effective, and to provide, and advise on the content of, such training; and
5. to promote closer international co-operation over judicial training.

The Chairman and members of the JSB are appointed by the Lord Chancellor. The Board comprises of senior judges, respected academics and prominent members of the community. Representatives from the judiciary, the magistracy and tribunals constitute a majority of the JSBs members. The management of the Board consists of the Chairman and a Director of Studies, both of whom are senior judicial officers, supported by a small secretariat staff, and a framework of honorary committees, including:

1. Criminal Committee
2. Civil Committee
3. Family Committee
4. Magisterial Committee
5. Tribunal Committee
6. Equal Treatment Advisory Committee

Each committee is responsible for developing and overseeing the conduct of particular training programmes. These programmes generally comprise induction training courses, continuing education seminars and publications.

Curriculum and Curriculum Development Processes

The JSB has not developed a comprehensive formalised curriculum

of training, consistent with its informal approach to professional education. Instead, it reports that it is now developing a more integrated approach to all aspects of judicial training, using a combination of judicial seminars, written and electronic materials, to maximise the effectiveness of the training. This is in response to receiving technical advice from educational experts to this effect. It includes developing systems of distance learning using materials supplied in CD-ROM or other electronic formats; creating and ensuring an efficient and continuing updating of materials supplied in bench books to enable them to be both a means of assisting the less experienced judiciary, and a means to regularly provide information on latest developments in the law; and to develop training in IT skills for judges.

The JSB publishes a range of materials. These publications are generally written by members of the judiciary at the JSBs request. These include journals and leaflets, and a range of bench books which provide practical assistance to judges in hearing cases, including:

1. Specimen Directions
2. Civil Bench Book
3. Family Bench Book
4. Equal Treatment Bench Book
5. District Judges (Magistrates Court) Bench Book
6. Youth Court Bench Book

In addition, it published a range of journals and leaflets:

1. Tribunals Journal
2. Reporting Restrictions: Crown Court
3. Reporting Restrictions: Magistrates Court
4. Race and the Courts
5. Equality before the Courts

The JSB also holds occasional seminars on ToT whose aim is, “to

equip those with training responsibilities with the competences they require in order to understand how to devise and provide effective and appropriate training to judges.”

Commentary and Lessons Learnt

Analysis of the British experience highlights a curious but very important issue relating to facilitating the introduction of formalised programmes of judicial development, and to addressing the existence of certain judicial sensitivities pertaining to the need to be trained.

Sensitisation

While this may seem strange to non-judges, many senior judges of “the old school” did not necessarily spontaneously recognise the needs for and the benefits of formalised training. This was doubtless because in a merit-based system of appointment where they had been appointed for outstanding competence from their peers, they epitomised the successful self-directed learner, and presumably saw their earlier careers as demonstrating their capability to learn whatever they need to know without outside help of a formally organised process. In other words, many saw the introduction of a training programme as being both redundant and potentially insulting.

The JSB confronted this sensitivity in its earlier years, and has publicly commented that the use of educational terminology – with its connotations of pedagogy which may be seen by judges and educators alike as inappropriate – is generally avoided. Such are these sensitivities that the Judicial Studies Board has remarked on the “awkward question of nomenclature” regarding the use of such words as ‘teach,’ ‘train,’ ‘instruct’ and ‘student’ in relation to professional judges. Interestingly, the Board overcame these sensitivities by using the term judicial studies, which it defines as “an organised means of enhancing (the judge’s) performance . . . to enable him to perform his duties more effectively.”⁵³

Seen in the light of this history, the recent endorsements of judicial training by the superior judiciary in Britain which demonstrate that these sensitivities have been addressed over the past twenty years provide an

⁵³ JUDICIAL STUDIES BOARD, REPORT FOR 1983-87 at para. 3.5, 13 & 3.2, 12 (London: Her Majesty’s Stationery Office).

indication of the time required for education programmes to change deeply-held judicial culture and attitudes. This is particularly relevant when contemplating the time required for programmes of training and development to serve as agents of change in generating leadership and culture change. Some recent topical examples of training performing this longer term leadership role in Britain, Australia and other developed countries, relate to judicial attitudes and values to the disadvantaged, women's rights and/or the standing and treatment of racial minorities.

C. Pakistan

An assessment of the Pakistani experience in introducing judicial training reveals the existence of significant constraints relating to independence and autonomy which are of considerable relevance to the judicial authorities in other countries. Other significant lessons relate to ensuring the financial viability of centrally-delivered training for provincial judges, and the need to amend judicial service rules so that judges can serve as trainers without losing seniority.

Context:

Pakistan was established in the partition of British India in 1947, and is a secular Muslim republic of four provinces under transition from a military dictatorship headed by General Musharraf as president with an elected bicameral legislature. The population is approximately 150 million people. The economy is largely underdeveloped and is mainly agricultural, with substantial textile exports. The GDP purchase power parity per capita is USD 2,000.

Justice System :

The justice system is a hybrid based on the post-colonial British common law model overseen by the apex Islamic Shariat Court. The judiciary comprises almost 2,000 judges sitting in the federal Shariat and Supreme Courts, provincial High Courts, and District trial courts exercising civil and criminal jurisdiction. The Supreme Court has original, federal appellate, and advisory jurisdictions. High Courts have original and provincial appellate jurisdictions. The Shariat Court

determines whether any law is repugnant to the injunctions of Islam. In addition, there are special courts and tribunals to deal with specific kinds of cases, such as drug courts, commercial courts, labor courts, traffic courts, an insurance appellate tribunal, an income tax appellate tribunal, and special courts for bank offences.

The Pakistani judicial system has been plagued by various systemic problems that have hampered the effective administration of justice, due primarily to erosion of its independence, neglect and under resourcing. Problems include long delays in the courts; lack of a centralised coordinating body to develop legal and judicial policy; lack of professional management and case systems management in the courts; lack of budget resources; shortage of judges; inadequate infrastructure; lack of public access to justice; and the very serious decline in the standards of legal education and the profession. While changes have been made over the years to some substantive laws, little has been done to address some substantive problems. Despite its many shortcomings, the court system is responsive to reform, and is presently participating in the massive "Access to Justice Programme" valued at USD300m funded by the Asian Development Bank aimed to improve infrastructure and judicial service delivery to the public.

How and Why the Country and/or Judiciary Decided to Reform or Build a New or Significantly Revamped Judicial Education Mechanism

Judicial education was initially recommended by the First Law Reforms Commission in 1959. This Commission recommended that judges "should receive an intensive practical training in the functions of a subordinate judge for an adequate period of (one or two years) before they are allowed to work independently." This was supported by the Second Law Reforms Commission in 1970 that recommended that, "a Judicial Service Academy be set up to impart training to serving and newly recruited judicial officers in substantive and procedural law, the art of judgment writing, the appreciation of case law, the interpretation of Statutes and in the general techniques of planning and organising judicial work efficiently and with the least inconvenience to the litigant public." It also recommended that, "Judicial Officers with less than ten years service should also be selected by rotation for a short intensive course of training of at least three months duration at the Academy."

History of the Establishment and Development Process to Date

The Federal Judicial Academy was established under a Government Resolution in September, 1988. A permanent campus was established in the capital Islamabad in 1994 comprising lecture theatre, seminar rooms, library and a hostel with a capacity for fifty-two residential guests. Legal cover to the organisation and functioning of the Academy was provided with the enforcement of the Federal Judicial Academy Act in 1997.

Independence and Autonomy

It is essential to ensure that the judicial training institution is led by the judiciary rather than the executive to avoid the constraints in independent decision-making exist in both Mongolia and Pakistan. Similarly, there is a need to delegate as much financial autonomy (accompanied by accountability) as possible in order to consolidate judicial independence, elicit ownership and buy-in from the judiciary, and enable the institution to deliver the training which the judiciary perceives it needs. Constraints in the independence and financial autonomy of institutions have limited the scope of training services available to the judiciary in both of these countries, and additionally the Philippines. While it is recognised that there is usually a shortage of financial resources available for training purposes, it may be observed that independent judicial training institutions are more likely to be actively supported by donor bodies in the interests of good governance.

Summary Description of the Organisation, Mission and Management Infrastructure

For general supervision of the affairs of the Academy and the achievement of its aims and objects, a Board of Governors has been constituted under the chairmanship of the Chief Justice of Pakistan. Other members include the Minister for Law, Justice and Parliamentary Affairs; Principal Secretary, Ministry of Law, Justice and Parliamentary Affairs; Attorney-General for Pakistan; Chief Justice of Lahore High Court; Chief Justice of High Court of Sindh; Chief Justice of Peshawar High Court; Chief Justice of Baluchistan High Court; and Director General of the Academy.

The management of the Academy is carried on under the general directions of the Board, by the Director General who is the Principal Accounting Officer as well as academic and administrative head of the Academy. The aims and objects of the Academy are:

- orientation and training of new Judges, Magistrates, Law officers and Court personnel;
- in-service training and education of Judges, Magistrates, Law officers and Court personnel;
- holding of conferences, seminars, workshops and symposia for improvement of the judicial system and quality of judicial work;
- publishing of journals, memoirs, research papers and reports.

The Academy is presently expanding its pedagogical techniques for imparting training. These now include class room lectures by judges, jurists and scholars, supplemented by panel discussions, scenarios, simulations, problem solving and case studies with reference to landmark judgments of the superior courts, involving issues both pertaining to substantive and procedural law. Workshop syndicate discussions also form part of the training methodology. These aim at providing an opportunity to the participants to interact and exchange their knowledge and experience with one another; which helps in analysing and articulating current juridical issues. Participants are divided into a number of groups. One of the participants is designated as chairman who prepares, with the contribution of other members of the group, a report which is presented in the plenary session, for conclusions and finalisation of recommendations.

As a part of the capacity building of the Academy, management has recently introduced a change mainly in the method of judicial education and training. Hitherto emphasis has been on dissemination of knowledge and information about substantive law by way of lecturing. However, the FJA is now employing more useful and effective means of delivering educational services, with the introduction of a new professional approach to judicial training based on the theory and principles of adult education. This quite fundamental shift of approach

was made by the Academy in response to the advice of international educational experts advising the Academy to expand the training agenda from focusing on transferring legal information to improving court performance through developing the skills of good judging. In terms of content, this will focus not just on substantive law, but on the skills and disposition of judging. In terms of method, lecturing will be heavily supplemented by the introduction of small group seminars and workshops which will build on the active participation of judges in techniques of active learning, such as problem solving case studies, scenarios and simulations, and also panel discussions to develop professional skills and judgment which will be supported by the foundation of information and knowledge. It is important to stress that this training approach will be considerably more practical and active than theoretical and passive.

Curriculum and Curriculum Development Processes

The FJA has conducted more than one hundred courses since its inception in 1998, and has provided training to some 2,098 judges from all provinces. These courses have included pre-service and in-service refresher training and re-orientation courses, seminars and workshops. In addition, the Academy conducts lectures and discourses by eminent scholars and jurists on a range of subjects to equip the trainee judges with judicial skills which are required to improve the quality of justice with greater stress on subjects such as the rule of law, alternative dispute resolution, framing charge in criminal cases, issues in civil matters, the conduct of a judge, court management, etiquettes and manners, self-management and stress management. Various other topics are also covered, with particular emphasis on civil practice and procedure, maintenance of court registers and record, case management, style of judicial reasoning and the process of decision making. As already noted the Academy has now developed and extended its curriculum from being information-focused to being skills-focused. This has involved a quite profound transition in outlook and pedagogical approach, requiring considerable provisioning of ToT support for the faculty of instructors.

The FJA also conducts an expanding programme of conferences, seminars and workshops for judges, as well as a model court, together with new programmes in computer training and publications. While

this volume of training – notionally suggesting slightly more than one single training experience per judge over the past six years – is relatively low compared with more established programmes, such as that in Australia where each judge participates in one week of training every year on an average, it does provide an indication of volume for comparative purposes.

Commentary and Lessons Learnt

There are a number of particular challenges confronting the delivery of judicial training in the Pakistani experience which have relevance to the judicial authorities in other jurisdictions. These include independence and financial autonomy, logistics of delivering centralised training, and accessing high caliber judges to establish core faculty.

(i) Independence and Financial Autonomy

As with Mongolia, the issue of independence and funding are problematic in principle, but not necessarily in practice. The FJA is a creature of statute, headed by the Chief Justice, but funded through the Ministry of Justice. This arrangement means that while theoretically independent, it must curry favour with the executive through the Ministry of Justice to secure its operational survival. This has not created any overt problems to date, because it is the policy of the Ministry of Justice to second a sitting judge to serve as its secretary – and, in this way, it can be seen that the interests of the FJA and the wider judiciary are well understood by the executive. But, it does highlight the proximity of the relationship between judiciary and executive, and it should never be forgotten that on two occasions in the past twenty-five years, the executive has dismissed judicial officers unwilling to re-swear oaths of allegiance to those administrations.

The impact of this lack of independence is seen in the constraints which exist in judicial autonomy to determine its own programme of training. In practice, the judicial training institution must not only secure the endorsement of the judicial leadership to its proposed programme of training activities, but this must also be agreed upon by representatives of the executive in the Ministry of Justice. While there are no visible examples of clashes between the judiciary and the executive in decision-making, what is clear is the evident subservience of the judiciary in this

decision-making process which renders it reluctant to place itself in any course of collision. The legacy of this subservience is all-pervasive and, it is argued, should be avoided from the outset through the establishment and composition of court-owned and judge-led governance structures if at all possible.

(ii) Centralised Delivery

While it may be cheaper to establish a single centralised body to provide training services, this approach transfers the burden of funding the recurrent logistical costs of travel and accommodation of training judges to provincial or distant courts, and often creates a significant invisible barrier to participation in practice for courts with no training budgets. The solution to this problem is to ensure recurrent funding for travel and accommodation is adequately provisioned. This provisioning should be centrally allocated to the training institution to ensure coordination in the allocation of funding. This will enable the national judicial training programme to, for example, provide allowances for the travel/accommodation of distant judges and prevent funding being spent on unrelated provincial purposes.

(iii) Judicial Leadership through Training Faculty

A further problem encountered in Pakistan is accessing talented judges to serve on the core faculty of trainers. Members of the judiciary and the subordinate judicial service are promoted on a seniority system structured around years of sitting in court. Service in the Academy does not qualify for purposes of promotion and thereby creates a barrier for otherwise upwardly mobile judges. The consequence of the anomaly is that only those judges whose promotion is no longer assured, or retirees, volunteer for such posting – hardly an optimal source of supply. The solution to this barrier, which still exists in Pakistan, is for the judicial authorities to amend the judicial service rules so that judges can serve as training faculty without losing their seniority.

D. Philippines

An assessment of the Philippines' experience in introducing judicial training is illuminating for judicial authorities around the world in four particular respects relating to the organisational mission of the training

institution, its organisational structure, financial resources, and the use of IT media.

Context:

The Philippines is a democratic republic headed by a President and bicameral legislature. The population of eighty-five million people is predominantly Catholic. The economy is underdeveloped and is service-based and industrial, with a GDP purchase power parity per capita of USD 4,600.

Justice System:

The legal system is a hybrid derived from those of Spain and the United States. Civil code procedures on family and property and the absence of jury trial were attributable to Spanish influences, but most commercial statutes are of United States derivation. There are four main levels of courts: local, regional, national and the apex Supreme Court. The Supreme Court regulates the practice of law in the Philippines, and manages PHILJA, which is responsible for the provision of judicial education to the courts.

How and Why the Country and/or Judiciary Decided to Reform or Build a New or Significantly Revamped Judicial Education Mechanism

The Philippines Judicial Academy performs what is seen as a vital role in ensuring judicial competence and efficiency through continuing judicial education. Chief Justice Hilario G. Davide, Jr. has described it as, "the [Supreme] Court's implementing arm and the nation's watchdog in the pursuit of excellence in the Judiciary."

History of the Establishment and Development Process to Date

PHILJA was established by statute in 1996 as a unit of the Supreme Court to be the training school for justices, judges, court personnel, lawyers and aspirants to judicial posts. It is mandated to provide and implement a curriculum for judicial education, and to conduct seminars, workshops and other training programmes designed to upgrade their legal knowledge, moral fitness, probity, efficiency, and capability. The programmes of the Academy enjoy the patronage and support of the

Supreme Court, and participation of the judges is guaranteed: no appointee to the Bench may commence the discharge of his/her adjudicative functions without completing the prescribed courses of the Academy.

Summary Description of the Organisation, Mission and Management Infrastructure

The *mission* of the Academy is to bring about an institutionalised, integrated, and professionalised system of continuing judicial education for justices, judges, court personnel and lawyers aspiring for judicial positions. This system aims not only to provide knowledge and essential skills expected of members of the Bench, but also to foster desirable traits, values and attitudes, particularly competence, honesty and integrity. Continuing judicial education is seen as being at the heart of fostering excellence in the judiciary. It is an indispensable tool for ensuring an effective, independent and credible judiciary whose members are of proven competence, integrity and probity. The *objectives* of PHILJA are to:

- foster sound values and attitudes, expertise in substantive and procedural law, and develop management competence through courses, seminars and symposia for members of the Judiciary and quasi-judicial bodies;
- contribute to available legal literature of scholarly and practical significance to members of the Judiciary through the publication of a Judicial Journal and Bulletin;
- integrate the Academy's philosophy, principles and objectives and instructional programmes in conventions, seminars, and programmes of the association of judges and of court personnel;
- conduct research to advance the frontiers of juridical science and court technology;
- develop and strengthen networking and partnership with other institutions for the development and implementation of programmes for continuing judicial education.

Curriculum and Curriculum Development Processes

Generally, PHILJA provides a range of courses and publications, which include:

- Pre-Judicature programme – month-long introductory programme for aspirants to judicial positions
- Orientation programme – five-day course for newly appointed Judges
- Immersion programme – month-long programme for newly appointed Judges
- Career enhancement seminar – four-day seminar to update Judges on substantive and procedural law
- Workshop for executive judges – management training seminar for Executive Judges which focuses on Trial Court Performance Standards
- Regional seminar for judges and clerks – four-day seminar to update Judges and court personnel on new laws
- Programmes for judicial personnel
- Mediation – basic workshop on mediation
- Special focus programmes – Shari’a, Family, Child Protection, Intellectual Property, etc.
- Bulletin – Quarterly newsletter to provide updates on new rulings of the Supreme Court, orders and circulars, and other news and current events
- Judicial Journal – Quarterly newsletter to provide a forum on the justice system, through lectures and papers
- Electronic alerts – Monthly issue on Supreme Court business and decisions online

- Electronic updates – Quarterly legal update in CD-ROM format, which contains laws, statutes, new doctrines, administrative resolutions, orders and circulars.

Commentary and Lessons Learnt

There are four particular aspects of the Philippines' experience which warrant the specific consideration of the judicial authorities abroad as lessons to be learnt. These relate to the organisational mission, organisational structure, financial resources, and the use of IT media.

(i) Organisational mission

The issue of organisational mission warrants specific comment. While it is relatively straight forward for the mandate of any judicial training institution to prescribe the promotion of competence as its overarching objective, it is important to ensure adequate specificity in its mission. In PHILJAs case this is lacking.

PHILJAs mandate exhibits a generality in words, being to “foster sound values and attitudes, expertise in substantive and procedural law, and develop management competence through courses, seminars and symposia for members of the Judiciary and quasi-judicial bodies.” While this mission is clear it is not specific.

A more useful approach can be found, for example, in the policy of the Judicial Commission of New South Wales, which is much more specific, providing that, “[t]he purpose of this scheme of continuing judicial education is to assist judicial officers in the performance of their duties by enhancing professional expertise, facilitating development of judicial knowledge and skills, and promoting the pursuit of juristic excellence.” It then outlines twelve separate service components which specify how that mission will be put into effect. It is argued that a more focused mission is useful in guiding and informing the operations of the institution.

(ii) Organisational Structure

In a recent review conducted on the structure and operations of PHILJA, it was concluded that it suffered from poor training resources,

weak management systems and a lack of financial management and administrative autonomy, in this instance, from the Supreme Court. Remediation has been proposed with an organisational restructure, and introduction of a new decentralised approach, with greater budgetary autonomy and accompanying financial accountability. This said, it is premature to advocate a particular organisational 'model' or structure for other courts at this stage. Generally speaking, there is no "one-size-fits-all" model because different missions and objectives require different organisational structures and institutional capabilities. What is more important is a universal endorsement of the principle for firmly established organisational systems which clearly define institutional mission and objectives, and organizational roles and responsibilities. Moreover, it is important to ensure that management of the judicial training centre has clearly focused areas of responsibility - for example, administration, course development, programme delivery - and is vested with sufficient operational autonomy to perform their duties in a timely and efficient manner.

(iii) Financial Viability

It is a relatively universal feature of judicial education around the world that there is a shortage of financial resources. The reality is however that such shortages are likely to define the operating environment of those training institutions. That said, the critical issue is how those resources are allocated and managed. PHILJA, like the FJA and other institutions, is constrained by this problem. The solution to the challenge of financial constraint is found in the strategic outlook and managerial direction of available resources to ensure that they address identified priorities in an educationally effective manner. Simply because the budget available for judicial training in the Philippines may be considerably less than that available in Britain does not mean that its training services are inferior, provided that management is strategically positioned and the training faculty applies educationally effective methods.

(iv) Use of Information Technology based Delivery Media

A topical issue which PHILJA has addressed is the application of innovative information technology-based media for the transmission of its educational services, specifically electronic alerts, bulletins and

updates. While there is no available information on the extent to which trainees value these different kinds of training opportunities, it is understood that the development of these alternative/remote media is in response to judicial demand, and this is not surprising in a relatively technologically developed country such as the Philippines. This is similarly the case in the United States and Australia where judges are increasingly accustomed to working with computers on a day-to-day basis. This raises issues for a developing jurisdiction as to the extent it invests in 'old' technology of conventional educational and publishing media, and the 'new' information technology-based communication and information strategies. As much as possible, the latter course is recommended for the consideration of judicial authorities as it embeds longer term solutions from the outset to the judicial training approach.

E. Mongolia

An assessment of the Mongolian experience in recently introducing judicial training reveals the existence of two fundamental issues which are of considerable relevance to the judicial authorities in other jurisdictions. These once again relate to the independence and autonomy of the training institution and to its financial viability, as outlined below.

Context:

Mongolia is a parliamentary republic. The President is directly elected as head of state with a single chamber legislature (Great Hural) which elects the Prime Minister. Mongolia was a communist regime until 1990 when it introduced a new democratic constitution and ceased dependence on the former Soviet Union. It is a large landlocked country sharing borders with China and Russia. It has a population of 2.5 million people, most of whom are Buddhist. The economy, which is service-based and agricultural, is currently undergoing major market reform, involving introduction of free pricing, privatisation and a stock market. The gross domestic product purchase power parity per capita is USD 1,900.

Justice System:

The Mongolian judicial system comprises some 400 judges and consists of a four-tier hierarchy of the apex Constitutional Court,

Supreme Court, Aimag or District-level Court. The Mongolian judiciary is now independent of the other branches of government, and in recent years many of the responsibilities have been transferred to the judiciary. All judges must have a law degree, and have been trained under the socialist system. The workload of judges has increased substantially over the last few years and the types of cases they deal with have changed. Under the socialist system, most of their work was criminal. Now two-thirds of the cases are civil, involving commercial and contractual disputes, and bankruptcies. Many judges find the new disputes they are called to deal with confusing. Much free market legislation has recently been enacted, but most judges were trained before the introduction of these reforms. There has been little new training over recent years, though judges have recently started to participate in continuing education.

The Constitution of 1992 formalised the separation of powers between the judicial and other branches of government, enshrining the judiciary's independent status. Under the previous system, while it was nominally independent, the judiciary was effectively controlled by the ruling communist party. Judges were appointed by committees of the party, and party membership was an unwritten requirement. The party could put pressure on a judge to decide a case in a particular way, and it was also common for citizens to use their personal contacts with high ranking officials to try to influence judicial decisions. Although the party had no power to override a judicial decision, it could summon the judge to appear before a party committee to explain the result, and this in turn could lead to the judge being discredited or simply not reappointed. Now judges are subject only to law, and judicial power is vested exclusively in the courts. The government must respect the independence and impartiality of the judiciary, and in turn judges must abstain from political activity.

The new Constitution also introduced judicial standards that are embodied in the United Nations Basic Principles on the Independence of the Judiciary, such as the right to a fair trial, the right to counsel, and the presumption of innocence. The court structure has been significantly transformed by reducing the number of courts, abolishing the military and railway courts, and introducing a constitutional court.

On May 4, 2000 the Great Hural passed the "Strategic Plan for the Justice System of Mongolia." This involves a substantial legal training

component, which is now being implemented through a Judicial Reform Programme. This strategic plan focuses on court management and administration; case management; training and continuing legal education; establishment of a qualification system for legal professionals; ethics in the legal profession; and clarification of the organisation, structure, jurisdiction and responsibilities of justice system agencies.

The continuing judicial and legal education component of this strategy supports the new NLC to build capacity to provide a unified programme of retraining and professional advancement of Mongolian legal professionals, including judges and lawyers.

How and Why the Country and/or Judiciary Decided to Reform or Build a New or Significantly Revamped Judicial Education Mechanism

Mongolia made a voluntary smooth transition to a democracy and market economy. To do this, a new constitution and many new laws were passed. This obviously required retraining of the judiciary. The judiciary is now implementing the "Strategic Plan for the Justice System of Mongolia," adopted in 2000.

History of the Establishment and Development Process to Date

The Mongolia Judicial Reform Programme [hereinafter JRP], a project of the National Center for State Courts funded by the U.S. Agency for International Development, began in April 2001. In 2002, at the request of the Ministry of Justice, the JRP presented direct training to judges and prosecutors. The bulk of training activity is in ToT and assisting Mongolian stakeholders in presenting their own continuing legal education. In November 2002, parliament established NLC as the primary provider of transition and continuing education for judges and lawyers. The NLC is an entity of the Ministry of Justice and Home Affairs, rather than the General Council of the Courts.

Summary Description of the Organisation, Mission and Management Infrastructure

The NLC has formulated a strategic plan for unified continuing education for judges and lawyers in Mongolia. The *mission* of the NLC is to (a) improve the legal knowledge and professional skills of judges

and lawyers in conformity with the constitution, modern legal theories, legal reform and the current needs of the judiciary; and (b) to introduce approaches/experience/practices/thinking/attitudes to work fairly, independently and creatively in adherence to the principles of lawful statehood and the professional ethical norms.

- The Continuing Legal Education [hereinafter CLE] consists of improving legal skills, knowledge and qualifications, retraining and acquisition of new skills which will continue through the period of judges' and lawyers' performance of their jobs and duties. Its *objectives* are:

to create conditions and environments that will insist on constant inspiration of judges and lawyers to study under the laws, policies and code of ethics of the organisation or according to the needs and demands of the market economy;

to develop and implement a unified training programme to ensure continuity of systematised long-term and short-term training activities for legal professionals; and

to create a training cycle to let judges, advocates, prosecutors and other legal professionals attend retraining regularly.

The NLC is now introducing continuing training courses for judges and prosecutors, and will shortly develop a training programme for newly-appointed judges and prosecutors, applying the following principles:

- The system of CLE should be realistic and functional.
- The system of CLE should be democratic.
- The system of CLE should be consistent.
- The system of CLE should be accessible.
- The CLE system should be fair, independent, business-like and supportive to the developmental process of the judicial organisations.

- The primary goal of the CLE will be quality training based on the needs and demands of legal professionals.

Both the judiciary and legal profession are very small. Therefore, training is consolidated in the NLC. The NLC has an Education Committee and three subcommittees: Judges, Prosecutors, and Advocates. The NLC has a Director, Assistant Director, and Division Managers.

Curriculum and Curriculum Development Processes

Accomplishments to date in developing a continuing education programme for judges and lawyers have included:

- training-of-Trainers – building a sustainable pool of CLE trainers;
- assistance to the National Legal Center – study tour and advice on strategic plans;
- first induction course for new judges;
- video on trial of a domestic violence case;
- manuals on Company Law and Contract Law;
- direct training to judges and advocates in the capital and all districts on criminal code, criminal procedure code, civil code, civil procedure code, ethics, and advocacy;
- present Training-of-Trainers courses;
- develop a continuing education curriculum for judges;
- develop alternative dispute resolution training;
- develop creative, interactive judicial ethics courses with the NLC;
- motivate improved decision writing by judges; and
- support planning retreats for the NLC Governing Board and Judicial Education Subcommittee.

Commentary and Lessons Learnt

Analysis of the Mongolian experience indicates the existence of two significant constraints in the selection of approach, what might be termed the NLC model, which are relevant for the consideration of other judicial authorities.

(i) Independence and Autonomy

In November 2002, Parliament established the National Legal Center as the primary provider of transition and continuing education for judges, as well as most lawyers. The NLC is an entity within the Ministry of Justice and Home Affairs, not the General Council of the Courts. Arguably, an independent NGO model might free the judiciary from any control by the executive branch more than is at present possible. It would also free private lawyers from any educational control by the executive branch. However, Mongolia is a small developing country, and the government thought that consolidation of training into one government institution was the most likely way to ensure sustainability. This strategy was evidently endorsed by USAID as a donor supporting this approach. It does however restrict the extent of judicial ownership and autonomy in decision-making. This factor risks restricting judicial independence and the willingness of judges to participate voluntarily and actively in the programme, thereby potentially limiting its educational effectiveness.

(ii) Financial Viability

The NLC has a small budget, but it is sizeable by comparison to some other Mongolian government departments. The NLC is empowered to charge fees for its course to private lawyers and for its publications. It hopes to generate enough revenue that way. It is also running a Bar review course for candidates taking the national lawyer qualification examination, and it can charge for that. The NLC plans to rent out its classroom facilities to generate extra revenue. While these concerns of financial viability obviously preoccupy managerial attention which would otherwise be devoted to developing the judicial programme, they do at least for the present underwrite the operational viability of the programme.

THE ROLE OF THE JUDICIARY AND HIV LAW

Justice Michael Kirby*

INTRODUCTION

Judges, by definition, are leaders of their communities. They are invariably educated above the average and they ordinarily enjoy a privileged lifestyle. Typically, they are respected because of their office. Their special position in society imposes upon them a responsibility of leadership. Nowhere more is that responsibility tested than when a completely new and unexpected problem presents itself to society. All the judges' instincts for legality, fairness and reasonableness must then be summoned up, to help lead society towards an informed, intelligent and just solution to the problem.

It is dangerous to generalise about the judiciary. In the Asia/Pacific region of the world several legal systems may be found. In each of them, the role of the judiciary is different. For instance, a judge in Cambodia observes quite different legal traditions and conventions than does a judge in Australia or India. Typically, in common law countries, which derive their legal systems from England, the judge enjoys a specially important place in the exposition, development and application of the law. The judge's creative role in developing the common law gives him or her opportunities and responsibilities of law-making, which are probably greater than in most countries of the civil law tradition.

But even within common law countries, the opportunities of legal development differ at different levels of the judicial hierarchy. Thus, a judge of the final appellate court will have an important role in applying the Constitution, in expounding basic human rights, in sometimes striking down legislation as unconstitutional, and in keeping the other

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branches of government within the law. A judicial officer at the other end of the spectrum, a magistrate, will have much less opportunity to develop and expound new legal principles. He or she will generally be bound simply to apply statute law or common law as elaborated by the higher courts. Yet, a magistrate will see many more citizens than what higher court judges do. Typically, the magistrate's court processes about 90% of criminal and small debt proceedings. This is where most people see the judiciary. It is a mistake to conceive that the role of the judiciary is limited to the judges of the highest courts.

THE AIDS EPIDEMIC: DELINEATING THE ROLE OF THE JUDICIARY

In the face of the HIV/AIDS epidemic, judicial officers everywhere are now being increasingly called up on to marshal their talents to give leadership in fighting this scourge. Even though the epidemic presents many problems of a legal character; still more vital are the problems of prejudice, ignorance and discriminatory attitudes. This is why discrimination against people living with HIV/AIDS (or who are thought to be in that position) is sometimes described as the "second epidemic."

Herein the role of the judiciary vis-à-vis this epidemic can be understood in terms of the "5 Cs." These are Consciousness; Courts; Cases; Colleagues and Community. In each of these contexts, the judiciary has personal and collective responsibilities. They are universal, and are not limited to any particular legal system. As far as the judiciary's response to the HIV/AIDS epidemic is concerned it is not confined to merely interpreting, developing and applying the HIV/AIDS law. The judiciary must do more than this, for the epidemic is fundamentally about human beings, fellow citizens. It is not about statistics. It is not about law, as such. Jurists, as educated leaders of the community, must understand this.

A. Consciousness

The first responsibility of the judiciary is consciousness about HIV/AIDS and about the relevant legal principles which affect the performance of their professional tasks.

At the outset of this epidemic in 1984, I was taught by Dean June Osborn, of the Michigan School of Public Health, that the first rule in

HIV/AIDS law and policy was to base all action and responses upon sound data. That data will require those involved in relevant decisions and the exercise of governmental power (including the judiciary) to know what they are dealing with, and what they are talking about.

This is why it is important that all judicial officers today, in every country, should have more consciousness than what a layman understands about HIV/AIDS. As I shall demonstrate, the epidemic is coming to affect millions of people. It will have enormous implications for the running of courts, the decision-making in cases, relationships with colleagues, and the judiciary's role in the community.

In my own jurisdiction, in Australia, a sister institution to the National Judicial Academy of India, the Judicial Commission published an excellent work¹ which starts with the basic facts about AIDS and HIV infection, rudimentary information on what AIDS is; when it first appeared; how HIV is transmitted; how many people in Australia have been infected; which groups of people have been particularly infected; what the life expectancy of a person with HIV or AIDS is; how it is diagnosed; what are its symptoms; whether health care workers and other professionals are at risk of HIV infection; and what risk still exists in donated blood, blood products or human tissue.

The booklet continues with basic information on public health legislation in New South Wales applicable to people with HIV/AIDS, and with chapters on relevant statutory and common law principles applicable to such topics as liability for HIV transmission; application of anti-discrimination laws; the rules on confidentiality; the relevance of HIV/AIDS to sentencing; and the impact of HIV/AIDS on family law.

Doubtless, with the passage of time, some of the data concerning the epidemic has been overtaken. Certainly, much of the treatment of particular legal issues would now have to be elaborated by reference to recent developments. But the beginning of wisdom is knowledge of the features of the epidemic. Judicial officers, by their privileged position, and responsibilities to make decisions relevant to people with HIV/AIDS,

¹ JUDICIAL COMMISSION OF NEW SOUTH WALES, HIV OUTLINE - SOURCE MATERIAL FOR JUDICIAL OFFICERS IN NEW SOUTH WALES (1992).

owe it to their communities to inform themselves about the basic facts. They should not rely solely upon the general media, for it is often guilty of misinformation and extravagant reporting on this topic. That is why the first step in the role of the judiciary in this area is consciousness about HIV/AIDS. That consciousness should extend globally, but should be supplemented by a detailed knowledge of the best data available on the spread of the epidemic in the judge's own jurisdiction, as well as the most relevant statutory and common law principles, that a judge, suddenly facing a problem involving HIV/AIDS, will need to be aware of.

It is the responsibility of the Executive Government in every jurisdiction to provide to judicial officers the basic information contained in the HIV outline as mentioned above. If it does not, the judges must inform themselves.

B. Courts

The professional judicial function is typically performed in courts and sometimes in chambers. It is here that the judge, as jurist, meets citizens involved in legal cases and their representatives. Some of those citizens will have problems relevant to HIV/AIDS. These will call for sensitive application of statute law and general legal principles. But before the judge gets to this, he or she will have to know how to conduct a case which concerns an infection which is not just an ordinary medical condition. Around various medical conditions, they can gather elements of prejudice and stigma. It is found in community attitudes to various venereal conditions such as syphilis, and even to cancer.

HIV/AIDS in the courtroom is especially sensitive. In part, this is because of its association with death. In part, it is also because the modes of transmission are frequently by sexual intercourse and injecting drug use. The association of HIV/AIDS with drugs, sex, and in particular, groups which have often been (and sometimes still are) the subject of stigma and even criminalisation (homosexuals, drug-addicted persons, sex workers etc.) makes community responses to the epidemic highly sensitive, and sometimes over-reactive. The judiciary are members of their communities. They cannot be entirely free from the attitudes, fears and prejudices of the societies in which they live. But it behoves the judiciary to be better informed, and especially to so perform their

functions as to reduce unnecessary burdens upon those who come before them who are living with HIV/AIDS.

When AIDS first came along, there was often gross over-reaction to its presence in the courtroom. Prisoners, actually infected or suspected of being infected with HIV/AIDS, were brought into Australian courts by guards wearing space suit protection, completely unnecessary and highly prejudicial to the fair trial rights of the accused. There is no need for special courtroom procedures, such as the wearing of surgical masks or gowns or protective gloves, still less for the exclusion of the defendant from the courtroom. In the United States, it has been suggested that such courtroom precautions, without any scientific basis, would be a violation of constitutional rights to due process of law.² Requests by court staff for the testing of prisoners, or for the provision of special gloves to sheriff and bailiff officers, should ordinarily be rejected. It is a duty of the presiding judicial officer to make sure that his or her court staff is protected from risks of infection, or exposure to such risks. But it is now well known that casual social contact will not transmit HIV. The judiciary should not permit court process to be distorted, invariably to the disadvantage of the accused, by generally unnecessary isolation, or disadvantageous treatment. As has been observed:³

We are employers, of sorts, with large personal and official staffs, whose safety and security are our utmost concern. Judges are independent and are paid a salary which is not based on whether they win or lose. . . . Our job is to do the right and just thing, without fear or favour. Ensuring the right to an attorney, the right to have one's case heard, the fundamental rights of fairness and due process are the cornerstones of the halls of justice.

Because of the nature of the sensitive questions that can arise in cases involving HIV/AIDS, it will often be the duty of the judge to afford a measure of confidentiality to the persons involved. This is because it is usually permissible and proper to report court proceedings

² *Wiggins v. Maryland* 315 Md 232; 554 A 2d 356 (1989) (Maryland CA). See M.C. Morgan, *The Problems of Testing for HIV in the Criminal Courts*, 29 (2) JUDGES' J. 25 (1990).

³ R.T. Andria, *Shed Your Robes - Three Reasons for Aggressive Judicial Leadership in Coping with the HIV Epidemic*, 29 (2) JUDGES' J. 7 (1990).

which are open. It would be wrong to close every court proceeding which involved some issue concerning HIV/AIDS, or concerned a person living with the virus. The principle of open justice is fundamental to the role of the judiciary. On the other hand, the need to protect confidentiality can be secured by judicial orders in appropriate cases, forbidding the naming of those who are infected. In such cases, the courts try to balance the public interest in protecting confidential information against the public interest which favours disclosure.⁴ In *X v. Y*,⁵ the English Court of Appeal considered the public interest exception in relation to the disclosure of information about a person's HIV status. An injunction was sought to prevent a newspaper from publishing the names of two doctors infected with HIV who were working in a particular hospital. The newspaper had obtained the information from confidential hospital records. The newspaper argued that there was an overriding public interest in disclosing the information, because the public was entitled to know that the doctors had HIV. However, the court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because people with HIV must not be deterred from seeking appropriate testing and treatment. This decision is important because the judges recognise that confidentiality in relation to a person's HIV status could be important, not only to protect the interests of the infected person, but also for public health strategies against the spread of the epidemic.

In Australia, there have been similar orders by the superior courts protecting the confidentiality of people infected with HIV.⁶ Sometimes these have proved controversial. Occasionally, the media attacks the confidentiality orders of the judge. But the judiciary will know, and give value to, the competing interests at stake. So it was in the Bombay High Court where an interim order was issued suppressing the

⁴ See *Woodward v. Hutchins* [1977] 1 WLR 760 (CA); *W v. Edgell* [1990] 1 All ER 835.

⁵ *X v. Y* [1998] 2 All ER 648. See also R. Sarre, *HIV/AIDS and Suppression Orders*, 17 (3) BULLETIN OF LAW SOCIETY OF SOUTH AUSTRALIA 11 (1995).

⁶ See *Loker v. St. Vincents Hospital (Darlinghurst) & Anor*, unreported, Supreme Court of NSW, Australia, 11 October 1985 (Allen, M). See also *Australian Red Cross Society v. B.C.*, Supreme Court of Victoria (Appellate Division), unreported, 7 March 1991, cited in JUDICIAL COMMISSION OF NEW SOUTH WALES, *supra* note 1, at 29.

information of the identity of a person infected with HIV. Both were allowed to sue by pseudonyms (Mr. M X and Ms. Z Y). The applicants challenged a public corporation's dismissal of Mr. M X because he had tested HIV positive. The corporation's policy permitted discrimination on that basis. Mr. M X had been a casual labourer for a public sector corporation. He was clear for promotion, subject to a medical. The medical examination declared him to be fit. He was then required to undergo a further examination for permanency. He was found to be physically fit. But the HIV test revealed that he was sero-positive. The corporation sought to justify its discriminatory policy, although it is hard to see how, before any onset of disability, such a policy could be justified especially in the case of a labourer. Mr. M X challenged it as contrary to law and a violation of the non-discriminatory clauses (Articles 14, 15 and 16 of the Constitution of India). The Bombay High Court showed considerable sensitivity in its name suppression order. Some people if denied confidentiality would simply abandon their rights at law and never come to court.⁷

Another consideration in such cases is the need for urgency. Particularly at an advanced stage of AIDS, unless judges become proactive, and take control of the litigation involving people suffering from HIV/AIDS, the litigant may improperly be denied a right or remedy, and such loss may prove irreparable:⁸

If attorneys will not vigorously represent or refuse to represent HIV defendants, or if a defendant is denied access to the courtroom, time is critical. Similarly, if an AIDS litigant does not receive a fair trial because of bias or hostility, given the pace of the appellate process, the probability is that he or she won't be around for a re-trial. Finally, if a defendant is sentenced to prison merely because of his or her HIV condition, the person usually receives sub-standard medical care and other deprivations before an appeals court can rectify the situation.

It is the duty of a judge, as the exemplar of due process, to insist upon fairness in the court, and to prevent discrimination from showing its ugly face.

⁷ A. Grover, *Names Suppressed in Indian Discrimination Case*, 6 (3) HIV/AIDS LEGAL LINK 26 (1995).

⁸ Andria, *supra* note 3, at 7.

An article in the *Victorian Law Institute Journal* described the kind of problem that can arise in the context of a litigant's sexual orientation. The same problem might arise in the context of HIV/AIDS status:⁹

Often it is simply a matter of homosexuality being unnecessarily dragged into a case. The criminal lawyer, Jeff Tobin, whose gay clientele is ten percent of his practice and growing, says that a lot of his work is in making sure the courts don't dwell on who his clients prefer to spend their lives with. 'Sexuality is rarely an issue in criminal matters and it should certainly not impinge on a person's equality in the eyes of the law. Having a client's gay status thrown about in court doesn't always help get a fair judgment.'

I was once greatly affected by a Canadian judge, later a member of the Supreme Court of Canada and now United Nations High Commissioner for Human Rights, (Justice Louise Arbour) when she told a conference of judicial colleagues in Quebec that she never tolerated sexism in her court - whether it came from a litigant, the lawyer or a colleague. She always intervened to correct the perpetrator and the record, and to insist upon manifestly equal justice under the law. The judiciary must do so in the courtroom upon every ground of irrational discrimination, including the HIV/AIDS status of litigants, witnesses or others in front of the court.

C. Cases

The cases involving aspects of HIV/AIDS are now legion. Whole texts are written about AIDS and the law.¹⁰ From something which began rather modestly,¹¹ this is now a very large enterprise. In many countries, special series are now published on aspects of HIV/AIDS and the law. In Australia, there is a quarterly newsletter on HIV/AIDS law and policy called HIV/AIDS LEGAL LINK. There is a similar journal in Canada called CANADIAN HIV/AIDS POLICY AND LAW NEWSLETTER. There are many similar publications in the United States. In India, the Lawyers'

⁹ K. Derkley, *The Hard Earned Pink Dollar*, LAW INSTITUTE OF VICTORIA J. 742, 743 (1995).

¹⁰ See, e.g., J. GODWIN ET AL., AUSTRALIAN HIV/AIDS LEGAL GUIDE (2d ed. 1993).

¹¹ See, e.g., M.D. Kirby, *AIDS Legislation-Turning Up the Heat?*, 60 A. L. J. 324 (1985).

Collective, HIV/AIDS Legal Unit in Mumbai does invaluable work in its newsletters by drawing to notice court decisions in HIV related cases.

As far as the role of the judiciary in responding to the many issues which HIV/AIDS have presented to the law are concerned they are many fold. A number of examples may, however, illustrate the way in which informed judges, and other quasi-judicial decision makers, can render service by the sensitive application of the law to novel problems presenting as a result of HIV infection.

Let me start in the criminal law area. In common law countries, bail before trial is quite normal. It is not a feature of most civil law traditions. In the United States, it has sometimes been argued that the defendant's HIV status is relevant to whether or not he or she should be released pending trial. This is because of the shortened lifespan of most people found HIV positive. Typically, constitutional and statutory standards refer to the central question of whether the defendant will return to court to face the charges. Few, if any, refer specifically to HIV status. According to one analysis, it is not so much the category in which the person belongs, as the behaviour in which he or she engages, which is relevant. The stereotyping views about dangers to the public should be expelled by the judge, who should confine his or her decision to the actual known conduct of the applicant. An appellate court in New York held that it was an abuse of discretion to impose a condition of a negative HIV/AIDS test prior to release on bail, in so far as this was not mentioned in the statutes, and could involve an injustice to the particular applicant.¹²

Increasingly, judges are being faced by applications of the general criminal law, with special HIV/AIDS statutes designed to penalise persons who know that they are infected, but proceed to have unprotected sex and spread the virus. A Kenyan visitor was recently convicted in New Zealand under the general law.¹³ But in Victoria, Australia, a judge directed a jury to acquit a person accused, following consensual, unprotected intercourse, because he considered the risks of infection unreasonably slight.¹⁴

¹² See *People v. Mc Greevy* 514 NYS 2d 622 (1987) (NYCA).

¹³ Morgan, *supra* note 2, at 25.

¹⁴ Two charges were brought under the Crimes (HIV) Act of Victoria. The accused was acquitted on the direction of Teague J. of the Supreme Court of Victoria.

In the criminal area, the main questions which have come before judges involve issues such as sentencing persons who are known to be infected with HIV, and ordering parole release of such persons. In Australia, the principle that has been applied was stated by King CJ in the South Australian Court of Criminal Appeal in *R v. Smith*.¹⁵

The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a license to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking, ill health will be factor tending to mitigate punishment only where it happens that imprisonment will be a greater burden on the offender by reason of his state of health, or where there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

In *R v. McDonald*,¹⁶ the accused had been aware at the time of his original sentencing that he had HIV, but did not disclose the fact to the court. Evidence as to his HIV status was brought out in an appeal. There was also evidence that the appellant, by reason of his HIV infection, had been transferred to a special wing of the prison, where conditions were more restricted than in any other part of the prison system. The New South Wales Court of Criminal Appeal said:

The very nature of the confinement in the assessment unit imposes hardships, including the lack of opportunity that would exist in other sections of the prison for the appellant to determine who his associates would be. He is necessarily confined with other AIDS sufferers. . . While so confined, the appellant would have reduced opportunities for courses of education . . . A further consequence of confinement . . . is the loss of opportunity for remissions.

The Queensland Supreme Court ordered that an HIV positive

¹⁵ (1987) 44 SASR 587; 27 A Crim. R 315 (CCA SA).

¹⁶ (1988) 38 A Crim R 470 (CCA NSW).

prisoner should have his application for parole reconsidered. It overruled the Parole Board's original determination that special circumstances had not been shown by reason of HIV status.¹⁷

Other areas where judges are called upon to make sensitive decisions include in family law;¹⁸ in immigration decisions on permanent residence or refugee status;¹⁹ in adoption;²⁰ in disturbance of a will which fails to make provision for a life partner and is contested by the family;²¹ in discrimination cases involving employment, including in the military;²² in superannuation rights;²³ in insurance benefits;²⁴ and in industrial cases concerned with family leave entitlements.²⁵ All of these, and doubtless many other cases call for sensitive understanding by the judge of the high passions which tend to be engendered by the element of HIV/AIDS. In such cases especially judges need to ground all decisions upon sound data resting on the evidence - not on prejudice, stereotypes, myths or pre-judgment.

Many cases are now coming before the courts concerning claims for negligence. The cases may involve an accusation that a medical practitioner did not test the patient for his or her HIV status; did not inform the patient's partner of a positive HIV test of a patient, so as to

¹⁷ Decision of Fryberg J. in the Supreme Court of Queensland, *cited in* 6 (2) HIV/AIDS LEGAL LINK 13 (1985).

¹⁸ K.B. Glen, *Parents with AIDS, Children with AIDS*, 29 (2) JUDGES' J. 14, 17 (1990). See also JUDICIAL COMMISSION OF NEW SOUTH WALES, *supra* note 1, at 33.

¹⁹ *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 787 ALJR 180; 203 ALR 112; *cf.* decision of Refugee Review Tribunal (Aust.) N 94/04178, *cited in* 5 (4) HIV/AIDS LEGAL LINK 3 (1994). See also M. Alexander, *HIV and Permanent Residence* 6 (2) HIV/AIDS LEGAL LINK 8 (1995).

²⁰ Glen, *supra* note 18, at 18.

²¹ Derkley, *supra* note 9, at 743.

²² *IW v. City of Perth* (1998) 191 CLR 1; *X v. The Commonwealth* (1999) 200 CLR 177; CANADIAN HIV/AIDS POLICY AND LAW NEWSLETTER, Apr., 1995, at 14.

²³ Derkley, *supra* note 9, at 742.

²⁴ A. Anderson, *Landmark Discrimination Case - Gay Family Wins Right to Family Health Insurance*, 6 (3) HIV/AIDS LEGAL LINK 18 (1995).

²⁵ M. Alexander, *Success in the Family Leave Case*, 5 (4) HIV/AIDS LEGAL LINK 12 (1994); *Family Leave Test Case*, 6 (1) HIV/AIDS LEGAL LINK 3 (1995). The case referred to is a decision of the Australian Industrial Relations Commission in the *Family Leave Test case*. The principle has been accepted in State Industrial Commissions. See Note, *NSW Industrial Relations Commission*, 6 (2) HIV/AIDS LEGAL LINK 4 (1995).

warn him of the risk of infection;²⁶ and the failure to advise against the risks of exposure to accidental infection.²⁷ The cases are virtually infinite in their variety. Whilst it is unlikely that some of the more esoteric cases will come before courts in many countries of the Asia/Pacific region, claims in negligence provide the vehicle for assertions that medical practitioners, other health workers, public authorities, and the like, have not acted with due care. Where a person has become HIV infected, it is natural that he or she should look to others to provide financial protection during life, and protection for dependants thereafter. Some of the most difficult decisions arise in the area of family law. Cases have been decided whereby access to a child was denied to a father found to be HIV positive.²⁸ The basis of the decision, however, was not any real risk to the child, but that it was "not unreasonable" for the child's mother to have concerns without the risk of infection from fatherly social contact. This was an irrational fear, and the judge should not have given effect to it. A better approach was suggested in another case, where a wise judge held that it was a more appropriate response to the risk of stigmatisation to bring the child up in a way that assists him or her in coping with it, and not to shield the child from it altogether.²⁹

The call to the proper judicial function in all of the cases which I have mentioned, and doubtless many others, is to rest the decision, as all good judges do, upon sound evidence. In so far as the judge may take judicial notice, he or she must inform the decision about the real nature of HIV/AIDS, so that prejudice is replaced by knowledge; and stereotyping by the judicial commitment to equal justice in the courts.

D. Colleagues

It is inevitable that as HIV/AIDS penetrates more societies and every branch of society, the judiciary will become aware of colleagues who are living with HIV/AIDS, either in the judiciary, or in the legal profession. Because the judiciary is still generally made up, in most countries, by middle-aged to elderly males, the modes of transmission of the virus may be less likely to have consequences affecting judges,

²⁶ See Reference, 6 (3) HIV/AIDS LEGAL LINK 5 (1995).

²⁷ See e.g., *Johnson v. West Virginia University Hospitals Inc.* 6 ALR 5th (1991) (CAW Va).

²⁸ *In the Marriage of B & C* (1989) FLC 92, 043 (Family Ct. of Aust).

²⁹ *Jarmen v. Lloyd* (1982) 8 Fam. LR 878 (Family Ct. of Aust).

than other groups in society. But this is not necessarily so. These suppositions sometimes collapse in the face of reality.

I myself have known a number of legal practitioners who have been infected with HIV. I have sat at the bedside of one, a fine attorney, born in New Zealand, who acquired the virus in a time that he worked in New York in the early days of the epidemic. He was an outstanding lawyer. He told me how he was determined to "beat the virus." He did not. But it is important that jurists should reach out to their colleagues facing this predicament. They should ensure that they are received without discrimination, but with support, where that is appropriate, and accommodation where it is necessary. Bar Associations, in Australia, and doubtless elsewhere, have provided special assistance to members of the legal profession who cannot continue in their professional work because of HIV/AIDS. Judges, as leaders of the profession, must not forget their duties of professional comradeship and support where colleagues are affected. This means not just other judges, but court staff, police and bailiffs, their families and friends.

E. Community

Finally, judges are members of their communities. They must give a lead to community discussion on HIV/AIDS, its causes, and the behavioural modifications that are necessary to arrest the spread of the epidemic.

Judges cannot be interested in everything. But many of the features of HIV/AIDS are relevant to the professional duties of judges. Typically, laws stigmatise and often criminalise conduct which is relevant, e.g., the sexual activities outside marriage; prostitution; homosexual activities; and injecting drug use. It is therefore the duty of judicial officers to reflect upon the effectiveness of current laws, in so far as they are relevant to the epidemic. Where law has become part of the problem, judicial officers (being better informed and usually more powerful) have a responsibility to add their voices to the discussion of reform. In default of a cure for, or vaccine against, HIV/AIDS, the only weapon in society's armoury is behaviour modification. Alas, it is a lesson that judges can tell society that strong criminal sanctions are of limited use in securing and reinforcing behaviour modification in such basic activities as sex and drug use.

This is why, in many countries, the advent of HIV/AIDS has led to a rare, and long delayed, re-examination of rules of law long established. Although the law in most countries no longer punishes (as once it did) adultery, as a criminal offence, legal vestiges from the same time intrude upon other consensual adult conduct of citizens. Because judges are the instruments of enforcing such laws, their moral sense is bound to be enlivened by what they are forced by the law to do. This gives them both the motivation and the legitimacy to add their opinions to the suggestions of reform.

It is surely no coincidence that, since the advent of HIV/AIDS, very significant pressures have built up, particularly in developed countries, for re-examination of laws concerning sex and drug use. In several parts of Australia, including my own State, New South Wales, prostitution (paid sex work) and the running of brothels has been decriminalised so far as it affects adult consensual conduct. Similar moves have occurred in other States of Australia.³⁰ But the reforms are uneven. In many countries, people are asking what business it is of the law to intervene in such matters, save to prevent oppression, and to protect minors. The AIDS paradox teaches that criminalisation and stigmatisation make it more difficult to reach the minds of those affected. The first step on the path to effective behaviour modification will often be de-criminalisation, and the provision of educational messages. It is in this sense that informed judges can contribute to AIDS prevention by participating in discussion of legal reform.

The same message is relevant to the re-evaluation of laws on homosexual conduct and drug use.³¹ In Australia, leading judges have begun to contribute to public discussion about the problems of homophobia, and the causes of injustice to fellow citizens by reason of their sexual orientation. Although HIV/AIDS is a human virus, and not limited to any sub-group, its early unequal impact upon gays has directed a lot of attention, particularly in developed countries, to the alienation of this group of the community, and the need to redress the unequal laws and policies which drive its members into a dangerous ghetto.³²

³⁰ Disorderly Houses (Amendment) Act, 1985 (NSW).

³¹ For the position in Canada, see CANADIAN HIV/AIDS POLICY AND LAW NEWSLETTER, Jan., 1995, at 12.

³² See e.g., the comments of Nicholson CJ, Family Court of Australia about same sex relationships in 5 (4) HIV/AIDS LEGAL LINK 13 (1994).

In a number of parts of Australia, the advent of the AIDS epidemic has also promoted a debate on euthanasia. In two jurisdictions (the Australian Capital Territory and the Northern Territory)³³ the criminal law has been modified to permit assistance to aid peaceful death under given conditions. A significant part of the momentum towards law reform in this area has been the predicament of young people dying prematurely by reason of HIV/AIDS. In this connection, the judicial function remains: of protecting the vulnerable and defending their human dignity against well-meaning, or avaricious, family and friends.

CONCLUSION

The judiciary has an important role to play in the response to the HIV/AIDS epidemic. It should be aware of the causes of HIV/AIDS, and familiar with the body of law that is growing up as a consequence of its unexpected advent. It should ensure justice and equality in every courtroom, and be alert to the differential way general laws fall upon those who are living with HIV/AIDS, their families and dependants. Because judges have choices in deciding cases, where their decisions are relevant to HIV/AIDS, they should rest them upon sound data. They should expel from their minds the stereotypes, the myths and the prejudice. The judiciary should be alert to colleagues in the court process who suffer because of the epidemic. To the best of their ability, they should reach out with help and understanding. And as leaders of the community, they should contribute to the discussion of law reform which the HIV/AIDS epidemic demonstrates to be needed.

We are only at the beginning of this unpredicted challenge to our species. India, which is promised enormous economic growth in the decades ahead, faces both economic and personal challenges unless behaviour can be modified and the spread of HIV contained. Harsh laws will not achieve these objectives, as any judge can tell. Instead, sensible policies, redress for discrimination and suitable law reform - as well as unyielding honesty - will be the chief weapons against the spread of HIV/AIDS.³⁴ Judges, as leaders and teachers, must play their part in responding to AIDS.

³³ See B. Delahunty, *ACT Approved Passive Euthanasia*, 5 (4) HIV/AIDS LEGAL LINK 10 (1994); Medical Treatment Act, 1994; P. Leach & S. McLean, *Euthanasia Law Passed in the Northern Territory*, 6 (2) HIV/AIDS LEGAL LINK 1 (1995).

³⁴ See generally UNDP, *HIV LAW AND LAW REFORM - ASIA AND THE PACIFIC* (D.C. Jayasuriya ed., 1995).

JUDICIAL EDUCATION FOR JUDICIAL REFORM

Judge Sandra E. Oxner*

I. HISTORY AND CONTEXT OF JUDICIAL EDUCATION IN THE COMMONWEALTH

It is generally accepted that judicial education in common law countries was initiated – at least for the higher judiciary – in the United States. Commitment to judicial education remains strong there. The judicial education budget for the Federal Judicial Center in Washington (serving 2,000 judges and their support staff) is \$19 million a year. Many state court judges are required to attend a requisite number of education sessions annually.

In the Commonwealth, the lay magistracy of England and Wales had a sophisticated education program that was underway in the early 1970s. Perhaps influenced by its southern neighbour, Canada was the first Commonwealth country to mount regular judicial education programming for judges of trial and appellate courts. All Commonwealth law jurisdictions today are engaged in judicial education activities, although to varying degrees and at various levels. A strong impetus for this in developing countries has been international donor recognition that a judiciary that attracts public confidence is necessary for social and economic development,¹ and that judicial education was a necessary foundation for the behavioural change necessary for effective reform.

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¹ J.D. Woolfensohn, Welcome Address to the World Bank Group Annual Meeting (Sept. 28, 1999) at 9, where he said, “with poverty reduction front and center of our agenda, our work at the rock face must be governance, institutions, and capacity building”, (unpublished paper in the writer’s files); estimates of international financial institution loans for judicial reform ranges from one to ten billion dollars as indicated in a document from M. Dakolias, Acting Chief Counsel, Legal and Judicial Reform Unit, World Bank (on file with the author).

In all jurisdictions, contemporary demand for accountable institutions of government has made the judiciary more open to criticism, reform and continuing education.

Objectives of Judicial Education:

I Impartial

C Competency

E Efficiency

E Effectiveness

= Community Confidence in the Judiciary

II. OBJECTIVES OF JUDICIAL EDUCATION

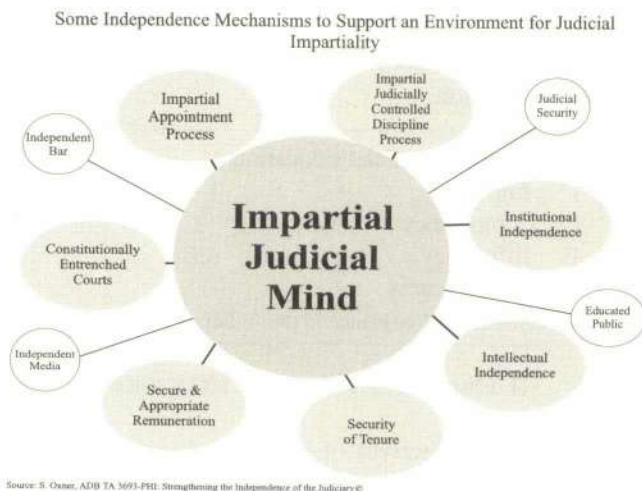
In my view, the objectives of judicial education² are identical to those of judicial reform and it includes the following concepts:

I would like to use the acronym "ICEE," pronounced icy, to identify them. "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, annotated and publicised 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 refers to 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 legislature, the executive, the media, the legal profession and the public.

² This section is based on a Paper on *Judicial Education and Judicial Reform* written by the author and published by JUTA in 1997.



The creation and support of an impartial mind has different focuses. For example, in the newly emerging states of Eastern Europe, the focus was 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, 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 biases from the judicial mind in fact finding, particularly in relation to gender and ethnic issues.

“Efficiency” includes efficient judicial court room management – placing the Judge and not the Bar in charge of case management, case flow and process efficiency, reform of rules and procedures to narrow the issues early. It encourages timely settlements and courts 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 process reforms in non-political ways.

To be effective, a judiciary must be legitimate, trusted, respected and relevant. A judiciary must not only be impartial, competent, efficient and effective, but it 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.

III. TRAINING IN DETECTION OF FACTUAL AND JURISPRUDENTIAL 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 judgement 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 Commonwealth 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 Loftus³ have shown us how sympathy can make honest people see things inaccurately. 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 issue⁴ their analysis is different from the process of belief and proof that is considered by Seniuk.⁵ 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 drawn. This, in essence leaves the outcome as much to chance as would the flip of a coin.⁶ His conclusion is supported by

³ ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1979); ELIZABETH LOFTUS, *MEMORY, SURPRISING NEW INSIGHTS INTO HOW WE REMEMBER AND WHY WE FORGET* (1980).

⁴ R.S. Abella, *The Dynamic Nature of Equality in Equality and Judicial Neutrality* 8 (S. Martin & K. Mahoney eds., 1987); B.L. Shientag, *The Virtue of Impartiality in Handbook for Judges* (G.R. Winters ed., The American Judicature Society, 1975); Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 (1990) OSGOODE HALL L. J. 507; J.H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* (3d ed., 1937); W.L. TWINING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* (1985); N. GOLD ET AL., *LEARNING LAWYERS' SKILLS* (1989); W.L. TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* (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*, 13 CARDOZO L. REV. 253 (Special Issue, 1991). I am indebted to the Honorable Judge Gerald T.G. Seniuk for this reference.

⁵ G.T.G. Seniuk, *Judicial Fact – Finding and a Theory of Credit* (paper given at the Nova Scotia Judicial Education Seminar, Feb. 16, 1994, Halifax, Canada). This section is based on Judge Seniuk's paper.

⁶ Rabelais' Judge Bridle goose did decide cases by tossing a coin, 3 Gargantua & Pantagruel Chs. 39-43 (J.M. Cohen trans., 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, Feb. 3, 1982.

mock findings of guilt or innocence made by judges in judicial education programmes. Having viewed a video which depicts a trial in which a young female from a troubled past alleges that a retired war-disabled veteran sexually assaulted her, the judges were polled for their verdicts. When used throughout the Commonwealth, the result has almost always been an approximate 40/60 split on the part of the experienced judicial decision makers.⁷ Judicial education programmes assisting judges to analyse, detect and minimise 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.⁸ 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 analysing judicial approaches to decision making, an analytical and introspective self-study of the judge's decision making process and a philosophical consideration of the objective of the justice system fuelled by taking time for academic reading.

IV. DEFINITION

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 or electronic. Judicial education includes programming delivered by video, video conferencing, computer disk, satellite television and on-line means. As well, mentoring, organised feedback such as performance evaluations, self study material and distance learning are important judicial education mechanisms. It has two divisions – (1) pre-service orientation programmes, and (2) continuing education and professional growth training throughout the judge's professional life.

⁷ Experience gained from the use of the video at Commonwealth Judicial Institute programmes.

⁸ See generally R. Devlin, *Judging the Diversity: Justice or just Us?/ Les Décisions Judiciaires et la Diversité: La Justice des Justiciables ou de Justiciers?*, 20 (3) *PROVINCIAL JUDGES J.* 4 (1996); R. Devlin, *ReDressing the Imbalances: Reflections on Judicial Decision-Making After R.D.S.*, 31 *OTTAWA L. REV.* 1 (1999-2000); R. Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary*, 38 *ALBERTA L. REV.* 734 (2000).

V. TARGETS

The targets of judicial education to support judicial reform are:

- (1) Aspirant judges,
- (2) Newly appointed judges,
- (3) Sitting judges,
- (4) Judicial support staff,
- (5) The legislature,
- (6) The executive,
- (7) The media,
- (8) School children, and
- (9) The community at large including NGOs and CSOs.

The targets of judicial training bodies vary from one jurisdiction to another. Some offer training to subordinate court judges only (much of Commonwealth Asia);⁹ some to appeal court judges, high court judges, subordinate court judges (Canada,¹⁰ U.K.¹¹); 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,¹² Malawi,¹³ Ghana). To achieve the objective of a judiciary attracting public confidence, all of the above listed targets should be included to at least some degree in the work of the judicial education body.

⁹ A visit by the author to the Sri Lankan Judiciary in 1999, (on file with the author).

¹⁰ NATIONAL JUDICIAL INSTITUTE, ANNUAL REPORT 1995-1996, 4 (1996).

¹¹ JUDICIAL STUDIES BOARD, ANNUAL REPORT 1997-1998 (1998) and the author's discussions with Mr. Edward Adams, Secretary to the Judicial Studies Board. Notes of which are in her files.

¹² FEDERAL JUDICIAL CENTER, ANNUAL REPORT 1999 (1999).

¹³ Visits by the author to Malawi 1995-2000 and discussions with the Honorable Chief Justice R.A. Banda and the Honorable Justice R.R. Mzikamanda and the Honorable Justice D. Tambala, judicial education chairs (notes on file with the author).

"Aspirant" or pre-appointment training is relatively rare in common law countries, although there are exceptions. England and Wales gives training to the part-time judges whose part-time work forms part of the criteria for appointment to judicial office.¹⁴ Some African common law jurisdictions, such as Zimbabwe and Uganda, have formalised training for lay magistrates. The Uganda programme is under a statutory body called the Law Development Centre. 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.¹⁵

On the other hand, pre-appointment training is part of the judicial culture in the judicial career path in the European countries of Italy, France, Germany, Portugal and Spain.¹⁶ The 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 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

¹⁴ Information from correspondence with Mr. Edward Adams, Secretary of the Judicial Studies Board of

England and Wales, Apr. 5, 2001 (on file with the author).

¹⁵ Information received from the Honorable Justice John Tsekooko, Chairman of the Law Development Center in Uganda. In Zimbabwe, the Justice College, chaired by the Chief Justice, trains lay magistrate. Both programmes were inspired by the need for magistrates created by a lack of legally trained candidates for the positions.

¹⁶ G. DI FEDERICO, JUDICIAL INDEPENDENCE IN ITALY: A CRITICAL OVERVIEW IN A (NON-SYSTEMIC) COMPARATIVE PROSPECTIVE IN IFES/USAID, GUIDE TO JUDICIAL INDEPENDENCE – DRAFT REPORT, PART G (Washington: IFES/ USAID, 2000).

committees made up of judges, senior civil servants and law professors. Only fifty percent of candidates achieve appointment to the judiciary.¹⁷

Over fifty years ago, *L'Ecole Nationale de la Magistrature* [hereinafter ENM] was established at Bordeaux to train law graduates for the judiciary. ENM is under the administrative control of the ministry of justice.¹⁸ Training lasts thirty-one months. The period of studies includes practical training in government administration or with a business corporation, fourteen months at ENM and fourteen 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 by a special examination (three percent) or by lateral recruitment (twelve percent).¹⁹

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. This makes duplication of such training impossible for transitional states and developing countries following the civil law pattern, as well as mixed civil/common law countries (i.e., Philippines) which have difficulty in attracting suitable candidates to the judiciary and would like to adopt the European judiciaries' approach of training their own.

As the problem of attracting suitable candidates for judicial vacancies exists in many Commonwealth developing countries, particularly for the subordinate courts, the civil law tradition of training aspirant subordinate court judges in a career path or modified career path judiciary is an attractive option if state funds would be allocated for this purpose. Many developing Commonwealth countries presently have a career path or modified career path judiciary. Governments which pay lip service to the importance of a well functioning judiciary to social

¹⁷ D. Kommers, *Autonomy Versus Accountability*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY CRITICAL PERSPECTIVES FROM AROUND THE WORLD 143 (P. Russell & D. O'Brien eds., 2001).

¹⁸ This describes the main category of candidates. There are two other minor streams.

¹⁹ 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 FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE 90S AND BEYOND 126 (H. Cunningham, ed., 1997).

and economic development must accept that national budget funding to achieve this must compete successfully with transportation and even humanitarian needs.

VI. STRUCTURE

A judicial education body can be a simple committee named by the Chief Justice or it may be a legal entity incorporated by Letters Patent, Statute or under a Companies Act. The functions of the body will determine the structure most appropriate for the jurisdiction. Highly organised entities with a number of paid staff and entering into contracts, etc. may feel more comfortable with an incorporated structure. In addition to the issue of liability of an individual judge, there are two issues arising from the question of structure. The first is who controls the judicial education body and thereby judicial education.

The United States, Canada, England and many other Commonwealth countries have adopted as a first precept that the overall control and direction of judicial training must be in the hands of the judiciary. There are two reasons for this. First, judicial education must be credible to the judges. Judges will more readily accept tuition from other judges. Additionally, "the constitutional imperative of judicial independence also requires that judicial training remains in the apolitical hands of the judges and not in the potentially doctrinaire hands of government."²⁰ Such control requires at least a majority of judges on the governing body or at least on the body controlling curricula and faculty. The second issue questions if the governing body is representative of all categories of learners. Representation from the user groups encourages ownership by and sensitivity to the needs of all users.

Structure

- Committee? Statutory Body? Incorporation under Companies Act?
- Composition
 - Majority of judges
 - Reflective of judiciary including support staff
- Powers

²⁰ LORD JUSTICE HENRY, JUDICIAL STUDIES BOARD REPORT 1991-1995, at 5.

The following is a thumbnail review of various structures that have been established in Common Law jurisdictions for judicial education:

The United States, a pioneer in judicial education, has *inter alia*, a Federal Judicial Center for federally appointed judges and their support staff. The eight member Board is chaired by the Chief Justice of the United States and is made up of two Appeal Court Judges, three Trial Court Judges, one Subordinate Court Judge and a Court Administrator. The Director of the Center is a seconded Trial Court Judge. The Board's function is to provide orientation and continuing judicial education for federally appointed Trial and Appeal Court Judges and administrative support staff. It is incorporated by Statute.

In Canada, the National Judicial Institute has a seven person Board chaired by the Chief Justice of Canada. On the Board, there are three Appellate Court Judges, one Supreme Court Trial Judge, two Subordinate Court Judges and the Dean of Law School (all judges but one). The Director of the Institute position is for a two to five year term and alternates between a seconded High Court and Subordinate Court Judge. There is an Associate Director representing the court not represented by the Director. The Board's function is to provide orientation and continuing judicial education for Trial and Appellate Court Judge of all levels of courts. It is incorporated by Letters Patent.

In Pakistan, the Federal Judicial Academy has a nine-person Board of Governors chaired by the Chief Justice of Pakistan. The Board includes four State Chief Justices, the Registrar of the High Court (Acting Director-General), the Minister for Law, the Secretary of Law and the Attorney General. The Minister for Law, the Secretary of Law and the Attorney General are the non-judicial members (a majority, six out of nine members, are judicial officers). The Board's function is to provide orientation and continuing judicial education for judges and orientation for State law officers. It is incorporated by Statute.

In Sri Lanka, the three person governing body of the Sri Lanka Judicial Institute is chaired by the Chief Justice and has two Supreme Court Judge members. The Director of the Institute is a retired Supreme Court Judge. The Board's function is to provide orientation and continuing judicial education for Appeal Court and Trial Judges.

The sixteen member English Judicial Studies Board is chaired by an Appellate Court Judge and has representatives of all levels of courts as well as academic membership. Eleven of the sixteen members (a majority) are judicial officers. The Director of the Judicial Studies Board is a Subordinate Court Judge. The Board's function is to provide orientation and continuing judicial education for judges of all courts. The Judicial Studies Board is established by an exchange of letters between the relevant ministers.

Malawi, Uganda and Zambia are examples of jurisdictions where judicial education is governed by a committee named by the Chief Justice.

VII. FUNCTIONS

A well functioning judicial education body has many tasks. It analyses the judiciary to identify areas which require strengthening through training (this includes both topics to be studied and processes to be improved); it engages in research, both to identify and prepare programmes that respond to the judiciary's and community's perceptions of judicial weakness as well as to evaluate their impact; it ensures its faculty are not only competent but are trained and skilled in interactive learning techniques essential for adult education; it prepares teaching plans and tools; it presents and evaluates sessions; and it provides judges and support staff with information to improve the quality of justice. In addition to these functions of curricula development, faculty development, and organisation and delivery of sessions, a judicial education body should provide and catalogue judicial tools, - manuals, bench books and other essential legal and judicial information, both in print and electronically. It should also organise in partnership with the judiciary, judicial feedback and mentoring systems. Fund raising, from the limited appropriate sources that do not give rise to conflict of interest issues, is also a function of a judicial education body.

Functions

- Teaching
- Faculty development
- Curricula development

- Program development-teaching tools, plans, self study kits
- Assembly and cataloging of judicial education material, teaching tools, etc.
- Research
 - Statistics gathering, i.e. baseline data
- IT/Publications

In developing countries, multilateral and bilateral donor funding is appropriate for periods of intense judicial reform, which necessitate increased levels of training. However, if the Executive and Legislature accept that a well functioning judiciary is essential for social and economic development, it must provide annual adequate funds for the training to support such a judiciary.

Expenditures on bricks and mortar for judicial education need to be approached with caution to ensure that the money required for maintenance does not eat into the program budget and render it ineffective.

However, that said, the judicial education body's organisation must be housed and must either have appropriate meeting places with necessary audio visual and other visual aids to deliver programmes or funds to rent appropriate premises.

If the judicial education programmes are not of high quality, presented in such a way as to attract the judges' attention, the judges will lose interest in the present session as well as interest in attending future programmes. This risk can be minimised by the preparation and delivery of first quality programmes using interactive teaching tools. To do this requires the assistance – part or full time – of an adult educator attached to and paid by the institute.

The organisational structure of the judicial education body will flow from its function. There will usually be a programme presentation committee to develop teaching techniques, teaching tools and plans for collegial, self study and print, electronic, video conference and cable TV programming. Such a committee should have as a resource a full or part-time professional educator who will be able to guide the judicial

education body on the most effective ways to both transmit information to and achieve behavioural change in adult learners. A faculty development committee will ensure adult education skills are transmitted to judicial and non-judicial full and part-time faculty. In many Commonwealth jurisdictions, this may involve extra national training for some judicial educators. Those so trained need to transmit their acquired skills on their return home to colleagues also charged with judicial education responsibilities.

The organisational structure of a well functioning judicial education body will include curricula development committee with special topic subcommittees, a statistics gathering and research committee, publication and IT committees and an evaluation committee and, where there is a career judicial, a judicial career development committee.

Organisational Structure

- Program Presentation Committee (teaching tools, plans and self study kits)
- Faculty Development Committee
- Curricula Development Committee and special Topics subcommittees
- Statistics Gathering and Research Committee
- Publications and IT committees
- Evaluation Committee
- Judicial Career Development Committee (if career judiciary)

VIII. LEVELS OF JUDICIAL EDUCATION

Judicial education has many levels, ranging from provision of legal information such as new laws and the philosophy behind them to behavioural change training. The latter is the most important to judicial reform and the most difficult to achieve. During periods of intense judicial reform, the greater part of the judicial education budget should respond to the behavioural changes to effect reform. This should concentrate on ethics, judicial efficiency, the ethos of service and social context training.

There are several levels of judicial training. They include:

1. The provision of basic legal information - such as updated statutes and case reports - necessary for the judge to effectively do his/her job, - not always easily provided in the developing world.
2. Ensuring judges understand new laws that define a shift in philosophy, - as in the laws of a new regime creating a democracy or legal framework reform to support a market economy.
3. Teaching a judge a new intellectual approach as in the judicial exercise of discretion, domestic application of human rights norms or in developing schools of jurisprudential thinking related to reform.
4. Inspiring behavioural change required to provide an impartial and accountable Bench rising to social expectations. As discussed above, in some countries the change required may relate to gender or racial bias. In others, the behavioural change required is to encourage the judicial ethos of service to the community and the fact and perception of judicial independence, integrity and impartiality. In many countries the serious backlogs and delays require changed behavioural patterns to make the process more efficient.

Attitudinal and behavioural change is the most difficult area of education in any field. It is the essence of reform. It requires motivated and inspired teachers who are properly trained and who are respected and trusted by the judges.

IX. FACULTY DEVELOPMENT

The attraction of appropriate faculty is a major problem in all Commonwealth judicial education bodies. Quite appropriately most draw heavily on judges. However, judges have their regular day-to-day work and are unable to commit the amount of time required for the development and presentation of necessary programmes.

This problem can be lessened in various ways. In the first place, the judge/ teachers task can be lightened by a professional adult educator providing assistance in the development of teaching tools. Secondly,

one or two judges could be seconded (freed from judicial duties) to work full-time for the Institute for a two-five year term. Non-judicial specialists in legal and other necessary topics can be used for faculty as needed.

All faculty need to be educated in the interactive adult teaching techniques necessary for cost effective education. In smaller jurisdictions, this can be achieved by sending faculty members abroad to international training of trainers' programmes. This provides access to international judicial education networks for exchange of human and material resources. The skills thus acquired should be transferred to others through local training of trainers' programme. These should be sufficiently extensive mechanisms to provide trained judicial educators at local levels.

The identification and training of judicial education leaders is key to effective judicial education and reform. Few judges have teacher training. However, most are accomplished learners and with professional educator support can design programmes that motivate and inspire judicial reform. Skills that judicial educators need to acquire include adult pedagogy, resource networking, the methodology of curriculum development, the development of teaching plans and tools, distance learning techniques and fund raising.

Faculty Development

- Training of trainers
- Importance of professional adult educator
- Judicial policy for attracting full and part-time judicial educators.

X. EVALUATION²¹

The first measure of successful program content is how well it responds to the community's concerns about its judiciary. Achieving this goal, however, is only the first step. Programme topics must respond not just to programme objectives but individual sessions within a programme should articulate sub-objectives that can also be evaluated.

²¹ Kind permission to include this section, which was previously published in 3 (2) EDUCATUS has been given by the Canadian Association of Provincial Court Judges.

These precisely defined session objectives should be linked to participation evaluation forms to measure the learning achieved. For example, a programme on detecting bias in fact-finding may have the following session objective; *the participant will learn three biases of which he or she was previous/y unaware*. In assessing the session, the participant evaluation form would ask: *Did you learn of any biases you hold of which you were previously unaware? If so, how many?* This would allow quantifiable evaluation of whether programming objectives were achieved or, unhappily, not achieved.

The measurement of learning achieved, however, is relatively simple when compared with the challenge of evaluating how the learning process produces attitudinal and behavioural change. Professionals in the field spend many long hours developing effective performance indicators. While they are still fine-tuning these tools, a combination of the following is often used:

- (1) pre, post and year end focus groups/surveys of internationally accepted standards;
- (2) participant satisfaction and self evaluation interviews;
- (3) assessment of court data and records;
- (4) personal interviews with designated officials; and
- (5) independent expert appraisal.

The behavioural change which is the basis for sustainable judicial reform is likely, however, to take one or even two decades to have an impact. While obviously mileposts along the way are necessary, donor agencies need to understand that in judicial reform projects, the full impact cannot be measured in a three - five year project term. A project is not unsuccessful if the seeds for change have been planted and nurtured. Donors need to establish evaluation techniques for judicial reform projects that do not put pressure on programme managers to only choose project components (i.e., provision of equipment) that have little sustainable behavioural change impact.²²

²² For a general discussion on this point see Stephen J. Toope, *Programming in Legal and Judicial Reform: An Analytical Framework for CIDA Engagement*, Sept., 1997, at 17.

A further aspect of judicial education that needs to be evaluated is the effectiveness of presentation. In the old days, any incumbent of a distinguished office was considered an adequate speaker to fill up judicial education hours. Failing this, a quickly established panel of those present would be talked into convening an ad hoc discussion. Long lectures - highly conducive to judicial nap-taking! - were a matter of course. Today, adult education studies have shown that an average adult (hopefully, a judge is better than average) retains only seven percent of what he or she hears. Visual aids, teaching plans, provision of background material and interactive teaching methods are now highly essential in order to achieve an acceptable score in programming evaluation.

Evaluation

- Learning achieved/impact
- Value for money spent
- Attractiveness to judges

XI. CURRICULA DEVELOPMENT

How does a judiciary determine what to study? In many common law 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 rarely seems to find fault with judicial application of the law of evidence and procedure. Criticisms dwell on 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 judges study? The content of judicial education programming must respond to community perceptions of judicial weaknesses. The community (in this context) includes not only the Judiciary, the Bar and

court-users, but also the business sector and society at large.

Judicial education is expensive - one must take into the account the judge days off the Bench, the cost of maintaining courthouses and court staff during judicial absences as well as travel and accommodation expenses for participants and programme delivery costs. To justify these expenditures, programming must go beyond the old standbys of "Evidence" and "Procedure" and visibly respond to areas of perceived weakness.

Curricula Development

- Curricula must respond to judicial weaknesses that can be strengthened by judicial education
- Such weaknesses should be identified by judges, court users and the community at large
- Continual evaluation of programmes for impact and cost efficiency
- Curricula should respond to both subject and process needs

A curriculum committee may employ several tools to identify areas requiring improvement:

- (1) an analysis of the role and function of a judge;²³
- (2) a broad based needs assessment survey of the judiciary, court users and the community at large;
- (3) a review of complaints under judicial and support staff discipline processes;
- (4) a review of media complaints on justice issues;
- (5) an assessment of areas of the law that call for frequent appellate review;
- (6) identification of potential hazards in new legislation;

²³ *Id.*

- (7) court communication and social context issues;
- (8) a review of process gaps or weaknesses, these may be obvious, as in attracting insufficient appropriate candidates for judicial vacancies or court management issues disclosed only through gathering an analysis of statistical data;
- (9) or a combination of all of the above.

A sample needs assessment is contained in Chart One below. It is interesting to note that an additional benefit of such a needs assessment is that it often produces a prioritised list of needed judicial reforms. It also tends to enhance public confidence in the judiciary as soliciting court users' opinions and assures the public of judicial sensitivity to the community it serves.

Chart One - Needs Assessment

The _____ Judicial Education Curriculum Committee would like to solicit your opinion on topics for judicial education, study of which would strengthen the Judiciary. Would you kindly prioritise the following topics ranked in order of preference from ONE to TEN, number ONE being given to the most important? More than one topic may share the same numerical rank. Please write in any additional topics you might like to suggest, assigning them a numerical rank.

You will note the topics are divided into four general categories:

1. Impartiality

2. Competency

3. Efficiency

4. Effectiveness

Please rank the above noted categories in order of their priority to you. More than one category may be assigned the same rank.

A. Impartiality, Independence and Accountability *(Please enter a number between ONE and TEN for each item. Two or more items may share the same rating)*

- | | |
|--|----------------------|
| 1. The Principle and Practice of the Independence of the Judiciary | <input type="text"/> |
| 2. Accountability to the Public Judges Protect and Serve | <input type="text"/> |
| 3. Judicial Ethics and Conduct, On and Off the Bench | <input type="text"/> |
| 4. The Science of Fact Finding — Recognition of Judicial Bias | <input type="text"/> |
| 5. Sensitivity Training in Contemporary Social Issues | <input type="text"/> |
| 6. Gender, Ethnic and Other Disadvantaged Groups Sensitivity Training Other: | <input type="text"/> |
| | <input type="text"/> |
| Other : | <input type="text"/> |
| <hr/> | <input type="text"/> |
| <hr/> | <input type="text"/> |

B. Competency - Professional Skills Updating - Continuing Education in Substantive and Procedural Law *(Please enter a number between ONE and TEN for each item. Two or more items may share the same rating)*

7. Criminal Law	<input type="text"/>
8. Sentencing	<input type="text"/>
9. Evidence	<input type="text"/>
10. Constitutional Law	<input type="text"/>
11. Family Law	<input type="text"/>
12. Civil Procedure	<input type="text"/>
13. Criminal Procedure	<input type="text"/>
14. Legislative Interpretation	<input type="text"/>
15. Torts	<input type="text"/>
16. Contract Law	<input type="text"/>
17. Administrative Law	<input type="text"/>
18. Assessment of Damages	<input type="text"/>
19. Property Law	<input type="text"/>
20. New Developments in the Law	<input type="text"/>
Other:	<input type="text"/>
<hr/>	<input type="text"/>
<hr/>	<input type="text"/>

Economic Laws *(Please enter a number between ONE and TEN for each item. Two or more items may share the same rating)*

21. Intellectual Property Law	<input type="text"/>
22. Bankruptcy Law	<input type="text"/>

23. Banking Law	<input type="text"/>
24. Modern Corporate Law	<input type="text"/>
25. Principles of International Trade and the Role of Financial Institutions and Banks	<input type="text"/>
26. Evidence Laws for Administrative Tribunals	<input type="text"/>
27. Foreign Exchange Laws	<input type="text"/>
28. International Trade Procedures	<input type="text"/>
29. International and Domestic Arbitration Laws	<input type="text"/>
30. Competition Law	<input type="text"/>
31. Communications Law	<input type="text"/>
32. Labour Law	<input type="text"/>
33. Income Tax Law	<input type="text"/>
34. Environmental Law	<input type="text"/>
Other:	<input type="text"/>
<hr/>	<input type="text"/>
<hr/>	<input type="text"/>

C. Efficiency *(Please enter a number between ONE and TEN for each item, Two or more items may share the same rating)*

35. Computer Training	<input type="text"/>
36. Case flow Management	<input type="text"/>
37. Time Management	<input type="text"/>

- | | |
|--|----------------------|
| 38. Mediation Skills | <input type="text"/> |
| 39. Alternative Dispute Resolution | <input type="text"/> |
| 40. Stress Management | <input type="text"/> |
| 41. Court and Docket Management Skills | <input type="text"/> |
| 42. Management Skills | <input type="text"/> |
| Other: | <input type="text"/> |
| <hr/> | <input type="text"/> |
| <hr/> | <input type="text"/> |

D. Effectiveness *(Please enter a number between ONE and TEN for each item. Two or more items may share the same rating)*

- | | |
|---|----------------------|
| 43. Judicial Techniques to Bridge the Gap between Law and Justice | <input type="text"/> |
| 44. Interpreting Constitutional Charters of Rights | <input type="text"/> |
| 45. Domestic Application of International Human Rights Norms | <input type="text"/> |
| 46. Exercise of Judicial Discretion | <input type="text"/> |
| 47. Media-Bench Relations | <input type="text"/> |
| 48. Judgment Writing and Delivery | <input type="text"/> |
| 49. Judicial Skills - Chairpersonship of the Proceedings - Maintenance of a Dignified, Orderly, Efficient Pace of Proceedings | <input type="text"/> |
| 50. Sensitivity to Needs and Rights of the Witnesses, Litigants and Public | <input type="text"/> |
| 51. Communication Skills - in the courtroom, with stakeholders and the community at large | <input type="text"/> |

52. Adapting to Change
53. Social Impact of Judicial Decisions.
54. Economic Impact of Judicial Decisions
55. Legal and Judicial Reform- please specify
reform
- Other:
-
-

Comments:

XII. JUDICIAL PERFORMANCE EVALUATION

Judges have the least feedback and evaluation of any profession, at least in the Superior Courts and the Subordinate Courts of Common Law developed countries. In jurisdictions where the judicial office has been perceived as powerful and attracts respect, it is difficult for the legal profession to deviate from the traditional deferential stance to the judge or risk judicial wrath wreaked on the interest of future clients by being known as critical of a judge's conduct. In jurisdictions where the judicial office is held in low esteem and is at the bottom rung of the legal profession,²⁴ there is as little motivation to devise methodology for feedback as there is no motivation for judicial behavioural change to correct judicial weaknesses exposed by the measurement. However, the democratic calls for judicial accountability in the industrialised democracies and the accepted need for a well functioning judiciary in developing countries has raised interest in the development of methodology that will allow qualitative and quantitative measurement of judicial performance as a foundation step to improvement.

²⁴ Some South American and transitional country jurisdictions.

Programmes for measuring judicial performance are in place in the United States.²⁵ Attempts to create such methodologies are underway in Canada²⁶ and Australia.²⁷ Multilateral and bilateral donor agencies are also interested in such evaluation methodology to provide measurements by which to evaluate judicial reform projects. A difficulty in drawing up judicial performance evaluation standards is to do so in such a way that judicial independence is not compromised.

Measurement of judicial performance may be quantitative²⁸ (relating to the efficiency of the judicial process and the individual judge) or it may be qualitative (attempting to measure the competency, impartiality and effectiveness of the judicial process or the performance of the individual judge). The quantitative evaluation is less difficult as it collates objective data such as number of cases filed per year, number of cases disposed of per year, number of cases pending at year end, clearance rate (ratio of cases disposed of to cases filed), congestion rate (pending and filed over resolved), average duration of case, number of judges per 1,00,000 inhabitants, workload per judge, work time per judge, length of time judgment rendered after close of case, etc. Further data may also be collected from those jurisdictions²⁹ which have time limits for the rendering of judgments counting from the close of the case. Little quantitative or qualitative measurement of judicial performance has yet been achieved.³⁰

In quantitative evaluation, two thoughts must be kept in mind. The first is that the desired end product of the justice system is not speed but

²⁵ See e.g., Massachusetts, New Jersey and Connecticut. See NATIONAL CENTER FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM (Williamsburg: National Center for State Courts, 2001).

²⁶ D. POEL, NOVA SCOTIA JUDICIAL DEVELOPMENT PROJECT A FINAL REPORT AND EVALUATION (Halifax: Institute of Public Administration, Dalhousie University).

²⁷ Family Court of Brisbane, Australia (Information received from Justice Neil Buckley, Family Court of Australia, Brisbane, email: justice.buckley@familycourt.gov.au).

²⁸ M. DAKOLIAS, COURT PERFORMANCE AROUND THE WORLD: A COMPARATIVE PERSPECTIVE (Washington, World Bank Technical Paper No. 430, 1999).

²⁹ Nova Scotia, Canada and the Philippines have time limits for the rendering of judgments counting from the close of the case. The Philippines has other time limits and sanctions if a judge does not achieve the deadline. Pakistan also expects subordinate court judges to complete a certain number of cases in a given time. The Philippines and Pakistan time limits are often honoured in the breach or honoured in a way that is counterproductive to the justice system.

³⁰ DAKOLIAS, *supra* note 28, at 10.

justice, even accepting that "justice delayed is justice denied." The second is that there needs to be good judicial statistical data gathered by the courts before such measurement can be made. In many developing jurisdictions, the gathering of statistical data is considered by the judiciary and staff as secondary to the staff's role as judicial assistant. The Uganda experience³¹ has shown that until this attitude is changed, the data gathered will not be sufficient or reliable enough to identify bottlenecks in the system or provide a measurement of judicial performance. Basic to quantitative measurement of the judiciary is the entering of court data either manually or electronically in such a way that it is available for analysis.

The quantitative measurement of judicial performance has in most countries been left to the Appeal Courts. Only in the Philippines and South Africa in the common law world³² are errors in law or ignorance of the law considered misbehaviour triggering discipline or dismissal. The qualitative assessment presents difficulties of subjectivity, attempting to measure immeasurable, lack of data and reluctance of court users to evaluate individual judges. The qualitative assessment is particularly difficult in hierarchical developing countries where the culture depresses criticism of authority figures. Many of these countries are Anglophone common law jurisdictions.

In the past decade, performance evaluations of judges of all levels have come into being. As discussed by Baar,³³ in relation to common law jurisdictions judicial performance evaluation began in the United States. These contemporary judicial feedback performance mechanisms are far from universal and indeed would be considered in many jurisdictions as an encroachment on judicial independence. To date they are used extensively in the United States and are being considered in Canada and Australia in the common law world.³⁴ These vary from Bar

³¹ The Uganda DANIDA Judicial Reform Project 1998-2000 (notes in the author's files).

³² M. Feliciano, Analysis of Administrative Cases Against Judges in the Philippines (1999) (unpublished paper on file with the author); THE SOUTH AFRICAN CONSTITUTION, s. 177 (1) (a) includes "gross incompetence" as a criteria for judicial removal.

³³ Carl Baar, *Judicial Appointments and the Quality of Adjudication: the American Experience in a Canadian Perspective*, 20 R. J. T. 1, 10 (1986).

³⁴ *Id.*

initiated evaluations,³⁵ those initiated by the legislature by statute,³⁶ those initiated by the judiciary as a volunteer mechanism for self-improvement³⁷ and others initiated as a judicially ordered feedback mechanism for self-improvement, re-appointment or promotion and disciplinary purposes.³⁸

In some American States with elected judges, evaluations are published for the benefit of the voters. In non-elected jurisdictions, they are generally disclosed only to the judge himself or herself or to the Chief Justice and judge. A Volunteer Canadian Pilot Project³⁹ took great care to separate the anonymous feedback from the disciplinary process and the information was made known only to the judge through a mentor chosen by him or her. All material relating to the project was destroyed.

In addition to providing the judge with information for improving personal performance, summaries of the evaluation results are also valuable to judicial education bodies to indicate areas of general weakness in judicial performance which may be improved through judicial education programmes.

Competitive examinations are written in some Asian jurisdictions by subordinate court judges at certain career level entry points. Annual performance appraisals by the chief judge of the court are common in Africa and Asia. This is a holdover from colonial days when magistrates formed part of the Executive and came under Civil Service Regulations.⁴⁰ This is a monitoring mechanism considered by some countries, such as Pakistan, to be essential information for promotion. Other countries, such as Uganda, are considering doing away with it. These annual performance reports can be an internal judicial independence issue and be threatening to the independence and integrity of the subordinate

³⁵ American Bar Association; Washington, D.C. Bar.

³⁶ See e.g., Massachusetts (duplicate process with Bar).

³⁷ Nova Scotia, Canada.

³⁸ Many American States such as New Jersey and Connecticut.

³⁹ POEL, *supra* note 26.

⁴⁰ Some Asian Jurisdictions are still governed by the Civil service laws, e.g., Pakistan, under the Civil Servants Act, 1973(LXXI of 1973).

judge.⁴¹ There are no comparable annual performance appraisals for Commonwealth High Court Judges or developed country Subordinate Court Judges.

Appropriate judicial performance evaluations bring to the judiciary an opportunity for professional self-improvement. They provide a much needed and acceptable method of communication between the court users and the judge. Most judges want to do a good job and will strive to modify their behavior to respond to negative comments in the evaluations. Judges, who in their isolation rarely receive praise, will feel appreciated and be inspired by the positive aspects of the evaluations.

For most effective results, care should be taken to design performance evaluation processes so that fire walls are built between the evaluation and the disciplinary process. This will go a long way to attracting judicial support. A further suggestion for easing into such a programme would be to initiate it on a voluntary basis.⁴²

⁴¹ Judicial performance evaluation in the subordinate court in common law countries is not a new idea. In many European countries and in developing Asian, African and South American countries entry to the judicial profession is by competitive examination. Annual performance appraisal reports in the bureaucratic style are performed on each subordinate court Judge and placed in his or her file. This is also a common occurrence in Africa. Such reports play an important part in promotion. In countries where there is a tradition of interference in subordinate judge decision making by senior judicial officers who have a say in the performance report, these reports have obvious dangers. They are also a vestige of the bureaucracy from which the subordinate judiciary has come and are ties that bind the subordinate judiciary to the executive in its common law struggle to emancipate itself from it. Such ties underline publicly held perceptions of executive control of the judiciary and hinder efforts of the subordinate court to gain the trust of the public as judicial officers independent of the executive. Superior court judges in developing common law countries have, to my knowledge, never been formally evaluated post appointment. Some evaluation has been demonstrated in elevations to appellate courts but in many countries politics has played a more important role than trial performance, and appellate judges are frequently appointed not from the trial bench but from the senior practicing Bar of the correct political stripe.

⁴² This section is based on a portion of a paper prepared by the author. See Sandra Oxner, *Quality of Judges* (paper prepared for the World Bank Global Conference on Judicial Reform held in St. Petersburg, Russia in 2001).

SOCIAL CONTEXT EDUCATION FOR SOCIAL JUSTICE ADJUDICATION

Prof. (Dr.) N.R. Madhava Menon*

INTRODUCTION

The object of this Article addressed particularly to judicial educators, is to canvass for making “social context” a central theme in curriculum development and training methods of institutions involved in preparing judges for the task of what I call “social justice adjudication” or SJA. Let me explain at the outset what SJA is all about and how it is relevant in judicial education and training particularly in developing countries like India having multi-cultural population and caste and sex-based inequalities.

I. SOCIAL JUSTICE ADJUDICATION: WHAT AND WHY?

India is a developing country inhabited by over a billion people (one-sixth of the human race) professing different religions, speaking different languages and living contemporaneously in extreme levels of poverty and affluence. It has chosen the democratic path under rule of law to achieve the goal of securing to all its citizens:¹

JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity
and integrity of the Nation.

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¹ CONSTITUTION OF INDIA, Preamble.

These Preambular promises have been elaborated, *inter alia*, in Parts III, IV and IV-A of the Constitution giving the blue print of the future society which WE, THE PEOPLE OF INDIA have adopted for ourselves. The Constitution itself provides a roadmap to achieve the New Society through Constitutional means and values founded on the history of the Freedom Movement. The law making bodies at the Centre and in the States have been active in giving meaning and content to the constitutional mandates. The Statute Book is replete with social justice legislations giving special protection and benefits to vulnerable groups in society. The judiciary has been entrusted with the difficult job of overseeing the implementation of these laws in a manner conducive to constitutional values, rights and processes so that no section of the society might feel discriminated unjustly while the policies and programmes for social justice are advanced uninterruptedly towards reconstruction of a just, fair and humane social order. In many respects the tasks have been admirably performed by the superior courts through judicial activism, PIL, democratisation of judicial remedies, domestication of international human rights instruments, use of continuing mandamus, compensatory reliefs for constitutional torts, expansion of fundamental rights, etc. This trend is to be strengthened and institutionalised not only in Constitutional Courts but in the subordinate judiciary as well. Social context judging is a judicial tool for facilitating this process.

The beneficiaries of social legislations normally have their claims adjudicated at the first level courts of the magistrate or civil judge and sometimes in special courts (created under special legislations like the Prevention of Atrocities Act) presided by the District Judges or Chief Judicial Magistrates. The beneficial approaches and interpretations of the constitutional courts have to inform and illuminate the attitude and decision-making processes of the trial courts. Furthermore, the spirit of the social legislations and the social context which necessitated the enactment has to be reflected in the implementation and interpretation of the laws. In other words, what is required is purposive construction rather than liberal interpretation of the provisions of welfare laws. Delay and technicality shall not be allowed to defeat the purpose of the law. Sensitivity to the problems of the lowly and disadvantaged sections is to be reflected in judging issues concerning them even if the pleadings and arguments were not supplying enough to fill the need of delivering equal justice under law. Affirmative action jurisprudence is part of

equality jurisprudence and can be invoked if circumstances so warrant. To be able to do so the judge has to consciously abdicate possible biases and prejudices in him and take law as an instrument of social change towards achieving the constitutional goal spelt out in the Preamble.

Social justice adjudication is constitutionally mandated by Articles 14 to 18 (Right to Equality), Article 21 as interpreted by the Supreme Court, Articles 23-24 (Right against exploitation), Articles 29-30 (Cultural and Educational rights), Articles 38 to 49 (Directive Principles fundamental in governance), Article 51-A (Fundamental Duties) and Articles 330 to 342 (special provisions relating to SCs, STs, Anglo-Indian community, etc.). The central issue involved in these provisions is what the Preamble articulated as social justice or equality and dignity of the individual. It is therefore respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.

II. SOCIAL JUSTICE IMPLICATIONS OF "ADVERSARIAL LEGALISM"

In a critical study of adversarial litigation, Prof. Robert A. Kagan wrote:²

As often occurs in American litigation, the outcome is shaped more by the delays and opportunity costs of extended adversarial legal processes than by authoritative legal judgments about the just result. . . Generally, American judges are motivated not only by their political predispositions but also by the desire to maintain a reputation for legal craftsmanship and to protect the perceived legitimacy of the Courts.

² ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003).

Kagan defined 'adversarial legalism' to mean policy making, policy implementation, and dispute resolution by means of lawyer-dominated litigation. It is a method of governance, apart from a technique of dispute resolution. "It is a markedly inefficient, complex, costly and unpredictable method of governance and dispute resolution." In consequence, Kagan argues that:

The American legal system is often unjust. The complexity and unpredictability of its processes often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses. Adversarial legalism inspires legal defensiveness and contentiousness, which often impede socially constructive co-operation, governmental action and economic development, alienating many citizens from the law itself.

Even if the charge itself is not entirely true of all styles of adversarial systems of justice, there are reasons to suspect the inability of the system to give equal justice to the poor unless mechanisms are put in place to reduce adversarial legal excesses. Social context education for judges is one such mechanism to redeem the system from its own excess and to enable it to deliver equal justice under law irrespective of the status of the litigant.

"Adversarial legalism's procedural tools," writes Kagan:

[E]xacerbates its potential for inconsistency and unequal treatment. The outcomes in criminal justice are shaped by the shifting and often unequal balance of competence, commitment, and resources between prosecuting attorneys on one side and defense lawyers on the other. In a regime of adversarial legalism, the quality of justice is especially dependent on equality in the quality of the duelling lawyers. Adversarial legalism therefore is far less effective for achieving equal justice in everyday criminal legal processes.

A damning indictment of the inherent bias of the judicial process against the poor and disadvantaged people caught in the system! The author further writes:

On the civil side, adversarial legalism is expensive and dilatory. By making litigation and adjudication slow, very

costly and unpredictable, adversarial legalism often transforms the civil justice system into an engine of injustice, compelling litigants to abandon just claims and defenses. It encourages and rewards manipulative lawyering and extortive demands. It is a two-fold source of inequality: sophisticated litigants gain an advantage not only because they are better at withstanding the costs and uncertainties of adversarial litigation but also because they are better able to devise ways of circumventing it.

If there is any truth in the finding, it is for judges to sit up and deliberate on how to neutralise the inequalities in adversarial judicial processes by affirmative action from the side of judges and other actors in the system.

What is said of the discriminating impact on the weaker litigant of American adversarial legalism is applicable with greater force in India because of the extreme inequality in which majority of litigants are placed and the mediocre nature of legal services extended to the poor. In a lawyer-dominated adversarial system there is no way to provide equal justice to the poor and the disadvantaged people unless the judge is sensitive to the disabilities of the poor in the litigative game and is pro-active to tilt the scales overcoming procedural technicalities and manipulative lawyering. Fortunately, the procedural law does provide for such a role if the judge is so disposed. In doing so, the judge is called upon to probe suspicious facts, evidence and contentions, seek legislative purpose underlying the laws in question and invoke affirmative action measures to do justice to deserving poor. The inequalities inherent in adversarial adjudication can thus be moderated to some extent if the judge is socially sensitive and professionally enterprising. Social context judging is an imperative need in contemporary Indian society if courts have to have legitimacy and adversarial adjudication is to continue as the major technique for administration of justice.

III. EQUALITY JURISPRUDENCE AND SOCIAL CONTEXT JUDGING

Equality broadly understood in its substantive and procedural dimensions capture a great deal of the judicial functions envisaged for social context/justice adjudication. Let me elaborate the proposition by looking at equality as a constitutional value and a fundamental right in

the background of a society fractured through a hierarchical caste system and a feudal economic order. Under the Constitutional scheme of social justice, Right to Equality appears to be a powerful strategic tool provided for all three wings of state to bring about the just society through rule of law. The challenge before the judiciary is to translate this vision of the Preamble into juristic concepts and instruments capable of bringing about change while honouring the rights of individuals and the unity and integrity of the nation. If the judiciary does not do so, society might pay a heavy price to maintain peace and stability. Indian Constitutional history does provide several instances of this dynamics operating in the system with varying socio-political consequences. An obvious example is the right to property particularly in relation to land, the main means of production. When the right to property was interpreted in such a way as to inhibit land reform (*zamindari* abolition), the Constitution had to be amended several times, ultimately resulting in the deletion of right to property itself from Part III of the Constitution. After all, in a system under which all cultivable land in the country remain in the hands of a few individuals and an impoverished State is not allowed to acquire it without paying "market value," the objects of Articles 14, 38 and 39 would naturally be frustrated. It is this impasse the Republic faced when the Supreme Court gave a literal (non-contextual) interpretation to the scope of right to property in the early years after independence.

The story is not different if one were to analyse the trials and tribulations through which the equality right was advanced through reservation or affirmative action for disadvantaged people in the matter of education and employment. Courts had to be innovative and enterprising to find ways and means to reconcile merit with social justice, individual right with collective good, economic growth with distributive justice. If initially the Courts' approach was fashioned to project formal equality through the "reasonable classification formula," in later years it was informed more by substantive equality in terms of results and outcomes among the intended beneficiaries. Between *Champakam Dorairajan*,³ and *Indra Sawhney*,⁴ equality jurisprudence took on board a range of affirmative action measures which resulted in greater educational and employment opportunities to the country's oppressed and backward classes while maintaining the essence of non-

³ AIR 1951 SC 226.

⁴ AIR 1993 SC 479.

discrimination and fairness to all. This is a supreme example of social context judging or social justice adjudication in the true spirit of human rights and a just social order.

While the justice revolution towards equal justice in an unequal society was happening in the Superior Courts of the country generating a jurisprudence of affirmative action for weaker sections and a technology to work it out in the judicial process, its impact on the country's 13,000 trial courts has been, to say the least, weak and dispersed. Why is it so particularly when the Parliament and State Assemblies have been rather over active in enacting a variety of civil and criminal laws conferring beneficial rights and entitlements to women, children, Dalits, tribals, disabled and elderly persons. The common explanation is the insensitivity of the Bench and the Bar, the corruption and distortions in the system and the lack of proper training to members of the subordinate judiciary. The Government responded by creating Special Courts (Family Court, Juvenile Justice Board, Labour Tribunal etc.), by cutting down lengthy procedures, by simplifying rules of evidence, by providing free legal services and by even inducting more persons from the aggrieved sections into the judiciary and law enforcement agencies. Still the gap between legislative intentions and judicial performance seems to persist. There are many reasons for this situation some of which are well outside the judicial system itself. Nevertheless, experience suggests that considerable progress could have been achieved if there was proper change of mindsets, attitudes and approaches on the part of judges who presided over the system. Hence, the importance of training, training not just to inform but training to change attitudes and mindsets. This is what social context education through equality jurisprudence attempts to accomplish.

IV. CONTEXTUAL JUDGING: ISSUES AND CONCERNS

In fact, contextual judging is nothing new though its reach and techniques have undergone radical changes in different countries since the Second World War and after the adoption of human rights and democracy as the central concerns of governance. Broadly speaking, the inquisitorial system prevailing in continental jurisdictions use social context judging more widely as compared to the adversarial system with its heavy emphasis on technicalities of procedure and dependence

on precedents. What seems to be happening today in the Common Law world is a convergence tending to moderate what Prof. Kagan described as excess of "adversarial legalism." It is happening more in the area of public law where newly adopted Constitutions are setting new standards and goals for legislatures as well as judiciary. In private law, there are constant tensions experienced when the old and the new mediate to strike a balance which has legitimacy among all sections of people. Family law in India based on personal laws of different religious communities is a good example of this process where contextual judging is increasingly being canvassed for equality and gender justice in matrimonial relations.

There are many roads and by-lanes available to a judge interested in social context judging. For example, he may invoke principles of fairness and equality essential for dispensing justice. He may in appropriate cases accept legislative history to reason his interpretation. He will use the power of appreciation of evidence in such a way as to remove possible disabilities tending to vitiate equality before law. He may try to understand the systemic disadvantages suffered by parties and seek the support of available empirical evidence impeding substantive equality. To be able to do so he may start by interrogating the assumptions and presumptions which according to him, inhibit delivery of equal justice. He should be concerned with shifts in public policies; community expectations from courts; advances in scientific knowledge; power imbalances between the two parties and their possible consequences etc. He should be prepared to work with other functionaries in the system who may have specialised knowledge which the legislature desired to go into judicial decision-making. Problem solving should be a dominant goal in social context judging and this demands therapeutic approaches to the maximum extent that the law permits. Thus perceived, every judge in the Family court, juvenile court, environmental court, tribal court, court for matters of the disabled, court hearing conflict of law cases etc., are typically to be social context judges. The core competence of such judges is equality consciousness and a willingness to respect diversity. Judging is not just deciding; it is strengthening social cohesion, pushing the development process, enabling co-existence of diversity, maintaining rule of law and legitimacy of governance. Contextual judging indeed helps to bridge the gap between law and life, between law and justice.

The problem today is how to equip judges to become adept in contextual judging and excel in problem solving without doing violence to the system. In this regard it will be instructive to look at the experience of the Canadian judiciary which launched in 1996 a massive nationwide programme of social context education for judges. In a paper circulated by the National Judicial Institute of Canada, the Social Context Education Project is explained and evaluated in the context of experiences of several judges trained under the scheme during a ten year period.

Social Context Education Project, Canada

"SCE is intended to improve the delivery of justice through brining into focus the role of social context in judicial action." Judges become better judges when they are more knowledgeable about society. It is a great deal more than sensitivity training on diversity issues. Building on the insight that determination of facts and law are both influenced by social context, SCE attempts to expand the scope of legal analysis and is aimed to achieve the following:

1. assist judges to understand the nature of diversity, the impacts of disadvantage and the socio-cultural issues that shape the persons who appear before them;
2. encourage judges to explore their own assumptions, biases and views of the world with a view to reflecting on how these may interact with judicial process;
3. examine relevant research and community experience in order to enhance processes of judicial reasoning in the interpretation and application of evidence and legal principles; and
4. provide jurisprudential and analytical tools to enable judges to examine the underlying basis of legal rules and concepts to ensure that they correspond with social realities and conform to the constitutional guarantee of equality.

Social Context Education Project [hereinafter SCEP] argues that it is a constitutional mandate and an ethical principle for judges to "conduct themselves and proceedings before them so as to assure equality

according to law.” For this task social context inquiry is necessary. “A conscious, contextual inquiry has become an accepted step towards judicial impartiality”, reasoned one judge. When issues are examined in context, it becomes clear that some so-called “objective truths” may only be the reality of a select group in society and may, in fact, be completely inadequate to deal with the reality of other groups.

An important principle of judicial education pioneered by SCEP was outreach to the community and efforts to foster a two-way dialogue between judges and communities outside the adversarial setting of the courtroom.

In Canada, Chief Justices supported the social context education initiative through resolutions of the Canadian Judicial Council, through constituting Education Committees in their Courts to plan and deliver social context seminars, and through dedicating court-based education meetings on the subject of social context. This high level of judicial leadership sent a strong message that this work was considered to be credible and of a high priority for all judges.

Funded by the Federal Department of Justice, the Canadian SCEP consisted of two phases. In the first phase (1996–2001) the Project delivered programmes to over 1000 Federal and Provincial Court judges in Canada on social context issues including gender, aboriginal peoples, race, age, disability, poverty, language and communication, domestic violence, expert evidence, judicial notice, sentencing etc.

The second phase of SCEP (2001–03) focused on curriculum design, Faculty development and integration of social context in all stages of judicial education.

With funding from the Canadian International Development Agency, Social Context Education (Equality Education) was extended to South Africa, several countries in South Asia in partnership with NGOs and judges of the region.

A by-product of SCEP is the emergence of what are called problem solving courts or problem solving approach adopted by courts when called to adjudicate specialised problems like mental health, drug addiction, domestic violence etc. Based on principles of what is called

therapeutic jurisprudence these courts consciously abandon the “one size fits all” approach of criminal justice and deal with cases holistically. The judicial role has been transformed from detached, neutral arbiter to that of a central figure in a team focusing on causes, accountability, impact etc. A team based approach (as in Family Court or Juvenile Court in India) to decision-making requires a judge to abdicate sole responsibility in determining the outcome of a case. It is said that problem solving courts and the underlying theory of therapeutic jurisprudence have revolutionised the working of the criminal justice system in Canada and elsewhere. As the context keeps changing SCE is a continuous process for the judge to grasp the changed contexts.

Based on the experience of the Canadian Initiative a lot of comparative data on social context education have been presented and discussed by judicial educators from several countries who assembled in the Second International Conference of Judicial Educators (Ottawa, 2004) organised by the Canadian Judicial Institute. In fact a lot of information given here are gathered by the author while participating in the Conference on behalf of the National Judicial Academy, Bhopal.

Few important findings emerged at the meeting are listed below:

- i. Taking account of diverse perspectives increases the genuineness of judgment and its validity in society.
- ii. SCE enables judges to write judgments without prejudice, avoiding stereotypes and enhancing communication across cultural lines.
- iii. Even in fact finding SCE helps in as much as it tends to eliminate unreliable factors ordinarily supported by technical evidence and to appreciate evidence of witnesses with cognitive disability.
- iv. In the matter of understanding legal rules whose meanings are taken for granted (reasonableness, judicial notice, consent, equality, fairness) SCE is of enormous help. Equality assumes new meaning when situations are looked at contextually.
- v. Managing the trial processes fairly when parties are

inadequately represented or counsels turn aggressive to witnesses demand contextual knowledge and skills.

- vi. Scientific and expert evidence invariably demand contextual information and the capacity to appreciate it.
- vii. Multi-cultural societies, caste-ridden societies, societies with wide economic disparities or, in short, societies with diversities pose difficult problems to judges if they have to administer equal justice. Learning the skill of understanding context and of dealing with diversity in a fair and realistic manner is the function of SCE.

V. INCORPORATING SOCIAL CONTEXT JUDGING AS PART OF JUDICIAL EDUCATION IN INDIA: AN ESSENTIAL STEP IN DELIVERY OF EQUAL JUSTICE

Many judges in the Supreme Court and High Courts do consciously adopt social context judging techniques while interpreting rights particularly of the poor and while exercising powers of judicial review on issues relating to equality, fairness and reasonableness of governmental action. Of course, the approach and the outcome depends on the facts and circumstances of the dispute and the social philosophy of judges constituting the Bench. However, Constitution being a socio-political manifesto of the people and Courts being the guardians of the Constitution, it is to be expected that social context cannot but form an indispensable tool of judging in constitutional courts. The challenge here is to consolidate, streamline and institutionalise the techniques so that in the name of social context, judges may not indulge in propagating their own perceptions of social reality contributing to uncertainties, ad hocism and indiscipline. The controversy over the use and abuse of public interest litigation illustrates the dangers involved if social context judging is not critically evaluated and scientifically developed as part of judicial techniques for judges to cultivate. This is the function of education and training.

Another challenge, more fundamental and critical in dispensing equal justice to the poor, is the method of institutionalising social context judging in the trial courts where an overwhelming majority of the poor including women and children seek justice. The problems here are many and complex. "Adversarial legalism" rules the roost in trial courts. The

mind set of judges and lawyers is inimical to anything new in the accepted notions of analysis and procedure. The weight of precedents is too big to be ignored. The unit-based performance assessment militates against innovation and flexibility. Evidence law would dismiss social context arguments as hearsay and of no consequence in the trial. Constitutional values and equality arguments are seldom advanced by parties and judges are trained to leave them for the constitutional courts to consider. However, there is some light at the end of the tunnel. Firstly, specialised courts like the Family Court, Juvenile Justice Boards, Environmental Courts and Quasi-judicial Regulatory Authorities are now being set up in which the statutes themselves are providing freedom from technicalities based on equity and equality compelling the trial court judges to invoke the social context approaches and remedies. There are criticisms that judges are still not exercising their powers accordingly and the beneficiaries are not getting their due promised by the laws. It is in this context judicial education and training has assumed great importance. If the training institutions are equipped to play the role imaginatively there are prospects for change in judicial attitudes and approaches which may result in social context judging processes becoming part of administration of justice. This is what we mean by social context education for social justice adjudication.

Another possibility opening up in a big way to inculcate the social context judging culture among judges of the subordinate judiciary is the advent of what is called Alternative Dispute Resolution Methods. Given the import of the amended Section 89 of the Civil Procedure Code, the provisions of the Legal Services Authority Act and the Conciliation and Arbitration Act, judges would naturally be persuaded to look beyond the confines of conventional procedures and seek settlements fair to both the parties. Here again training and education of the judge in respect of the philosophy and methods of social context approaches are critical to equalise the position of parties involved in the dispute. Equalisation of positions in terms of access to information and negotiating capacities is essential for a fair outcome in mediation and conciliation. In court-annexed mediation and in Lok Adalats, judges can bring into the process a lot of social context inputs while attempting to equate both sides towards pushing for a fair settlement of the dispute.

The advent of globalisation and unprecedented technological

advances are throwing up new types of disputes before courts at all levels which cannot be addressed in terms of old mindsets and approaches. There are no precedents to follow either. Judges have to be necessarily creative, and innovate methods of judging which are in conformity with legislative intentions and are fair to parties before the court. In so doing, judges necessarily invoke social and scientific data, find relevancy provisions to support their position and use them for appreciation of evidence and ascertainment of facts in order to do justice. Such techniques may even be extended to innovate reliefs and remedies appropriate to the situation. When they do all these, they are in the domain of what we call social context judging. Judicial educators have to find the dynamics of the process and prepare lessons to be incorporated in the judicial training curriculum. The rules may vary in different types of disputes though there are some core principles governing the entire process. The approach should aim not only to impart instruction on the usefulness of knowledges from outside statutes and judicial decisions, but also the skills necessary to apply those knowledges judiciously knowing its limitations and to learn to address the ethical dilemmas involved in social context judging.

The National Judicial Academy and the State Academies have made a beginning in this direction through the following strategies:

- (a) Select issues of priority in equality and social justice, collect case studies on them, invite judges involved and conduct orientation and sensitisation courses to demonstrate the strengths and weaknesses of social context judging. In all these programmes the overarching principle of justice discussed and adapted is the "Right to Equality" and its exposition in Supreme Court decisions and in international human rights instruments.

Refresher courses of this type organised so far relate to Family Courts, Juvenile Justice Courts, Environmental Courts and IPR Courts. There is scope to extend similar exercises for judges presiding over Disability Courts, Mental Health Courts, Atrocities Courts, Forest Act Courts, Human Rights Courts, etc.

- (b) Introduce variety of social science data bearing on

adjudicative issues in the study materials circulated among trainee judges and confront judges in the training sessions on their use in adjudication. Take examples from other jurisdictions if necessary.

- (c) Develop 'Bench Books' containing functional use of social science knowledges in performing judicial functions when judges sit in specialised courts adjudicating social justice (equity and equality) issues.
- (d) Publish 'Occasional Papers' by jurists and judges of repute who have persuasively canvassed judges to be "problem solvers" performing social justice roles for which the conventional court is neither equipped nor inclined.

The task is complex and continuing one which requires sustained effort and imaginative pedagogic techniques. The object is change of mindset and behaviour of judges who are learned and experienced people. Written law has limitations to initiate behavioural change. Leadership has greater role to play. Fortunately, the country is blessed with a long line of superior court judges who have opened up a new jurisprudence of equality and social justice which not only inspires successive generations of judges but also provides some adaptable techniques and approaches for those seeking to equalise parties for delivery of equal justice under law.

VI. A BRIEF REVIEW OF SOCIAL CONTEXT APPLICATIONS OF EQUALITY JURISPRUDENCE IN INDIAN COURTS

Unlike other basic human rights, the Right to Equality has infinite possibilities in the hands of socially sensitive judges to advance social justice amidst the inequalities and diversities which persist in every society in varying degrees. Diversity is writ large in Indian society. Traditionally a lot of discrimination was practised with some degree of legitimacy, on the basis of sex, caste, religion, ethnicity etc. Freedom Movement united people across all diversities to create a new society based on the values reflected in the Constitution. Of these values, equality poses the greatest challenge particularly for the judiciary endowed with the responsibility of protecting the rights of people who have been discriminated for long because of their sex, caste, religion or socio-

economic status. The judicial experience in resolving such challenges on grounds of equality during the last fifty years and more is an unfinished story of social engineering through constitutional means unparalleled in the history of democratic societies. One of the significant messages which emerge out of this judicial experience is that social context judging is an integral part of justicing more particularly in pluralist societies and the more judges imbibe the spirit and techniques of the same, the better chances of realising the vision of the Constitution makers. This paper would now reflect on some highlights of this judicial history and suggest key areas where it is now required to be promoted as a deliberate judicial policy in the cause of equal justice for the immediate future.

Equality as a concept meant different things at different periods in history and courts legitimised those widely varying meanings to justify conduct. The idea was how to deal with people different from oneself and the method society as a whole adopted to justify differential treatment. If the initial reaction was to exclude or eliminate the other by sheer superior force, in later periods man learnt to segregate, subjugate and exploit them. Thus was born the practice of slavery and the "equal but separate" rationale for treating differences. Systematic subordination and discrimination against different groups were justified under the then prevailing conceptions of equality. The merit principle was introduced to distinguish people with differences and equality was interpreted to mean "equality among equals only." The differences were classified on the basis of conceptions of justice and based on the so-called reasonableness of classification and its nexus to the object intended, discrimination and differential treatment were considered as fair or unfair. Judges were persuaded to believe that so long as people within a particular class are treated alike, the equality guarantee is not violated.

The problem arose because of the mix-up of these classifications with castes, racial and minority groups and backward classes. The "Like Treatment Model" could not deliver equal status and opportunity to groups of people traditionally discriminated on the basis of birth, religion, sex or caste. The constitutional guarantee was to remove these inequalities built over the years on irrational formulations of equality and justice. The Constitution went a step further and built into the right to equality the principle of preferential discrimination in favour of the

unequally treated groups, prohibition of caste and sex-based discrimination in education and public employment and affirmative action programmes (including reservation of jobs and seats in educational institutions) to specified weaker sections not available to the privileged groups. It became clear that what the Constitution promised is substantive equality and not just formal equality on the 'Like Treatment' model. This development in Indian Constitutional law evolved over four decades of judicial gymnastics and a series of struggles within Parliament and civil society. In deciding the constitutionality of discrimination violative of equality or in interpreting the scope of affirmative action programmes and its beneficiaries the Court today is called upon to invoke techniques of social context judging. From *Champakom Dorairajan*,⁵ and *Balaji*⁶ to *Thomas*⁷ and *Indra Sawhney*,⁸ one can see the evolution of changes in judicial perception of equality and the role social context judging played in clarifying the principle in unequal societies and situations. While some questions seem to have been resolved other issues have cropped up compelling judiciary to constantly invoke social context judging tending to promote substantive equality in every sphere of life and to modify theories of justice long accepted as sacrosanct.

Another striking demonstration of social context judging in Indian judicial experience is in relation to gender-based discrimination and women's right to equality. There have been revolutionary changes in judicial perceptions and practices instigated by statutory amendments and social movements with a view to achieve what is popularly called "gender justice." Status of women is a product of social relations constructed by society based on notions of needs, interests, rights and duties. Gender relations therefore are an aspect of broader social relations and are sometimes conflicting. These conflicts are not to be perceived or analysed on the basis of biological differences or differences in Nature, but as being socially determined according to circumstances. If therefore discrimination based on sex is to be eliminated and equality redeemed, courts have to understand social context including reasons for male domination, unequal pay for women, denial of education to women etc. This is what social context judging demands in the sphere of gender

⁵ AIR 1951 SC 226.

⁶ AIR 1963 SC 649.

⁷ (1976) 2 SCC 310.

⁸ AIR 1993 SC 479.

justice. The same logic provides the key for understanding domestic violence, sexual offences against women, dowry harassment etc. This is the line of reasoning adopted in *Shah Bano*,⁹ *Vishaka*,¹⁰ *Apparel Export Promotion Council*,¹¹ *Gita Hariharan*¹² etc.

A former Chief Justice of India passionately spoke about the need for educating judges on issues relating to gender justice. He wrote:¹³

A socially sensitised judge is a better statutory armour in cases of crime against women than long clauses of penal provisions containing complex exceptions and provisos . . . The object of judicial education in this regard is *to change one's awareness, knowledge, skills and behaviour in relation to gender issues and to provide an opportunity to evaluate and discuss the issue against existing understanding and social context . . . Gender sensitive judges can take a more pro-active role in the proceedings rather than simply responding to the material presented by the lawyers. They can exercise their discretion to assist the processes in favour of women wherever appropriate.* They can recognise the need to obtain the best quality evidence from witnesses particularly women in criminal trials who have been subjected to violence and women litigants in civil cases. . . *In their appreciation of the evidence they can be aware of the gender context and take care to avoid stereotyping.* Judges determine what evidence can be given and how under the rules of evidence. An important factor in this behalf is change in the outlook and perception of the judge. . . *There are umpteen number of cases to show how individual judges have been trying to eliminate gender bias in courts with varying degrees of success. To encourage such judges and to sensitise other judges, regular training courses are required.*" [emphasis supplied]

Yet another sphere where social context judging is going to be critical for delivery of equal justice is in the interpretation and application of the Disability Law (The Persons with Disabilities (Equal

⁹ AIR 1985 SC 985.

¹⁰ (1997) 6 SCC 241.

¹¹ AIR 1999 SC 625.

¹² AIR 1999 SC 1149.

¹³ DR. JUSTICE A.S. ANAND, JUSTICE FOR WOMEN 71-72 (2002).

Opportunities, Protection of Rights and Full Participation) Act, 1995). Describing the disability as a dimension of the vast array of diversities in society, the South African Judge Albie Sachs wrote:¹⁴

... It then occurred to me that the right to be treated equally and the right to be different were not opposed to each other. On the contrary, the right to be the same in terms of fundamental civil, political, economic and social rights provided the foundation for the expression of difference through choice in the sphere of culture, life style and personal priorities.

The challenge before law and courts in relation to the disability issue is how equality of opportunity can be materialised given the current norms and practices. Nothing but a social context approach can help the judges in addressing the issues of non-discrimination and equalisation of opportunities in respect of the fifty million disabled persons in the country.

Equally challenging is the role of the judiciary in relation to citizens with HIV/AIDS. The association of HIV/AIDS with drugs, sex and in particular with groups such as homosexuals and prostitutes already stigmatised or criminalised in several ways in society make the task of the judge all the more difficult. The judge needs to so perform his functions as to reduce the additional burdens upon those unfortunate persons when they appear before him. Prejudices need to be replaced by scientific knowledge and stereotyping to be avoided by a strong commitment to deliver equal justice. In so doing, social context judging techniques are of great help to the judiciary.

Discrimination, prejudice, exploitation and intolerance are growing in society. At the same time consciousness of people in respect of dignity and human rights is increasing. "Judges" as Justice Michael Kirby of the Australian High Court has said:

[A]re essential equalizers in a pluralist society. They serve no majority; not any minority either. Their duty is to the law and to justice. . . In upholding law and justice, judges have a

¹⁴ ALBIE L. SACHS, HUMAN RIGHTS IN THE TWENTY FIRST CENTURY: REAL DICHOTOMIES, FALSE ANTAGONISMS (1998).

vital function in a pluralist society to make sure that diversity is respected and the rights of all protected.

Social context education on a continuing basis is the surest method for cultivating the habit of respecting diversity and protecting the rights of the disadvantaged sections.

THE CONCEPT OF AN INDEPENDENT JUDICIARY

Fali S. Nariman*

Two great concepts: supremacy of law and the establishment of a judiciary to administer it originated in the United Kingdom. It was nurtured and cherished in the Americas (Canada and the United States) - it took root in the former penal settlement of Australia, and later in New Zealand. It came to British India first in the form of the East India Company's Court and later as the Courts of the British Crown. It was also introduced in what was the Colony, and later the Dominion, of Ceylon, and in the Peninsula of Malaya (which then included Singapore). After the Second World War, these concepts were incorporated into the Constitutions of the newly emerging independent countries in the continent of Asia.

Those who decry everything 'British' have searched in the *Shastras* and have hearkened back to the times of the Emperor Asoka to look for the roots of judicial independence in our ancient heritage. They look in vain. It could not be otherwise. Indian history-ancient and medieval-with a few exceptions is a history of succession of monarchs and conquerors - not of institutions. There could not possibly be a tradition of judicial independence in a country different parts of which were ruled by different potentates exercising absolute powers over their subjects. The judiciary in Indian States for instance (the State of the Princes, the Nizam, the Maharajahs, and Rajahs) were in a sense independent - but only just so. In these Indian States there were judges of integrity who decided cases as between citizens impartially-but they could afford no redress against the excesses of the ruler. About twenty years ago, at a seminar held in Bombay under the joint auspices of the International

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Bar Association and LAWASIA - a seminar whose theme was 'Administration of Justice in the year 2000 AD,' at that time a long way off, the then President Zail Singh graphically described the conditions under which judges functioned in the erstwhile Indian States.

The ardent young Zail Singh who was a keen nationalist was put in jail on innumerable occasions by the Ruler of one of the princely Patiala States - on one occasion in his youthful exuberance he protested to the judge against his fresh detention on the evidence of a tutored witness who had given evidence about his allegedly illegal activities on each of five previous occasions when he had been imprisoned; he demanded that he should be permitted to cross-examine this procured witness and for that purpose to bring a lawyer from British India.

The judge (who was a kindly man) adjourned the Court and asked the young Zail Singh to see him in his chamber. In the chamber, the Judge asked him why he was so impetuous, and when informed that it had become intolerable to be detained, times out of number, on the false testimony of the same person, the Judge said:

How foolish you are Zail Singh! What's all this talk about cross-examination of the witness produced by the Police? They have only acted because the Maharaja has asked them to. Don't you know? - if he asks me to acquit you, I will acquit you and if he tells me to convict you, I will convict you. So, let's have less talk about lawyers from British India- and get on with the case.

The tradition then of judicial independence in British India (and later in independent India) is essentially an English tradition. It started in England of course with the Magna Carta, which the bad King John was made to sign at Runnymede. Everyone knows this. But it is worth a moment's reflection to remember that if King John had prevailed over the Barons at Runnymede (and not they over him), and he had fed the Great Charter to his horse instead of affixing his seal to it, a large part of the world would still have been living under a government, but it would have been a government of men, not of laws.

The first great name in English law is Henry Bracton, a Judge. Bracton was only a boy when Magna Carta was sealed in 1215 AD, but

under its influence he later wrote, "The King should not be under Man, but under God and the Law." Many years later, it was the first Lord Chief Justice of England Edward Coke, who saved his head by remembering and recalling these words.

James I regarded judges as the King's servants. "They were lions," as Bacon put it, "But lions under the throne." It was Coke who courageously refused to obey the King's writ prohibiting judges from hearing a case. The story of Lord Coke's brush with his King is well-known but it warrants being retold. I repeat it for several reasons: *first and foremost*, because he alone amongst all his colleagues in the Court refused to obey the King's writ (prohibiting the Judges from hearing the case) – the names of his colleagues are no longer remembered, and the incident illustrates what one fearless judge amongst many "lions under the throne" can do in a crisis; *next*, the story emphasizes the sense in which the word 'independent' is used when we speak of the independence of judges; *thirdly*, the story stresses the importance of the rule of law.

A dispute between two parties over land was heard by the King himself. King James gave his decision. But the Courts refused to recognize it since the dispute was one which belonged to the Common Law and came within the jurisdiction of the Courts, and they proceeded to hear the dispute. It was then that the King issued his infamous writ – which Coke refused to obey. King James was furious. He said that he thought that the Law was founded upon reason and that he and others had reason as well as the judges. Coke's celebrated answer (a masterpiece of courage and circumlocution), as he knelt before his monarch, was:

True it was, true it is that God had endowed Your Majesty with excellent science, and great endowments of nature; but Your Majesty is not learned in the laws of your realm in England, and causes which concern the life, or inheritance, or good, or fortunes of your subjects are not decided by natural reason but by artificial reason and judgment of Law-which law is an act which requires long study and experience before a man can attain to the cognizance of it: that the law is the golden met-wand and measure to try the causes of subjects and protect Your Majesty and the peace.

But the King was not convinced with honeyed words. "Then I am

to be under the Law (he said): It is treason to affirm it."

Coke had to be very careful. His head was at stake. He replied taking refuge in precedent. He quoted Bracton. He said, "thus wrote Bracton- The king is under no Man, but under God and the Law-for it is the Law that makes him King."

To affirm what Bracton said was treason. But to quote the dead Bracton was not!

It is now more than fifty years since each of the former colonies of one or other of the great powers in this region became independent. But the pattern of Government has changed-most of them started with a parliamentary system which still prevails in India. But in many parts of South and South East Asia, there has been a shift; to the Presidential form of Government which is, of course, in theory, democratic since the Presidential Office is an elected one; too often, however, the Presidential form of Government lapses into a civilian (often military) dictatorship. The temptation of absolutism is great and the task of an Independent Judiciary is a trying one. There is always the charisma of the National Leader trying his best to relieve the poverty-stricken masses, only to be thwarted (so it is said) by a Bench of non-elected Judges who cannot gauge the real aspirations of the people.

Often Presidential forms of Government in this region have yielded to Martial Law regimes where there is law and order (or an outward semblance of it) but no rule of law. In such countries, judges are required to take an oath not to a Constitution but to a Martial Law Order or in other words to a *firman*. How does a Judiciary relate to an autocratic non-elected regime, if you are going through a period of revolution which has succeeded and a writ is filed, What do you do? – Resign? Is it important for the Judiciary to continue to function at any cost? – Even at the cost of its independence? Even the sine qua non of an Independent Judiciary, a guaranteed tenure of office is denied in Martial Law Regimes.

The reason is the reluctance to govern by an objective set of laws, the tendency to frame rules to suit the whims of those in charge of the governmental machine. I remember the charming story related at a seminar of the Indian Branch of the International Law Association, a few years ago, by a sitting Judge of the Supreme Court of a neighbouring

country. He was a fearless Judge and internationally recognized as such: it was he who was nominated to accept the Nobel Peace Prize on behalf of Amnesty International when it was awarded to that Organization. He was friendly with the man who later became the President of his country and its Chief Martial Law Administrator-that President is no more and so one can relate the incident without causing offence. The President turned to his friend, the Judge and asked him to draft a Constitution for the country, the administration of which he had just taken over. The Judge said:

When I was a young boy at Calcutta there was a famous playwright and two famous actors - each having a different theatrical style. Whenever the playwright was commissioned to write a scenario, he would ask for which one of the two actors it was intended, so that the play would suit the talent and ability of that actor. Do you want me to write a Constitution like that playwright wrote his plays?

The President saw the point. He asked someone else to do the drafting. It was only the smoldering memories of a past friendship that saved the Judge's life! Tailor-made Constitutions imposed by force of arms are an impediment in the search for norms for an independent judiciary.

Bangladesh is an instance in point. When it came into being, it was provided by the Provisional Constitutional Order of 11th January, 1972, that there would be a High Court of Bangladesh consisting of a Chief Justice and other Judges appointed from time to time. The Constitution of Bangladesh which came into force on 16th December, 1972 provided for a unitary form of Government. Fundamental rights were guaranteed and made enforceable through the Superior Courts. There was no provision made for a declaration of Emergency, and hence, no fundamental rights could be suspended. The power of suspension was only acquired later by the Constitution Fourth Amendment Act, 1975, and was twice invoked.

The High Court had superintendence and control over all Tribunals and Courts - but after the Fourth Amendment (1975), superintendence was restricted only to the Court subordinate to the High Courts. The tenure of Judges was guaranteed and extended until the age of sixty-

two years, their independence was secured by providing that they should not be removed except by the President pursuant to a resolution of Parliament passed by majority of not less than two-thirds of the total number of members of Parliament on grounds only of proved misbehaviour or incapacity [Article 94(2)]. By a subsequent Amendment, the impeachment procedure was substituted by a provision for removal on a reference by the President to the Supreme Judicial Council composed of the Chief Justice and the next two senior Judges. This safeguard against removal of Judges continued to be available notwithstanding the promulgation of Martial Law in 1975.

The situation changed after the Proclamation of Martial Law on 24th March, 1982. Although under that Proclamation, Judges continued to function, all writ proceeding were declared to have abated. A few days later (on 11th April, 1982), the Proclamation First Amendment Order of 1982 was brought out which provided that a Judge of the High Court (i.e., the High Court and Appellate Court division of the Supreme Court) could be removed by the Chief Martial Law Administrator. Paragraph 10 (4) read thus, "a person holding any office mentioned in paragraph 3 (Judges) and paragraphs 6, 7 and 9 may be removed from office by the Chief Martial Administrator without assigning any reason."

In the next few years, several Judges of the High Court of Bangladesh were removed from office under paragraph 10 (4) by the Chief Martial Law Administrator without assigning any reason. Under the Proclamation First Amendment Order of 1982 (11th April, 1982), the Chief Justice of Bangladesh, whether appointed before or after the Proclamation, was obliged to retire from office if he had held office for a term of three years, even if he had not attained the retirement age of sixty-two years (proviso to Paragraph 10 (1) of the Order of 1982).

The result was that Chief Justice Kamaluddin Hoosein who had been the Chief Justice for more than three years, in April, 1982, automatically demitted office. The way he went did little credit to the system. On 12th April, 1982, the Chief Justice was hearing a batch of cases in which several advocates were engaged; the Chief Justice was not impressed by the merits of the cases and was not inclined to grant relief to the clients of these Advocates. The same would have been fate of another client whose case was not in the batch, but was listed that day and reached later that day. The Advocate engaged in the case raised

a new plea - the plea of *Coram non judice*. He said that it was reported in the newspapers that morning that the Chief Justice could not hold office for more than three years. The Chief Justice then sent for the Attorney General (since the gazetted copy of the Proclamation of Sunday, April 11, 1982, was not available) and asked him whether there was such a provision and whether it applied only prospectively or included the present Chief Justice. The Attorney General came to Court and enlightened the Chief Justice that he had demitted office by reason of the Proclamation Order No. 1 of 1982. The Chief Justice rose, went to his Chamber, took off his judicial robes for the last time, and bade farewell to the Advocates in the Bar Library.

The example of Pakistan is also worth nothing. In October, 1958 the Supreme Court of Pakistan-in *Dosso's Case*,¹ gave legal recognition to the Bhutto regime which had abrogated the Constitution of Pakistan. The Judges, with rare intellectual attainments, performed (what one distinguished writer has described as) the paradoxical task of delineating from first principles "Constitutional Contours of Extra-Constitutional Action" (Dieter Conrad).

In short, they rationalized Martial Law, they legitimized tyranny. The judge who delivered the main judgment was rewarded. He became Chief Justice of Pakistan. But some years later, when the political situation changed, he displeased his new masters when granting interim orders on Mrs. Bhutto's petition regarding the detention of her husband. The result was a presidential order by the then President of Pakistan (the new Martial Law Administrator) reducing the retirement age for a Chief Justice to sixty-two. The Chief Justice was then sixty-three years of age! Another judge, Chief Justice Murshid - whose name is still highly regarded - struck down the Removal of Difficulties order promulgated by Field Marshal Ayub Khan. But he could not serve out his term as judge as he was retired compulsorily! *Dosso's Case* was overruled many years later, in the year 1972.

In *Asma Jilani's Case*,² the Supreme Court of Pakistan ruled that martial law was illegal and President Yahya Khan was an usurper. But it was too late. Constitutional transgressions long recognized or

¹ PLD 1958 SC 533.

² PLD 1972 SC 139.

legitimized by pliant judges had become part of the legal culture of that country. It has still not recovered from it.

The basic problem in military regimes is the absence of any continuous constitutional tradition. During the period of twenty-five years before liberation, when what is now Bangladesh was East Pakistan, the longest period during which a democratic Constitution with entrenched rights and supervisory jurisdiction of superior courts functioned was a little over two years from March, 1956 to October, 1958; the only other period in this long history was when President Ayub's Constitution of 1962 with entrenched rights operated from 10th January, 1964 till September, 1965, when Emergency was declared!

We in India have been fortunate. Unlike our neighbours, we have had an unbroken constitutional tradition for over fifty years. When, after imposing an Emergency in June, 1975, Mrs. Gandhi called for elections in January, 1977, and lost, most people were concerned: would she call in the Army? To her credit she did not. Would she respect the mandate of the People? Despite the advice of some lawyer-politicians, she did! I recall with pride Prime Minister James Callaghan's tribute to this event in our political history. He said that, "the ultimate mark of a true democracy is the willingness of a Government defeated at the ballot box to surrender power peacefully to its opponents." That is what happened when Mrs. Gandhi was defeated at the polls in March, 1977 and that is what again happened when her opponents (the Janata Party) were in turn defeated at the elections of 1980, when Mrs. Gandhi came back to power.

My reason for drawing attention to other areas of this sub-continent in contrast to India is that we should count our blessings and help preserve a constitutional climate and a democratic set-up; not throw stones at our institutions as some people are wont to do.

The last twenty years in the world have not been very propitious for an independent judiciary. There have been spates of events that have occurred. Let me mention some of them:

- (a) the attempt to wind up the judiciary in Malta;
- (b) the prescription of an oath of personal loyalty for the Judges

of the Highest Court in a neighboring country (Pakistan) which resulted in the mass resignation of at least twenty judges;

- (c) the abduction and murder of three judges in Ghana in Africa;
- (d) the sentencing of the former Prime Minister of a country in Asia Minor to two month's imprisonment for issuing a press statement commenting on political affairs.

In one of the recent issues of the Bulletin for the Centre for Independence of Judges and Lawyers of the International Commission of Jurists, the President of the Bar Association of one of the countries in South America described the plight of his own country, Paraguay, which had been under a State of Emergency for over thirty years.

"To what degree is the judiciary independent?" - one of its judges was asked. The judge was too afraid to answer, so he replied with an anecdote of a judge appointed in a neighbouring country during the turbulent nineteenth century.

On assuming office that judge said, "I will do everything I can to help our friends. I will decide against our enemies, and I will do justice to the rest." "Unfortunately," says the President of the Bar Association of Paraguay, (commenting on this quip) "nearly every one in my country is a friend or an enemy!"

Then there had been the abolition of the lawyers profession in Libya, and recently in another Muslim country. As for the last, England must accept partial responsibility; it was an Englishman, one of the most renowned, William Shakespeare who made one of the characters in his play to say, "First of all, Let's kill all the lawyers." The problem in some areas of the world is that some Governments are taking Shakespeare too seriously. In Libya the "Killing" was by dispensing with the entire legal profession. But you can also 'Kill' by other means.

Sometimes the law itself inhibits the freedom of the legal profession and seriously prejudices its independence; this in turn necessarily affects the Judiciary. Take the law of sedition, not as understood in this country but in a neighbouring one.

But first we enjoy our freedoms differently from others because of the Indian view on the law of sedition. In *Niharendu Dutt Majumdar v. Emperor*,³ in consequence of a speech made at Calcutta, Niharendu was convicted by the Additional Chief Presidency Magistrate of offences under the Defence of India Rules. The conviction was upheld by the High Court of Calcutta from which Niharendu appealed to the Federal Court which allowed the appeal and acquitted the appellant on the ground that the speech of the appellant Niharendu did not constitute a prejudicial act of sedition. Chief Justice Gwyer proceeded to consider the meaning of sedition in English Law as defined by the English Court and held that the acts or words spoken must either incite disorder or be such as to satisfy reasonable men that it was clearly with that intention or tendency. Chief Justice Gwyer applied that test on Niharendu's speech and found that it contained no incitement or intention or tendency to incite public disorder and the conviction was set aside.

Unfortunately for the freedom in the colonies, the Privy Council set aside this judgment in *Emperor v. Sadashiv Narayan Bhalerao*.⁴ Sadashiv Narayan admittedly distributed printed copies of seditious material – seditious in the sense of exciting disaffection towards the Government. The Magistrate acquitted the accused as there was no allegation of incitement to public disorder. He followed the Federal Court judgment. The decision of the Magistrate was affirmed by the High Court – the learned judges found themselves bound by the decision of the Federal Court. Lord Thankerton who delivered the speech of their Lordships of Privy Council said that the marginal note to Section 124A used the word sedition and although the meaning and content of this word had been laid down in many decisions in England – decisions which had been referred to by Chief Justice Gwyer – these decisions were not relevant when there was a statutory definition of the term sedition. Their Lordships said that they could find nothing in the language of Section 124A that the act complained of must be either to incite disorder or must be such as to satisfy reasonable men that, that is their intention or tendency. The word 'disaffection,' said the Privy Council, includes disloyalty and all feelings of enmity – they did not have to excite disorder.

³ AIR 1942 FC 22.

⁴ AIR 1947 PC 82.

Fortunately for us, in *Kedar Nath Singh v. State of Bihar*,⁵ the Supreme Court of India (judgment by Chief Justice B.P. Sinha) held that the provisions of Section 124A and 505 of the Indian Penal Code were not unconstitutional as being violative of the fundamental rights of freedom of speech and expression under Article 19 (1) (a) and interpreted the word “sedition” as follows:

The explanations appended to the main body of Section 124A make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental rights or freedom of speech and expression. It is only when the words, written or spoken etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the Section strikes the correct balance between individual fundamental rights and the interest of public order.

The Federal Court decision was accepted – not that of the Privy Council. Chief Justice Sinha opined:

It is also worthy of note that the word ‘sedition’ which occurred in Article 13 (2) of the Draft Constitution prepared by the Drafting Committee was deleted before the Article was finally passed as Article 19 (2). In this connection it may be recalled that the Federal Court had, in defining sedition in 1942 FCR 38: (AIR 1942 FC 22) held that, “the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency,” but the Privy Council overruled that decision and emphatically reaffirmed the view expressed in *Tilak’s case* to the effect that ‘the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small – 74 Ind App 89: (AIR 1947 PC 82). Deletion of the word ‘sedition’ from the draft Article 13 (2), therefore, shows the criticism of government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground

⁵ AIR 1962 SC 955.

for restricting the freedom of expression and of the press, unless it is such as to undermine the security of or tend to overthrow the State.

But the law in Malaysia took a different course. A distinguished lawyer in Malaysia, the Vice-President of its Bar Council was prosecuted for Sedition under the Sedition Act, 1948. His offence? In an open appeal to the Pardons Board (a body which advise the Malaysian Head of State on petitions for clemency) he asked them to reconsider the petition of one Sim Kal Chou for commutation of his death sentence. Sim, a poor man, had been charged for possession of a firearm. He had no licence for his gun but he had not used it - he had not killed or injured anyone. He was not a terrorist nor was he involved in any subversive activities. He was tried under the Internal Security Act and being guilty of possessing a gun he was awarded the mandatory sentence of death. Sim approached the Pardons Board for clemency but his plea was rejected. The Vice-President of the Bar Council of Malaysia contrasted the refusal of the Pardons Board to accept Sim's plea for clemency with the case of Mokhtar Hashim (who was an important person). This man was found guilty of discharging a firearm and killing another. He was charged and tried under the Security Cases Regulation, given a light sentence, which on a representation to the Pardons Board was commuted. In the course of contrasting the case of Sim with that of Hashim, the Vice-President of the Bar Council said:

What is disturbing and will be a source of concern to the people is the manner in which the Pardons Board exercises its prerogative . . . on record before the Courts, Sim's case certainly was less serious than Mukhtar Hashmis case; yet the latter's sentence was commuted. The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the weak, and the unfortunate, whereas the rich and powerful and the influential can somehow seek to avoid the same severity.

These words were alleged to be seditious and punishable under the (Malaysian) Sedition Act, 1948 - actually they are because the Malaysian Courts follow the judgement of the Privy Council in *Sadashiv Narayan*. As a result, a person who was in the position of the Vice-President of the Bar Council of a country could not freely express his

frank opinion on a question of public importance. The case is an example of enacted law (inappropriately interpreted and enforced) tending to suppress free and frank expression of views.

Without a free, fearless and independent Bar, the Judiciary would soon cease to be independent. A free legal profession and an independent Judiciary in fact go hand in hand. Laws which suppress the freedom of lawyers (and other citizens) to freely criticize their Government or even tend to do so are a grave threat to the independence of the legal profession. And since in many countries it is the Bar which supplies the Judges; necessarily, this is a threat to the independence of the judiciary itself. At times' however, lawyers are also a danger to an independent Judiciary – more so some of the politically motivated ones. It was they who advised (I believe wrongly) the issue of the Proclamation of Emergency in June, 1975 in India which led to curtailment of civil liberties and threat to the independence of the Judiciary – and it is to me a matter of deep regret that it was a Lawyer – President who appeared to be in such a hurry to sign that Proclamation.

In the developing countries of Asia where State action dominates almost every field of activity and the levels of tolerance are always at danger levels there is a feeling amongst those who govern that an independent Judiciary - that is a Judiciary which adjudicates without fear or favour between citizen and State – is an unnecessary evil. This feeling is engendered even in those countries with a written Constitution and with virtually unlimited judicial review like India.

In this country in the early nineteen-eighties, two Cabinet Ministers stepping outside their portfolios, levelled broadsides at the Supreme Court. One of them reportedly said that the Judiciary seemed to be no longer aware of its true role, that it was vital that the Judiciary and Parliament functioned harmoniously, that “present trends were very, very serious,” and if these continued, no one could say what the ultimate result would be. He wondered why the Supreme Court was “unnecessarily inviting conflict” and that public opinion would have to be created on the issue. “Who knows the minds of the people,” he then rhetorically asked, “seventeen wise men or Parliament?” (at that time there were seventeen Judges in the Supreme Court). The other Cabinet Minister said that Judges express different views at different times and they are fallible - how then can they pronounce on the validity of

Constitutional Amendments made by the Parliament?

These were serious threats. When voiced by Cabinet Ministers they were ominous. They needed a reply; I wrote a letter to the Times of India, and this is what I said:

The great institutions of our democracy - Parliament and the Judiciary - cannot survive if those who man them shake its foundations. Courts do not sit in judgment over the minds of the people - the higher Judiciary is set up under the Constitution to adjudicate on the laws passed by the elected representatives of the people and to pronounce on the legality of the action of the executive branch of Government. That Judges, even those in the highest court, are mortals and hence fallible is no original observation. Fallibility of the individual Justices must not be confused, however, with the finality of the decision of the Court - the first is a human infirmity, the second, a constitutional mandate. The question, "Which is supreme under our Constitution - Parliament or the Supreme Court," is a mischievous one. The answer is neither. *It is the Constitution and the law that is supreme. And it is the Constitution (our Constitution) that declares that the final interpreter of the law is the Supreme Court.*

The two Ministers were unable to understand the distinction between the unexceptionable principles that political power is best entrusted to the majority, from the unacceptable claim that what the majority does with the power is beyond scrutiny or criticism. There is no disharmony between Parliament and the Judiciary, and no individual member of Government should claim to speak for that great parliamentary institution. Disharmony between the Government and the Courts is a different matter. If there were complete harmony between them, this country would not be worth living in.

It is the duty of the Judges to interpret the Constitution and the laws and if this creates clamour and controversy, well, it is the price that we have to pay for living in a democracy. It was that great democrat Edmund Burke who said, "the fire-alarm that rings at mid-night may disturb your sleep, but it keeps you from being burned at night."

The moment politicians, whether acting as Ministers or as Members

of the Legislature, set themselves up above the people whose interests they are there to represent, democracy (at least as we have come to understand it) ceases to exist. The outward mask of democracy is universal suffrage, but its content is political pluralism and a theory of limited Government - that means the theory which prescribes that a Government may not overstep the bounds set to it by a body of moral values, and if these bounds are to be effective, there must be a strong Judiciary able to call a halt to the acts of politicians whether they claim to be acting as the elected executives or as the Legislative body.

In developing countries like India, there have been increasing demands on the legal system. The responses of the Court have been encouraging as witnessed by a spate of decisions in public interest litigation and in the field of human rights, where, happily our Supreme Court - especially since 1977 - has shown that though lodged in a splendid building plush with teakwood paneling; its doors are wide open to the needy, the humble and the poor. All varieties of social problems which were at governmental levels are now being subjected to a variety of legal remedies and enforced through Courts. We are proud (I am proud) of the Supreme Court. In fact, its pronouncements are irksome to those in authority.

Take a recent judgement of the Constitution Bench of the Supreme Court presided over by Justice Hegde of which Justice Sinha was a member. The facts were that two ministers of the Government of Madhya Pradesh were, after investigation, indicted by the *Lok Ayukta* who submitted a Report to the State Assembly that there was sufficient grounds for prosecuting these two ministers under the Prevention of Corruption Act, and for offences of criminal conspiracy - they had been bribed to release seven acres of precious land illegally to their earlier owners, even though these lands had been lawfully acquired by and for the use of the Indore Development Authority.

On the basis of the Report of the *Lok Ayukta*, sanction was applied for from the Council of Ministers for prosecuting the two ministers. But the Council of Ministers decided there was not an iota of material evidence available against either of the two ministers from which it could be inferred that they had conspired to do an illegal act. The Council of Ministers with the Chief Minister at its head refused sanction on the

ground that no prima facie case was made out!

The then Governor considered the grant of sanction keeping in view the decision of the Council of Ministers: he would normally and under constitutional practice be bound by the advice of his Council of Ministers. But this Governor went through the available documents and noted that the evidence was enough to show that a prima facie case for prosecution had been made out. Despite the unanimous decision of the Council of Ministers, the Governor granted sanction for the prosecution of the two ministers under Section 197 of the Criminal Procedure Code.

Both ministers then filed separate Writ Petitions in the High Court of Madhya Pradesh which held that the Governor could not act in his discretion against the aid and advice of his Council of Ministers even in the matter of grant of sanction for prosecution of some of them for offences under the Prevention of Corruption Act and under the Indian Penal Code.

Since the question was of vital importance to probity in public life and since *Antulay's Case* (1988) had been decided on the basis of a concession made by counsel – the case was referred to a Constitution Bench of five Judges for decision.

Justice Variava spoke for the Court and his judgment shows the importance of the role of a Governor under our Constitution. This landmark judgment has carved out a new role for the Governor that of the conscience keeper of people of the State. The Constitution Bench of the Supreme Court speaking through Justice Variava relied on the Report of the *Lok Ayukta* (and there again full marks for the institution of *Lok Ayukta* since the *Lok Ayukta* was able to act despite the wishes of the Party in power in the State).

The Court held that the decision of the Council of Ministers was null and void since the Council of Ministers in exonerating two of themselves were acting as Judges in their cause which in law was impermissible. It was no decision at all. And since no decision could lawfully be taken by the Council of Ministers it was for the Governor as the Constitutional Head of the State to sanction or not sanction prosecution: the Governor having considered all the material and the Report of the *Lok Ayukta* had ordered the necessary sanction against the

Ministers and this was a valid and constitutional order and had to be upheld – the decision to the contrary of the High Court of Madhya Pradesh was set aside. Justice had triumphed.

This case highlights two things viz. *first*, the importance of the role of the non-elected Governor in our Constitutional Scheme – Governors should never be treated as political party appointees – they have an independent status of their own. And *second*, the importance of the role of non-elected Judges of the Supreme Court of India in boldly setting their face against the tidal wave of bribery and corruption that is engulfing our entire country.

It is a strange reflection on Parliamentary democracy, which means government by the people (through its elected representatives), that the institutions which act for and in the interests of the people are not elected institutions, but non-elected ones. In the above mentioned case, the Governor on the one hand and the Judges of the Supreme Court of India on the other have fixed tenures. They are appointed, not elected. But the tenure of a Governor is not constitutionally guaranteed – though appointed for five years he holds office at the pleasure of the President which means virtually at the will of the Central Government: but constitutional convention requires that those appointed in high Constitutional positions like that of the Governor must, unless there are compelling reasons to the contrary, be allowed to complete their tenure. If they are treated as independent functionaries most if not all of them would act independently: the office ennobles the man or woman who fills it.

I believe that it is an extremely short-sighted policy for Governors to be retired or compelled to resign with a change of Government at the Centre. Fortunately, the tenure of the Judges of the Supreme Court is guaranteed by the Constitution and they are thus constitutionally enabled to act independently of political pressures. I mentioned the recent Supreme Court decision because it is one instance of doing something to help remove the cancer of corruption in this country.

The reactions in the corridors of power to some of the Court's recent decisions are reminiscent of Laski's famous quip (though uttered in a somewhat different context), "It is not injustice that worries me, it is Justice that hurts." Very often it is Justice that hurts those who exercise

executive power in this vast sub-continent of State which we call India. There are, and always will be pressures on the Judiciary, even in stable democracies.

Give an Administrator a chance to dismiss a Judge and he will. In a recent book *JUDGMENT IN BERLIN* by Herbert Stern, the author, a retired Federal District Judge from New Jersey relates his days as a Judge in the United States Court for Berlin; the United States as an occupying power, convened the United States Court for Berlin, a body that had existed only on paper since 1955; its Judge was appointed by and served at the pleasure of the U.S. Ambassador to West Germany. Mr. Herbert Stern, a Federal District Judge from New Jersey was selected in 1978. A group of Berlin residents objected to a scheme for construction of Military Housing in a park-like area previously used for recreation. They sued the U.S. Government in the United States Court for Berlin. Such a case could only be heard if the occupying authorities consented, and since that consent had not been given, it was a virtual certainty that Judge Stern would have dismissed the complaint for lack of jurisdiction.

But not content to rely on its obviously strong position, the U.S. Ambassador Mr. Walter Stossel wrote informing Mr. Stern that his Court did not have the jurisdiction. This implied that he had no choice but to accede to the Ambassador's request. The issue of judicial independence was needlessly – but squarely raised. The judge attempted to persuade his Government to withdraw the letter. When this proved unsuccessful, he concluded that a ruling in favour of the U.S. Government's Motion to dismiss the Civil Case would be perceived as surrender to outside pressure. As a result, he declared that he would not rule to dismiss as the letter was in the Court. Early next morning, another letter came to his Hotel Room informing him that he had been dismissed. Lacking tenure in Berlin, although retaining life tenure as a Federal Judge at home, Stern's concern was ensuring the independence of his Court. Before leaving the Court, he addressed the Government's lawyers in the case before him and said:

Imagine if I sat here and was not an Article III (Life Tenure) Judge in another life? Imagine if my salary depended on the Ambassador? . . . Suppose my children's education depended on the goodwill of the Ambassador? Is that the kind of Judge you want, the kind of Judge that can be told how to decide

cases, even for you?

Judges do often get angry at lawyers, but it is rare for their anger to be kindled by concerns as fundamental as those encountered by Judge Stern in Berlin.

Different countries have different ways of dealing with pressures on the Judiciary, a former colleague of mine on the Human Right Committee of LAWASIA once recalled the Japanese way at a seminar in Tokyo in July, 1982. About ninety years ago, an Imperial Russian Prince Nicholas Alexandrovitch travelled in Japan. In the City of Ote (near Kyoto), he was assaulted by a Japanese Policeman with his sword. Fortunately, his life was saved. The Policeman (Sanzo Suda) was arrested and was tried for attempted murder under Article 116 of the Japanese Criminal Code wherein the maximum sentence was life imprisonment. But the Japanese Criminal Code also provided in another Article (Article 292) that anyone who assaulted, "the Emperor, Empress or a Prince" would be punished by death. This was really intended for the protection of the Imperial Family of Japan-though that was not expressly stated. Imperial Russia was at the time very strong, militarily and politically, and the relations between Russian and Japan had soured. (The incident took place only ten years before the Russia-Japanese war).

The Japanese Cabinet fearing reprisal from Russia; sent a message to the Court to punish the accused under Article 292 that is to sentence the policeman to death and not life imprisonment. But Mr. Kozima (the newly appointed) Chief Justice of the Supreme Court of Japan strongly resented this political intervention. He asked the Magistrate to decide the case according to law. The Magistrate taking no notice of the government pressure convicted the policeman under Article 116, i.e., to imprisonment for life. The Government appealed, Chief Justice Kozima rejected the appeal holding that the special provision of Article 292 applied only to the Imperial Family of Japan. We are told that after this case-famous in Japanese Judicial History - there was no interference by the Government of Japan with the Judiciary.

In times of stress, a brave judge though sometimes in a minority of one has changed the course of his country's judicial history. So too the dissentient Judge, the one who speaks for the brooding conscience of future generations. Let me remind you of *Liversidge v. Anderson* (1942).

It is now forty years since the decision was given, and the majority views have been buried by the House of Lords (in 1981). Lord Atkin's dissent has been finally vindicated. When it was delivered, however, the popular views were the majority view. And it is necessary to recall the context in which the House of Lords heard the case. The argument took place in September, 1941 and the speeches were delivered on 3rd November. It was a low point in war. The Balkans and Crete had been over-run; the invasion of Russia had carried the Germans close to Leningrad and Moscow; the British summer offensive in the Western Desert had failed; the Japanese menaced the Malayan Peninsula in Singapore; Pearl Harbour was to follow in the next month and the United States were not yet in the war. Lord Wright's speech (the majority view) reflected the atmosphere:

All the circumstances of national safety to which this House adverted in *Rex v. Halliday* are present in this war, only vastly increased urgency and gravity, because German methods for effecting the prisoners infiltration among British or allied subjects of their purpose and schemes have been immensely more subtle and ingenious than in the last war. Even a Judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like.

But Lord Atkin would not take notice. Instead, he reminded his colleagues in that oft-quoted purple passage that in England "amid the clash of arms, the laws are not silent; they may be changed, but they speak the same language in war as in peace." Brave words, heroic words. But not at that time. Lord Atkin suffered, his colleagues refused to speak to him for in his dissent, Atkin had hit hard - and he knew that the consequences of what he had said would hurt:

I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive . . . In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the Time of Charles I.

On 2nd November, 1841, he wrote to his daughter Gaven, "I am giving off my dissenting judgment in the Home Security Cases tomorrow; and haven't spared the others. I hope I shall be on speaking terms with

them afterwards." He was not. He was criticized by his senior colleague Lord Maugham, in an open letter to the Times. Atkin was requested by the Lord Chancellor (Lord Simon) to delete the scornful reference in his dissenting judgment to "the Humpty-Dumpty attitude" of his colleagues on matters of statutory construction. He was upbraided almost branded a traitor. But Atkin remained tight-lipped. He refused to be drawn into controversy over his dissent. He refused to go to the Press. He was amply rewarded - first in private; much later by posterity.

Dr. C.K. Allen, the author of "Law and Orders" which contained a forceful account of the administration of Emergency Regulation 18B, and who was always a vehement champion of the individual against the encroachments of executive power, wrote three days after the Judgment in *Liversidge* to Lord Atkin:

Rodhes House
Oxford
5. xi. 41.

Dear Lord Atkin,

I expect that this is a very improper letter to be written even by a non-practising member of the Bar, but, I cannot refrain from saying that it will be remembered as not the least distinction in your great judicial work that you alone among other judges have raised your voice against an abuse of power. *Such cries in the wilderness have strong and long echoes.* There is no real answer to the simple point of language on which you took your stand.

This whole business is another warning against bureaucratic 'discretion.' When the facts are known, it will be realized that this terrible power has been used neither wisely nor justly, and that thumping lies have been told about it in Parliament. You were not concerned with that, but what you have said will not be without its effect.

Yours sincerely,
C.K. Allen

The last word on *Liversidge* was spoken by Lord Diplock in 1980. Lord Diplock spoke for posterity. "For my part," he said in his speech in the House of Lords (in the *Rossminister Case*): "I think the time has

come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently, and at that time perhaps excusably, wrong and the dissenting speech of Lord Atkin was right."

The cries in the wilderness - the dissent of Atkin as what Krishna Iyer J. used to describe as an appeal to the "brooding spirit of the future," do have 'strong and long echoes.' Judicial independence is a byword in every democracy. In British India, with the establishment of the High Courts from the middle of the nineteenth century, the concept of an independent Judiciary took root. But till 1947, one third of the area of this sub-continent was being administered by what came to be known as the princely States: the Judges in those states' often described as the *Jee Huzoor* Judges, were required to function in the time-honoured tradition of judicial subservience, so characteristic of Moghul and pre-Moghul times. When we framed our Constitution, we chose the British model, not the other one. It is this model, though originally western, that we must cherish and preserve. It is preserved more by example than by words. There will be assaults from outside on the independence of the Judiciary. But always remember: the citadel never falls except from within. It is up to us - lawyers, judges, citizens - to help maintain the independence of this citadel.

COURTS, TV AND THE RULE OF LAW

Judge Antoine Garapon*

INTRODUCTION

The relations between justice and the media illustrate the revolution we are currently experiencing: a technological, political and anthropological turning point that Cora Bell calls¹ *the normative shift*. The political revolution these relations show is that we have entered a new democratic era that could be called *opinion driven democracy*. The Media tend to double classical political representation by posing as spokespersons for public opinion. This political change has anthropological repercussions because television has no vocation to act as a new institution, but rather draws its power from a capacity to flout the traditional trappings of institutional authority, that is, the space/time discontinuity symbolized by specific rites. These developments are indissociable from evolving technological capacities that produce new, unsettling effects, such as a kind of hypnotic effect on viewers. All of this raises novel questions concerning one specific democratic activity: dispensing justice.

I. DANGER OF INHIBITING CRITICAL DETACHMENT

The most common criticism of the image is that it short-circuits proceedings and gives the illusion of direct democracy. Is this a necessary, image-related evil or the misuse of television?

A. Quasi-hypnotic Power

The force of televised images results primarily from their "reality

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¹ Cora Bell, *Normative Shift*, *THE NATIONAL INTEREST*, 44 (Winter 2002-3).

effect.” Offering us the scenes our eyes can capture, they render the framework of the trial and its rites even more artificial. The images are intrusive because they allow “consumption without detachment.”² The truth is produced through a theatrical process and the trial is nothing other than a recital of events answering to the rules of the genre, that is, a selection of facts, establishment of an intrigue and a result. Broadcast images do not correspond to this scheme at all. On the contrary, the Media delocalise the spatial dimension of trials (creating a parallel trial outside the courtroom), they dislocate time, disqualify the participants (by individualizing people who are simply fulfilling a function) and depoliticise the people involved in the case by reducing them to a psychology, or to their suffering, without considering them as citizens).

The television news perspective offers no other possibility, especially for citizens who are unfamiliar with this sort of story, than communing in the scandalous evil of crime or injustice. Lack of critical detachment and communing effects may be present simultaneously, as was the case in Belgium during the famous “white march.”³ Very often, televised images of a court case do not facilitate understanding of the need to choose between two contradictory interests, such as the need to protect particularly vulnerable children, on the one hand, and the rights of parents on the other. During the *Outreau case*,⁴ the media quickly adopted the theory that the accused were innocent. The televised spectacle of suffering victims of the judicial machine crushed any serious debate. Some years beforehand, a newspaper, *Le Monde*, had strenuously denounced the release of a harmful criminal, who later killed six people, by an appellate court that simply respected the presumption of innocence. In the *Outreau case*, they denounced an absolutely contrary situation: the continued detention of people accused of paedophilia. There is no point asking the press to be auto-critical, a rare occurrence, but simply to raise the question.

B. An Invisible (and thus Irresponsible) Director

It would be untrue to imagine that images are a neutral vector for

² MARIE-JOSÉ MONDZAIN, L'IMAGE PEUT-ELLE TUER? [CAN IMAGES KILL?] 47 (2002).

³ A paedophilia case got all of Belgium out in the streets in 1996.

⁴ This recent case shook French public opinion, when a range of residents from a village in the North of France (baker, taxi-driver, priest, manual worker, etc.) was suspected of belonging to paedophile network.

the transmission of reality: they make choices that can only be understood by comparing them with the spectacle of the trial itself. During a trial, the same participants must see every aspect of the trial and nothing else, both in time and space. This whole is both diachronic (all operations are conducted in a determined order) and synchronic: everything must be seen at once.

The temporal dimension implies that a broadcast is meaningless unless the viewer can see everything, as is the case in the *Milosevic* trial on Internet. It is easy to understand the difficulty that this requirement represents for the television, which cannot present everything at once, unless it decides to launch itself into an enterprise such as the *Milosevic* trial. That is why the *Court TV* channel has decided to provide "gavel to gavel" film coverage, in other words, broadcasting from the first tap of the gavel to the last. Beyond a few monumental trials, it is not possible to restore an entire trial: choices must be made that the journalist never justifies and that creates problems for democracy and due process in the trial. When the *Milosevic* trial is reported on in Belgrade and Sarajevo, Serbs and Bosnians do not see the same images. In fact, the Serbian news manages to select those passages of the trial that make Milosevic out to be a glorious character holding his head high. All of the sequences that show him in difficulty are scrambled to ensure that the average Serbian viewer cannot see them without Internet.

The principle of unity within the hearing is confirmed in the spatial dimension, or, in other words, synchronously. The courtroom is organized in such a way that everyone can see all the others at the same time. Indeed, during a trial, the judge and the public must be able to see everything and see whatever they want, including the reactions of the accused and counsel, etc. This is what differentiates the naked regard of the public and the directed perspective of the audience. Even where the trial is broadcast in real time, watching it in another room already changes things. This occurred during the *Dutroux* trial, because the courtroom was too small, in the *Lockerbie* trial for the families of victims living in the United States or Scotland, and in the *Milosevic* trial. Already the atmosphere is different. There is a loss of information simply by observing a trial from an adjoining room. During the *Dutroux* trial, the courtroom could not hold everybody and another room was set aside for journalists wishing to follow the trial by live television broadcast

(as for the ICTY). Yet it was not the same trial. It lacked the atmosphere, the looks of complicity or hatred between the protagonists. For example, "believing" journalists (that is, believing in a paedophile ring) were seen to applaud when testimony went in their favour, and hiss when it didn't.

When one sees a trial through a director's camera, the regard is unconsciously biased. We are unaware that a choice has been made to present us with a specific perspective. The citizen's regard depends on the ability to direct one's own observation when forming an opinion. Take the example of the film by Raymond Depardon, *10ème chambre*⁵ (Courtroom ten), which chooses to film the judge and the accused using head-and-shoulder shots (the courtroom as a whole is only shown rarely, despite the fact that Levinas defines the trial as the simultaneous presence of all the protagonists in a judicial setting). In particular, when there are three judges sitting on the court bench, the photographer only shows the presiding judge. Thus, the relations between the protagonists in the trial are presented to the audience as interpersonal and appear less mediated by the law: Depardon presents the trial, by definition a public domain, as an interpersonal affair between individuals: the good presiding judge on the one hand and the "losers" on the other, the latter being depicted as touching or annoying, in turn. In others words, he runs the risk of privatising the public domain, of transforming a public scene into private theatre, or even a therapeutic zone.

Television images hide the choices and therefore the subjectivity of the person showing them to us. In others terms, television is ceaselessly hiding, leading us to forget its powers. The political question raised by the image is not, therefore, some hypothetical opposition between the inauthentic rituals of judicial institutions and real life (as presented by the media), but rather the search for a common criterion allowing evaluation of the constructions of reality proposed by both the courts through proceedings and the media through images.

We suggest that this criterion may be found in the degree of liberty that each of these forms of expression offers the viewer, as a citizen.

⁵ This recent film by a well-known photographer, Raymond Depardon, shows a number of cases heard in Courtroom 10 of the Paris criminal trial courts (*tribunal correctionnel*).

The political question of the image boils down to the place it assigns to the audience. Some images arouse the critical detachment of the viewer whereas others inhibit any such spirit, calling on the spectator to cry or cry out, but not to think. The viewer is subjected to the image. Violence is not intrinsic to television images. Whether it be the message or the medium. It depends on the degree of liberty allowed or refused to the audience.

II. THE VIEWERS PACT

The freedom of the viewer of televised images of justice is closely linked to what one may call the "contract of vision." It may be deduced from three elements: the context in which the images are viewed; the explanation of the director's project; and the clarity of the distinction made between works of fiction and factual reporting.

A. The Decisive Importance of the Viewing Context

The *context* in which the image is seen is essential: it could be called the "viewers pact," by analogy with the "reader's pact" for a novel. One does not see entirely the same thing by going to a courtroom to see a trial, or a cinema to watch a film like *10ème Chambre*, by watching footage of the *Barbie* or *Papon* trials at home, or television coverage of the *Milosevic* trial on Internet.

Let us take the last example: the Internet image of the *Milosevic* trial is a lot less "striking" than on television. It is imperfect, fragmented, there is a gap between the sound and the image, and gestures are jerky. In sum, the presence is less imposing and identification is more difficult. Moreover, the computer screen allows miniaturisation (the image of the trial can be placed in a sub-window, the sound cut off, etc.). In this way, the instrument restores the powers of the viewer. Sometimes a bit too much, when the trial is used as a backdrop to one's work, ending up as background noise, like chewing-gum to the absentminded listener's ear. Finally, listening conditions are very different. Alone before the screen, the viewer is more in a working environment than entertainment. Trial viewers have a keyboard to remind them of the interactivity of the tool (this is at the opposite end of the spectrum from the passivity of television).

B. An Explicit Intention

There can be no trial unless this production responds to a specific organizational intention dictating the stage directions. Thus, the trial ritual is organized so as to facilitate a loyal search for the truth and, to the extent possible, equality: equality of arms, contradictory proceedings, identical burden of proof on the defence and the prosecution. Thus, the organization of the entire trial is oriented towards the following objective: make the fewest possible mistakes. This objective is not compatible with all others: the historian's perspective is different from that of the judge. When they watch footage of the *Einsatzgruppen* trial, judges and historians do not see the same film. Their varying priorities (aesthetics, politics, ethnography, etc.) may be perfectly respectable, but nevertheless far from those of justice. A specific question arises concerning pedagogical objectives: are they compatible with justice? We all know of famous failures: the *Demjanjuk* trial in Israel was to have been an important pedagogical trial after *Eichmann*, but it failed after a continuous series of mistakes. One may also wonder whether the extreme media interest focused on the *Papon* trial, in the name of pedagogy, did not disserve the primary function of Justice. In other words, History and pedagogy are perfectly noble ends, but they may not be compatible with other aims.

On television, this objective is never explicit, if only because the TV station must both maintain ratings and, for private channels, make profits. The Media can act as a check because they are decentralized, but also because they are mixed properties, both commercial and non-commercial. As a result, it is often quite difficult to discern the *intentions* of directors: are they seeking to educate? Inform? Entertain? Amuse? Increase ratings? All of the above? The press plays all these roles without it being possible to know precisely which it is playing at any one time. It holds it self out, in turn, as prosecutor, defence or 13th juror. This is the contrary of the judicial ritual, where every player has a given role.

C. A Blurred Line between Reality and Fiction

A French Television Channel, *Canal Plus*, recently broadcast a new documentary by Jean-Xavier de Lestrade entitled *Souçons*, or "Suspensions." The six hour documentary shows a man accused of killing his wife, Mike Peterson, with his family, working with his defence team,

etc. The director filmed parts of the trial as well as media commentary on the trial and reactions to the commentary by counsel, who sometimes telephoned the journalists (the call invariably ends by "we're not following the same trial"). The director used the "abyeme" effect, the trial spectacle itself being placed consecutively within the professional film footage, the media spectacle and, finally, Lestrade's own production. What, then, did the producer aim to achieve? He saw himself as criticizing judicial bodies, but in reality he plunged us into a private affair, or more precisely, he allowed himself to be drawn into the defence strategy of man who was clearly more strong-willed than Lestrade, and more perverse. As a result, he also draws the audience into this manipulation. Instead of cultivating an impartial regard, he plunges us into confusion. One cannot participate in judicial reality in this way without being affected. As Hilberg would say, a witness to murder becomes a bystander.⁶ One is no longer a simple spectator when one is a witness to something. The bloodstains sully those who fail to react.

Introducing filmed images into the trial itself transforms the status of the judge, whose role is to see everything in the courtroom and nothing else. I remember a trial hearing for sexual offences, during which a film was shown of the accused making love to his children. Ultimately, this transformed us from judges into witnesses to the crime.

When I watch the manipulations by Mike Peterson, I feel a debt of justice towards Kathleen, the victim (whom I already call by her first name!), at least in a negative sense: regardless of whether the real murderer is punished, I do not want to become an indirect accomplice to murder by falling for Peterson's fantasies. In substance, only fiction guarantees a safe role to the viewer. We have the right to expect a documentary maker to preserve our status as an audience without forcing us into another, far more uncomfortable position.

III. FRAMING IMAGES THROUGH THE RULE OF LAW

This technological, political and anthropological revolution gives rise to new potential for our democracy, but new threats as well. We must stop reasoning solely in terms of medium (the image as such), in

⁶ RAUL HILBERG, *PERPETRATORS VICTIMS BYSTANDERS: THE JEWISH CATASTROPHE 1933-1945* (1992).

order to concentrate on the public uses of television images. How can we ensure respect for the values protected by the Rule of Law in this new context? There are two sides to the problem of films in trials: bringing images into the court; but also bringing justice into the image.

A. Artistic Quality v. Civic Quality of the Image

The first sort of problem relates to capturing the images. Should only fixed cameras be allowed (as in the *Touvier*, *Papon* and *Barbie* trials in France)? Where should the cameras be placed? This is not just a technical problem, given the symbolic meaning if, for example, the cameras are placed above the accused. Should the editor be granted any artistic licence? This is forbidden in the *Milosevic* trial (for example, the camera cannot zoom in on witnesses who cry, or during particularly dramatic moments).

This question turns on a sense of *justice within the image*. As the form of an image is indissociable from its substance, the way we film must not be in contradiction with the perspective of the institution itself. The producer of the images for the *Touvier* trial, Guy Saguet, had to invent a novel television genre, introducing a form of justice into the filming process. His terms of reference placed priority on the *discretion* of the installation. Indeed, it is essential that the cameras be hidden in order for the participants to forget them. At the ICTY, for example, the camera filming the judges is placed in the UN flag, above the presiding judge. The courtroom contains a total of four cameras, as for the *Touvier* trial. The question of sound recording is not purely technical either. Should a camera be placed above the judges' sightline, overhead? Filming a hearing from the public gallery has an entirely different meaning compared with placing the cameras at the same level as the participants: in the first case, the camera occupies a dominant position in all senses of the term, whereas in the second it is on the same level as the court. Guy Saguet chose to place the camera at the eye level of each participant. *Touvier*, the presiding judge and the witnesses were all seen on television from the jurors' perspective.

Then next question is that of the *neutrality* of shooting, whether or not to allow zooms or not, for example. At the TPI, there is a camera just behind the accused, but it never zooms, even when witnesses are testifying on extremely moving events. One may therefore speak of

impartial filming and equitable treatment: everyone is treated equally, with reserve. In this respect, Guy Saguet had to decide what to do when Touvier fell asleep during a hearing. Since Touvier was not speaking, he decided there was no reason to film him. This sort of reserve negates editorial spontaneity.

Clearly, all of these conditions are opposed to the normal work of television producers: artistic creation. Neutral shooting is contrary to artistic creation. Yet, shouldn't the civic virtue of the image take priority over aesthetic quality? Guy Saguet explains how difficult it is for a television director to film a trial: he was soon forced to forget that he was a director and put aside all creative desire. He placed his work at the service of justice: in others words, he chose the organisational intention of justice over his own aims (resulting in a blow to his narcissism).

B. Freedom to Inform and Protection of Individual Rights

Television producers who request permission to film trials rely on the principle of public debate. This argument, which is very strong, does not take account of the extraordinary power of images, at least two aspects of which perturb the traditional conception of publicity: the much greater precision of the image compared with the human regard, on the one hand; and its permanence and infinite reproducibility on the other. Far more people can see film images, for much longer than someone in the public gallery.

Firstly, the camera provides the spectator with a feeling of proximity that is not possible with written documents. Sometimes, it even shows details that nobody present was able to see (when the camera creates a view unavailable to the participants). One example is Brent Butler's tear in "Murder on a Sunday Morning" (*Un coupable Idéal*). Another is the problem of the football referee whose field of vision is limited: the camera sees much better!

Television can bring a trial to the attention of an immense audience, far greater than any courtroom can hold. Of course, the participants do not know most of these viewers, but what counts is the small number of people (their children, relations and friends) whose esteem they hope to keep. Mark Dutroux's first wife is currently a professor of religion. No

order was given to the media to protect her image (at least according to them). Her photo was soon in all the Belgian papers. Her life was instantly destroyed. There could no longer be any question of remaining anonymous, keeping her secret to herself, simply enjoying her citizenship. There was no refuge for her anywhere, unless she left the country. Publishing her name would not have had the same effect.

What is the justification for the accused losing the right to privacy? Although some people believe that the public regard is part of the punishment, should that apply to witnesses and victims as well? Is there not a danger of "over-victimising" them? The traditional concept of publicity was adapted to the fragility of the human regard, to the evanescence of visual memory. Technology provides publicity with worrying power: evidence of the event now appears eternal and indelible. For technology (Internet or images) forgetting requires a positive effort, implying the physical destruction of data or storage systems. What time did spontaneously, a deliberate act must now accomplish, otherwise, the memory will remain registered somewhere in archives that ignore time limits and amnesties. Given that these images have a certain commercial value, it follows that their circulation may not respond to any need for publicity, but rather to a purely commercial logic. Paradoxically, the democratic issue is thus double: organize public access to the public domain, but also ensure forgetfulness in certain cases, thus providing an antidote for the poison instilled by the power of images.

Of course, the consent of all private individuals being filmed in court must be obtained; but is this sufficient? It is not enough to obtain a one-off consent: since such images are both permanent and open to continual manipulation, more guarantees are needed. How should the distribution process be supervised? The images may be reworked in-between times, as was the case for the "*Eichmann trial*" by Rony Brauman.⁷ Such works may be broadcast at any time, anywhere. Shouldn't the consent be renewed before each showing? This implies being able to find those involved. Yet more problems in view for people who may reasonably wish to go back to being ordinary citizens. Without such guarantees, the images continue to hang over them like a sword of Damocles. It is not enough to seek consent to the original shoot, but also to each later distribution, from all the people visible on the screen.

⁷ *Un spécialiste*, Film by Rony Brauman and Eyal Sivan on the *Eichaman* trial.

C. Publicity and Voyeurism

Such a system would be extremely difficult and constraining for television stations and one can imagine their response to such precautions: that these limits amount to *de facto* prohibition of the distribution of images and obstruction of the freedom to inform. These distribution conditions are clearly less compatible with prime-time news than with a specialized TV channel. Indeed, such a regime is very constraining but isn't that the price to pay for the distribution of images concerning flesh and blood people?

In a democracy, image is both commercial property and an aspect of personal dignity. This dignity is not entirely available to the person in question (as shown by the dwarf tossing affair, the image of the woman, or that of a corpse shown during a trial). The image is both an indispensable check on the smooth operation of democracy, as an instrument for access to the public sphere, and a source of profit. Because Justice deals with real life cases, it has become a media issue. The private dramas brought before the courts have become a source of profit for those who provide the images, because viewers identify better and more easily with real people. This is the driving force behind "reality shows." However, the usage of trials must be subject to added constraints when real people are involved. Especially in court cases, special precautions are needed to protect the rights of the protagonists, who would otherwise be thrown before millions of television viewers, for an undetermined period, at a time when they are particularly vulnerable. Television has the effect of taking the reality away from such people: it is important to recall that the media, especially television, can be extraordinarily violent. Because these people are not actors, but everyday individuals, they have rights to protect, rights that are not always given their real value, or to be more precise, are subjected to prejudice that is not always fully evaluated.

Should this be seen as an obstacle to the freedom of information? Perhaps such liberty should be related to an objective. Images of a trial can serve the interests of public debate, but also encourage the kind of voyeurism that is spreading under media influence. In the same way as the case-law of the United States Supreme Court relating to the first amendment on free speech makes a distinction between the exchange of ideas and pornography, it may not be necessary to recognize automatically the dignity of information to all images of a trial.

D. Accountability of Judges and Image Makers

All of these checks could justify new judicial roles, such as a *judge of image taking*. This was the case during the *Touvier* trial in Versailles. At the ICTY, a form of *a posteriori* control has been introduced through a thirty-minute delay between shooting and broadcasting the images, leaving time for censorship. The public and journalists therefore see images thirty minutes later than the accused. This delay showed its usefulness when the fixed cameras once filmed a protected witness from the Serbian secret services by accident. The image was able to be censored in order to protect the witness. Images of the *Barbie* trial show that directors have a spontaneous tendency to go too far. Who should be filmed at the very moment the verdict is being handed down? The *Histoire* channel has also shown images of this trial, but using different footage. During the *Barbie* trial, when Barbie's daughter was called to testify, the cameraman could not resist the temptation to show Barbie himself, which raises some problems.

The often difficult relations between the television world and judicial personnel can only be resolved if both sides remember their civic responsibilities. At least in French culture, the image can exercise a new form of democratic control. The concept of accountability, which has no equivalent in our political vocabulary, is more often than not reduced either to its purely disciplinary dimension (thus becoming the equivalent of a deontological sanction), or its purely political version, thereby becoming another expression for political control over the nomination of judges, or requests for their denunciation. Yet the image confers a new meaning on accountability in an opinion driven democracy: in addition to the aspect of giving account (as would an accountant), it adds that of exposure to the public regard, to this disinfecting regard, to paraphrase a famous remark by an American judge. This exposure takes on a figurative meaning (accepting evaluation by external bodies, exposing judgments to criticism by making them comprehensible, or subjecting them to a review body including non-jurists), but also its own meaning. Exposure to the public regard means bringing the cameras into the courtroom so that citizens may see their judges, placing them in a position to make their own judgment (this is the key to what Joël Roman calls democracy of individuals) of the way in which justice is done in their names. Some judges will complain that

the presence of cameras will place added pressure on the trial, but isn't such pressure legitimate?

The image also helps to enhance the responsibility of the media, as was shown in the *Dutroux* trial in Belgium. Philippe Morandini was not the spokesperson for the court, but his mission was to explain the mysteries of Belgian procedure and technical decisions to the journalists, without any attempt to justify them. Coming back to our initial point, the information he gave was of a nature to increase viewer comprehension. The audience thus regained its freedom of judgement because it held all the cards. The Magistrate had very little restrictive power. For example, the accused, *Dutroux*, had exercised his right to refuse being filmed. Of course, when one journalist chose to ignore this refusal, the judge suspended his accreditation for a few days. Yet the judge's main role was to increase the responsibility of the media themselves. He did not make direct threats, but placed them before their responsibilities. If journalists decided to show images of a juror, they would be running the risk of providing grounds for annulling the trial and having to bear responsibility for the trial starting from scratch.

CONCLUSION

There is no point in fearing the image, or in shutting ourselves away in our courts. To purely and simply forbid the image is to protect oneself from a danger that, in reality, one does not wish to tackle. It would be better to secrete antidotes to the overwhelming power of the image, in order to reintroduce reflection, fortify critical method and stimulate the immune system of democracy.

CORRUPTION IN JUDICIARY: CAUSES AND REMEDIES

Justice R.V. Raveendran*

INTRODUCTION

Should we discuss corruption in judiciary at all? Is judiciary to remain a sacred cow, despite evidence of corruption? Is it so holy that instances of corruption be considered as mere aberrations not worthy of sustained systematic corrective action? These are some questions which need consideration while discussing a topic like this.

Arguments can be found for the view that corruption in the judiciary is to be openly discussed and action taken is to be widely publicised so as to send a warning signal to other erring officers and to instill confidence in the system. Proponents of this view argue that corruption should be exposed and dealt with publicly so as to put an end to it and deter others from indulging in it. Equally persuasive arguments are advanced for the view that corruption in judiciary should be dealt with in a discreet but firm manner without any publicity. It is pointed out that the real strength of the judiciary is the trust and confidence of the people in it and that such trust and confidence will continue only when judiciary is seen as a noble, virtuous, incorruptible institution; and that if there is wide publicity about corruption in the judiciary, people will lose their faith in the system thereby further eroding the strength of the judiciary. Any public debate in such matters, it is argued, would proceed on an assumption that there is wide-spread malaise in the system and therefore, such debate would undermine public confidence in the courts and acceptance of their decisions. It is further pointed out that people (litigants) may stop approaching the courts if there is a general prevalent view that the judiciary is corrupt.

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While there is no need for unwarranted publicity in regard to corruption, the need for firm timely action against the corrupt cannot be gainsaid. If corruption is to be viewed seriously in general administration, it should be viewed more seriously in the judiciary. Acts that may be condonable in normal service may not be condonable in judicial service. This is so since the standard of conduct expected of judges is very high and the expectations from judiciary are also high. The damage to the institution of judiciary on account of unnecessary adverse publicity would therefore be great. Accordingly, it is advisable if a middle path is followed where there is no undue publicity or open debate with regard to corruption in judiciary, but there is debate within the judiciary for ascertaining ways and means for eradicating corruption and firm and prompt action be taken in regard to complaints of corruption whenever and wherever it is noticed.

I. DISINFORMATION ABOUT EXTENT OF CORRUPTION

Let me at the outset assure you that corruption in the judiciary is not as much as it is thought to be. Honest judicial officers, for some strange reason, invariably think that they alone are honest and that it is their exclusive virtue. They tend to look down at all others with a supercilious assumption that others are not capable of maintaining their standards of honesty, probity and impartiality. It so happens that corrupt judicial officers, to ease their conscience also believe that every one else is corrupt and therefore there is nothing wrong in them being corrupt. The result is that in the judiciary itself, there is an all-round wrong perception about the extent of corruption in the system.

A decision in a lis necessarily favours one side and goes against the other. The person against whom the case is decided is normally dissatisfied with the decision. Very few unsuccessful litigants have the logical comprehension to realize that his loss is on account of the inherent weakness of his case. An unsuccessful litigant wants to blame someone for the loss. He asks his lawyer why he lost the case. The lawyer should have normally advised him against the litigation or advised settlement in the initial stage itself if there was any inherent weakness in the case. But either under the fear of losing the brief or with a notion that with his skill he can succeed in the case, some lawyers fail to advice against the litigation; rather they encourage it. When the case is lost, such lawyers

do not have the moral courage to tell the client that the case was lost as it was weak. They know that the client will then ask why he (the lawyer) did not inform him earlier about the weakness in the case and why he had made him undergo the ordeal of litigation involving wastage of time, money and energy. Therefore, the obvious way out for such lawyer is to blame the judge. He tells the litigant that he lost the case because the judge was a dunce who did not understand the nitty-gritty's of the case. Many a time, the lawyer irresponsibly tells the litigant that the judge was corrupt or was influenced by the other side. The litigant who has an innate distrust against the other side readily believes that the other side must have bribed the judge and goes around telling all and sundry that the judge was corrupt. This has a serious side effect. When the litigant subsequently has an occasion to be involved in any other litigation, he starts with an assumption that the judge can be bribed or influenced and proceeds to find ways and means of doing it.

Certain other *modus operandi* adopted by some unscrupulous lawyers also result in tarnishing the image of the judges. The lawyers from their experience can usually predict, with reference to the facts of the case and a general assessment of the mind of the judge, whether he is going to win or lose the case. This is more so in eviction cases or criminal cases where the philosophy of the judge is generally known (for instance, a 'convicting judge' or an 'acquitting judge'). When there is a likelihood of success, the unscrupulous lawyer puts a seed of doubt in his client's mind about the chances of success and at the same time informs him that he can obtain a favorable result for a consideration. The gullible client, who is eager to win takes the bait and pays the amount demanded by the lawyer as a bribe to the judge. The lawyer of course keeps the money. When the judgment is in favour of the client, he tells the client that he has paid the money to the judge and secured the decision. The client is happy that he has won and goes around telling that he has managed to purchase the judgment. In the unlikely event of decision going against the client, the lawyer faithfully returns the money to his client stating that the judge had already been approached by the other side. Here again, the litigant believes the lawyers and thinks that the judge is dishonest and goes around telling every one that he lost because the judge was corrupt and the other side had purchased him. Unfortunately, many an honest judge thus gets branded as corrupt. Similar *modus operandi* is also adopted by some court clerks/readers,

stenographers and touts, all to the detriment to the fair name of the judiciary.

There is another disturbing trend in some places where a set of lawyers are in collusion with each other. Where there is such collusion, each of the two lawyers in the case tells his respective client that a bribe should be paid to the judge to secure the judgment. The plaintiff's lawyer takes money from the plaintiff saying that it has to be given to the judge and the defendant's lawyer also takes money from the defendant saying that it has to be given to the judge. Of course, neither lawyer gives the money to the judge. The case is decided one way or the other. If the plaintiff succeeds, the defendant's lawyer returns the money taken from the defendant and the amount received by the plaintiff's lawyer is shared equally by the plaintiff's lawyer and defendant's lawyer. Similarly, if the matter ends in favour of the defendant, the plaintiff's lawyer returns the money to his client and the defendant's lawyer shares what he has received, equally with the plaintiff's lawyer. Whether plaintiff wins or defendant wins, both plaintiffs and defendant's lawyers end up with fifty percent of the alleged bribe amount. The result is that both the plaintiff and the defendant and more importantly, the world at large will be under an impression that the judge is corrupt.

The above illustrations do not mean that there is no corruption in the judiciary at all. The above illustrations are given only to show that the corruption many a time is shown on a much larger scale than what it actually is. When any lawyer indulges in such practices, they may gain some extra money as a short term benefit, but in the long run he will lose his clientele permanently. When the public are constantly informed either by the lawyers or by the media that the judges are corrupt, you cannot expect people with problems to come to court. People have stopped coming to courts just like they have stopped going to the police stations. This is evident if you compare the quantum of civil litigations and criminal litigations. About forty to fifty years back, these were approximately of equal number. But if you seek the figures now, you will find startling differences and that there is an alarming downward trend in the civil litigation. The number of civil litigation, which is voluntary litigation, is the true yard-stick of the trust and confidence of the public in the judiciary. Criminal litigation, on the other hand, is the inevitable compulsory litigation which is mostly initiated by the State.

The public are slowly and steadily reaching a stage where they would rather give up than agitate their rights, because of delay, cost and corruption. Many have also found other illegal alternatives for getting relief. Let me illustrate, if a landlord wants to get his tenant evicted and comes to the court it would take fifteen to twenty years for a decision and that too an uncertain one. Accordingly, the landlord would not approach the court once again if he wants possession, but would rather approach the local mafia or the underworld for evicting the tenant. Even police have started acting as arbiters of disputes.

II. REMEDIES

There is, therefore, a need for a constant campaign to re-build the public trust and confidence in the judiciary which means that the judges should not only be honest but should also seem to be honest. Judgments given by them should be speedy, well-informed, clear and just. The lawyers should be educated and their ethical standards increased so that they will not bring disrepute to the Bar and to the judiciary. If a lawyer comes to know that a judge is corrupt, he should immediately bring it to the notice of the High Court so that action could be taken. The lawyers should be made to understand that they should not only desist from influencing judges but also discourage any effort on the part of his client to influence the judge.

One more aspect needs to be remembered. There is a large influx of law graduates into the legal profession. The numbers of lawyers are far too many when compared to the available litigation. Let me illustrate. If there are 10,000 cases in a town of 100 lawyers, each lawyer would have an average of 100 briefs. In such a situation, the Bar as a whole would generally behave properly and settle cases which deserve to be settled and fight only those which merit a fight and also advise clients against unnecessary litigation. But let us say if for the very same 10,000 cases, there are 1,000 lawyers, then the number of cases per lawyer becomes ten. If a lawyer has only ten cases and he has to eke out his life from the average ten cases, his entire attitude would change. The lawyer naturally will not permit any of these cases to be settled even if they merit settlement. His tendency would be to prolong the case so that his income is not affected. Further, his tendency would also be to somehow win those cases. Once this tendency develops, he becomes ready to

adopt all means, fair and foul, to ensure success. This is also a cause for corruption. The remedy involves long-term planning. There should be strict restriction at the Bar entry level as in the case of Chartered Accountants. The standards of legal education should be increased and the mushrooming of dubious law colleges should be curbed. The lawyers should be made to realize that only the good reputation of the judiciary is their passport to survival in the profession and that they have therefore a vested interest in preventing corruption and ensuring the good name of the judiciary.

There is also a tendency among traditional litigants to be in touch with the court staff (readers, typists, stenographer and peons) of the judges to know about the result and if possible influence the result. Many a complaint has been received about court officers acting as conduits between the litigants and the judges. A strict vigilance should be maintained to prevent such occurrences.

One way to reduce corruption, it is said, is to appoint only honest persons as judges. It is very easily said that corruption can be avoided by ensuring that persons with known honesty and integrity are appointed as judges. But how do you know whether the person selected is going to be honest, particularly when there is wholesale selection of a large number by a written examination. This is like the parents of a girl searching for a good bridegroom for her. They can only hope but cannot with certainty predict that the husband of their daughter will turn out to be a good and noble person. But certain steps can be taken. There can be a more strict verification of the antecedents of the persons to be appointed as judges. In so far as the higher judiciary is concerned, instead of selection by mere examination/interview, the earlier system of inviting lawyers with good reputation and work, to be appointed as judges may be revived and restored.

Steps would have to be taken to ensure that the causes which are likely to make a judge corrupt are eliminated. One step is to provide good and proper salary with better facilities and working conditions. Second is to ensure that he does not have worries regarding education of children, treatment of family members, finding accommodation and transportation etc. Third is to isolate corrupt officers and prevent them from being role-models for others. The High Court should also send a clear message that corruption would not be tolerated under any circumstance. The tendency to brush corruption under the carpet or deal with corruption lightly should change. It may not be sufficient to

compulsorily retire a corrupt officer or ask him to take voluntary retirement. Then the corrupt officer knows that he will not be punished and that he can get away with corruption.

Selections to subordinate Judiciary is made on a large scale. At the time of such appointments, unlike in the case of Higher Judiciary, there is no individual verification of integrity. As a result, the following normal representative behavioural patterns will emerge in due course in regard to such appointees:

- (i) Twenty-five percent will turn out to be incorruptible under any circumstances.
- (ii) Another fifty percent though honest by nature, if subjected to discrimination or in-justice, may become dishonest on account of extreme frustration. For example, when a honest person is denied just reward (like promotion) for long and at the same time finds that dishonest persons are thriving and are benefited, the honest may initially fight against the injustice. But if he fails to get justice, he may in a moment of frustration, feel 'if I cannot beat them, let me join them'. The employer should ensure that honest person do not reach that stage. If the employer treats them with dignity, impartiality and understanding, this category will remain steadfast in their commitment to honesty.
- (iii) Another twenty percent may fall under the category known as fence sitters. They are not dishonest'. If they think that there is no supervision or that no action will be taken in regard to any deviant behaviour, they may become susceptible to corruption. But if their performance is regularly scrutinized and their behaviour is monitored and if they know that they will be subjected to disciplinary action, punishment or ridicule for deviant behaviour, they will not become dishonest.
- (iv) The last five percent are those who are dishonest. Being corrupt does not trouble their conscience. Strict action by weeding them out is the only solution.

The above human behavioural projections is not to be construed as reference to existing position, but the premise on which the Vigilance Registries may plan their action to tackle corruption in the District Judiciary.

CONCLUSION

Thus, there should be a constant vigil against corruption. The fight

against judicial corruption will succeed only if:

- Care be taken to select and appoint only persons known for their honesty and integrity.
- Honest judges are encouraged and protected. Better working conditions and facilities should be provided.
- There are constant refresher courses for the judges which would enable them to improve their conduct and ethics.
- Prompt and firm action is taken against corrupt judges.
- Members of the Bar be made to realize their roles in preventing corruption.

JUDICIAL REFORMS: A PERSPECTIVE

Madan B. Lokur*

The purpose of this paper is to remind readers that efforts have been made in the past to bring in judicial reforms, even today some efforts are being made (the results of a few studies carried out in the District Courts in Delhi have been adverted to) and what the future can hold for us. The idea is to dovetail all these efforts to bring about positive results, *within existing resources*, which I think is quite possible.

INTRODUCTION

Judicial reforms in India have been the subject of discussion and debate for almost eighty years. Unfortunately, we are still where we were in 1924-25 when the Civil Justice Committee (commonly known as the Justice Rankin Committee) was set up to review the law's delays and suggest changes, "for the more speedy, economical and satisfactory dispatch of the business transacted in the courts."¹ Amongst other things, the Committee criticised the "mass of arrears" and thereby virtually set the agenda for several subsequent committees to consider reform in the justice delivery system.

In comparatively recent times, legal luminaries such as Justice S.R. Das, Justice J.C. Shah, Justice Satish Chandra and even more recently, Justice Malimath (who submitted two reports including one on the criminal justice delivery system) headed some of the more important committees on judicial reforms. In addition to their reports, we have almost 200 reports submitted by the Law Commission, established in 1955, and usually chaired by a former Judge of the Supreme Court. These reports have dwelt on various aspects of the law, both substantive

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¹ BIBEK DEBROY, INDIA: REDEEMING THE ECONOMIC PLEDGE, Chap. 19.

and procedural, but neither the executive, nor the judiciary (rather unfortunately) has given due importance to some of the easy-to-implement suggestions made in these reports, far from debating and discussing any of its key ideas.

In theory, therefore, we have a legal system that has its faults, like any legal system anywhere in the world, and we acknowledge it. These faults have been identified and in some cases viable solutions have also been proffered, but what is of seminal importance is that the situation at ground zero remains the same. Is the situation beyond redemption or is it that the justice delivery system in India is working as well as it can within its resources, and therefore needs no correction? I think the answer lies somewhere in between, and am hopeful that the year 2005 will be one that will kick-start the much-needed turnaround in the justice delivery system in India. This is because at a conceptual and psychological level, the Chief Justice of India, by declaring the year 2005 as the *Year of Judicial Excellence*, has not only given the judiciary food for thought, but has also given the legal system a much-needed shove. The declaration has given our judicial think-tank a clear direction and a vision statement. But, is this enough and secondly, where do we go from here?

I. REVISITING THE PAST

Isaac Newton wrote in a letter to Robert Hooke sent on 5th February, 1675: "If I have seen further it is by standing on the shoulders of giants." I think this is the first thing we need to acknowledge vis-à-vis the various reports that have been mentioned above. Over the years, a lot of toil and sweat has gone into these reports (and many more) and their systematic analysis, from a practical perspective, is long overdue.

The recommendations made in all these reports would broadly fall in two categories, namely:

- Those changes that can be brought about by the judiciary acting on its own.
- Those changes that may need legislative or executive intervention.

What is really required is a thorough study of all these reports and

thereafter a concise tabulation of the suggestions and ideas mooted in them. Such adjustments as can be brought about by the judiciary should be discussed, debated, suitably customised and implemented by the judiciary in a time-bound period, while those that require legislative or executive intervention can be taken up with the appropriate authorities, but the judiciary need not wait for those authorities to react. The problem today is that neither the judiciary is doing anything about the recommendations, nor is the executive concerned about it.

If an exercise of tabulation is to be carried out, who should bear the burden and how long would it take? Most States have their respective judicial academies, and it should not be difficult for them to depute a few officers to delve through a handful of reports each, preferably under the guidance and coordinating efforts of the National Judicial Academy. The task of analysis is not particularly monumental or even difficult, but would only certainly require a sustained effort. Some recommendations may be patently worthless today, but some can be implemented straightaway without much ado. True, this exercise may take a few months, by which time the Year of Judicial Excellence would have come to an end, but at least a beginning would have been made, where there is none.

That some recommendations can be immediately implemented is apparent from two examples that readily come to mind. The first is a recommendation repeatedly made by the Law Commission to explore alternative methods of dispute resolution. The judiciary never needed legislative sanction for implementing this suggestion, but in any case this has now become a reality with the amendment to Section 89 of the Civil Procedure Code followed by positive encouragement given by the Supreme Court.² Did the judiciary have to wait for these events, and could it not have acted independently? Secondly, much has been said about the problems faced by witnesses in a trial. The Law Commission has referred to inadequate arrangements for witnesses in the courthouse, the scales of travelling allowance and daily *batta* (allowance) paid to witnesses for attending the Court in response to summons.³ The Supreme Court also pithily summed up the problems faced by witnesses and said,

² *Salem Advocate Bar Association v. Union of India* (2003) 1 SCC 49.

³ 14 REPORT OF THE LAW COMMISSION, REFORM OF JUDICIAL ADMINISTRATION Vol. II, Chap. 36 (1958).

“[b]ut the malady is that the predicament of the witnesses is worse than the litigants themselves.”⁴ Again, is it not possible for the judiciary to independently do something about this malady? So much for the past.

II. STUDIES IN THE PRESENT

Critical analysis of problems faced by the judiciary would reveal, as they have in Delhi, that its tribulations are not insurmountable.

A. Inventory Clearance

The inventory clearance index [hereinafter ICI] for the District Courts in Delhi shows, by and large, that cases are being disposed of much faster than one would imagine, except in the magistrates' courts. This is best illustrated, for the present purposes, by the average ICI being the number of months it would take to dispose of a case (provided no fresh case is filed during this period). For easy reference, this is tabulated as under:

TABLE I

Year	2003	2004
Sessions Judges	32 months	28 months
Additional District Judges	31 months	22 months
Magistrates	39 months	55 months
Civil Judges	33 months	22 months

Table I suggests that the number of cases in the Delhi District Courts is a reducing balance and their period of disposal is also coming down in all courts except those of the magistrates. This analysis makes two points. Firstly, while the disposal rate could still be improved overall, yet it is not as shocking as one is anecdotally led to believe. Secondly, the major problem area is conclusively identified as being in the magistrates' courts, and that is where one needs to concentrate efforts for bringing about an improvement. I believe an analysis of this nature, coupled with an impact assessment of the amendments made to the Civil Procedure Code in 2002, would give a clearer picture, but would still

⁴ *State of Uttar Pradesh v. Shambhu Nath Singh* (2001) 4 SCC 667.

broadly yield similar results in any other part of the country.

It may be mentioned, *en passant*, that an issue that keeps cropping up whenever disposal rates are mentioned is that of the rather unpopular unit system of grading the efficiency and competence of a judge. Policy planners may also be well advised to have a thorough re-examination of this matter. I am of the view that, to some extent, the present unscientific unit system affects overall disposal rates, and therefore, the inventory clearance index.

B. Vacancies and Deputation

Can the inventory clearance index be brought down? The answer is yes and I think the solution is staring us in the face. Were you aware that at any given time there are as many as twenty to thirty-five percent sanctioned posts of judicial officers that are lying vacant in any part of the country? This is a huge number and the simple task of filling up these vacancies can, by itself, result in partially tackling the problem of arrears. The chart below shows the vacancy position in the District Courts in Delhi over the last few years – and this is symptomatic:

TABLE II

Year	2000	2001	2002	2003	2004
Actual vacancies	144	152	75	100	102
Percentage of total	37.4	39.27	19.37	25.51	26.02

Table II does not include the numbers of judicial officers who have been sent on deputation to perform non-adjudicatory functions. As far as Delhi is concerned, this roughly works out to 5% of the sanctioned strength.

What impact would the vacancy position (not including those on deputation) have on disposals, in actual numbers? Of course, the answer to this question would be hypothetical, and can be calculated through a mathematical module. But, that would be unscientific since it cannot take into account the fact that all cases are not similar or are not decided with the same dispatch. Nevertheless, an attempt ought to be made to find out the 'extent of damage' as it were, caused by a self-inflicted wound.

Is there any other impact of all these unfilled posts? A direct impact is on the listing of cases. A shortage of judges results in a greater number of cases being listed per judge. This influences the output in terms of disposal of cases per judge. A study conducted by the Asian Development Bank reveals that while in Delhi the disposal rate is 178 judges per 1,00,000 cases, the disposal rate in Australia is 66 judges per 1,00,000 cases.⁵ A mere increase in the number of judges, as directed by the Supreme Court, is therefore not the key to the problem, we already have too many judges deciding too few cases;⁶ and going by the track record, it is more than likely that an increase in the sanctioned posts of judicial officers will result in an increase in the number of vacancies. I would imagine that one of the causes of the relatively low disposal rate lies in the fact that judicial officers in Delhi are personally (rather than through a court administrator) handling far too many cases per day (on an average forty-one cases per day) than their Australian counterparts. In any event, however, what is of prime importance is filling up the existing posts of judicial officers before contemplating an increase in their number.

III. SOME OTHER CAUSES OF DELAY

What are the causes of delayed disposal of cases? Most judicial officers and those connected with the justice delivery system seem to believe that delay in effecting service is the prime cause of backlogs. While this may be generally true in most places, an analysis of information gathered from a recent study conducted in the District Courts in Delhi does not bear this out. A week-long pilot study conducted by the Asian Development Bank in twenty-nine district level courts indicated that only about five per cent cases were adjourned due to difficulties in serving court process. This is certainly not a high enough figure to give cause for worry. It is true that Delhi is a metropolis and, therefore, service of notice or summons may not be much of a problem unlike States having many districts, some in far-flung areas. But there can be no doubt of the necessity of carrying out a similar study to test the proposition whether difficulty in effecting service is a delay driver.

⁵ Presentation by the Asian Development Bank to the Project Monitoring Committee (Administration of Justice Project) on 30th May 2005. I believe that this has since been reworked to 153 judges per 100,000 cases in Delhi.

⁶ *P. Ramachandra Rao v. State of Karnataka* (2002) 4 SCC 578.

In this context, it may be mentioned that more than a decade ago, the then Chief Justice M.J. Rao carried out an experiment in the Delhi High Court. The experiment required advance service of a copy of each writ petition filed against the State, as defined in Article 12 of the Constitution. This simple expedient (sometimes misunderstood) more often than not saves an adjournment or two for effecting service of notice and also, as a practical measure, speeds up the disposal of a case. Are we prepared to similarly experiment and innovate?

Is it possible to identify the reasons for delay-causing adjournments? Yes, it does seem possible, but the answer reflects rather poorly on both litigants and lawyers, and not so much the court administration. A recent survey in Delhi showed that more than half the cases (58%) had ineffective hearings and were adjourned for varied causes such as the absence of a lawyer, or his lack of preparation of the case, or that a witness was not present or that one of the litigants was not available. Court related administrative reasons or other miscellaneous reasons were responsible for adjournments in the balance cases. But, of those that were ready to proceed, a large proportion (more than half) achieved the purpose for which they were listed, but this includes disposal of interlocutory applications rather than disposal of substantive cases. To me, this study suggests that judicial officers in Delhi are doing their job to the best of their ability and it is often external factors that cause delays in disposal of cases. It is this area that needs to be targeted for effective court administration.

The disadvantages of routine adjournments, ineffective or perfunctory hearings are many. It has been pointed out (quite simply) by Barr and Hann⁷ that saving half an hour from a judge's five-hour day would increase capacity by 10% - that's the equivalent of adding one full working day every fortnight. Reducing the number of adjournments, therefore, has the effect of improving the quality of judge-time available for disposal of cases. The significance of this will be realised if one appreciates that in the Delhi District Courts, it takes, on an average, more than twenty appearances before a case is disposed of - sometimes, it may take as many as forty appearances. Compare this with the best practice requirement of two to five hearings for criminal

⁷ *Reduction of Case Backlog in the Courts* prepared for the Third Biennial Meeting, Commonwealth Judicial Education Institute (Mar. 17-20, 2005).

case and four to six hearings for a civil case.⁸ One obvious method of reducing time spent by a judge in procedural matters pertaining to a case (such as completion of service, completion of pleadings etc.) is to delegate these tasks to a court administrator. This will give the judge or presiding officer of a court ample time to concentrate on core issues, or issues that should really concern a judge. This is, however, an aspect of case-flow management practice that will need a separate discussion altogether.

A random sample of about 250 really old cases, those that were instituted more than ten, fifteen and twenty years ago were considered for identifying the causes of delay, and the results were rather disappointing. Most of these cases (almost 50%) were delayed due to court-related procedures such as a stay given by a superior court or that the case file was in a superior court for some reason or general delays attributable to a superior court, while some delays were due to remand orders of a superior court. It may be advisable, in the light of these findings, for each High Court to take stock of the situation and find out for itself if delays in disposal of cases are internal or external. If some causes are internal, as they appear to be, it is possible to refurbish the system and speed up the disposal of such really old cases that have given the justice delivery system its bad name.

But whatever has to be done, it should be done quickly otherwise we may fall into the trap adverted to by *Francois de La Rochefoucauld* who said, "Good advice is something a man gives when he is too old to set a bad example."

THE FUTURE

There is no doubt that information technology, research and introducing better management practices are the buzzwords for the future of the justice delivery system. A lot has been said about the use of computers in managing the court system, and its importance in this sphere of administration can be gauged by the formation by the Supreme Court of an E-Committee for Monitoring use of Information Technology and Administrative Reforms in the Indian Judiciary. Rapid strides have been

⁸ Presentation by the Asian Development Bank to the Project Monitoring Committee (Administration of Justice Project) on 30th May 2005.

made in computerisation of the courts particularly in Karnataka and Delhi, and the cumulative experiences of both of them can serve the interests of the justice delivery system anywhere in the country.

But innovations have to be made even in this regard. The use of video-conferencing for routine remands (although this raises some human rights issues), use of digital signatures for supply of certified copies of orders and judgments, greater use of internet for dissemination of information to litigants and lawyers alike and finally introducing wireless microphone digital recorders for court proceedings, particularly recording evidence of witnesses need to be seriously considered. None of these involve any extraordinary amount of expenditure, but on the other hand, returns can be surprisingly rapid.

Research in judicial administration is sadly lacking and one of the prime reasons for this is absence of reliable data, and with insufficient or inaccurate data no viable strategic planning for tackling the bane of arrears is possible. I think this needs more than serious consideration by the policy planners. Sporadic researches into various aspects of the justice delivery system (the results of some of these have been mentioned above) have identified key areas of concern and have thereby added a new dimension to judicial case management and administration. Research shows that at least in Delhi the problem can be dealt with, and the optimism is not misplaced. Good management practices duly supported by an effective and positive leadership can work wonders.

Gandhiji said, "A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history." Does anyone want to prove him right?

E-GOVERNANCE IN INDIAN JUDICIARY

Dr. Justice G.C. Bharuka*

I. PROBLEMS FACING THE JUDICIAL SYSTEM

It needs no emphasis that the Indian Judicial System is facing an appalling state of affairs. It is apprehended that court congestion and delays in adjudication may acquire a perennial nature. Its functional credibility both in the domestic and international world is at stake. There is an urgency to take immediate steps to enhance its quality, productivity, accountability and transparency.

The Law Commission of India in its successive Reports has said that the reason for delay in courts is not because of any infirmity in our procedural laws but has essentially resulted due to non-observance of these procedures. The Reports have analysed the stages of delays. They have found that quite often, the indifference or incapacity of the actors/players in the system has led to its debacle.

The proper functioning of the state judiciary essentially depends on good governance and proper administrative control by the High Courts. With the enormous workload and caseload, increase of courts, piling of arrears and erosion of values and work culture, the governance and administrative control over the judicial institutions through manual process has become extremely difficult resulting in systematic failure. This has directly impeded the judicial productivity leading to disappointment and dissatisfaction among the justice-seekers. The systematic failure has occasioned many vices and ill-practices bringing disrepute to this constitutional organ.

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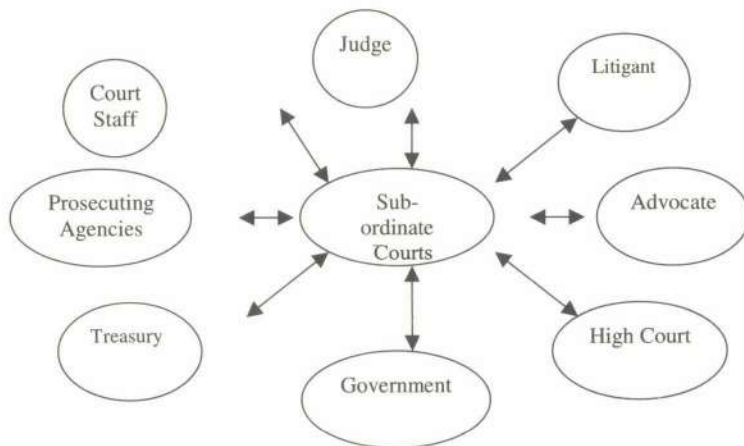
II. ORGANISATIONAL STRUCTURE OF THE INDIAN JUDICIARY

Indian judiciary comprises of three levels – the Supreme Court, the High Courts and the Subordinate Courts. Hierarchically, on the judicial side, the Supreme Court is the final court of adjudication but it has no administrative control under the Constitution over the High Courts and the Subordinate Courts. Under Article 235 of the Constitution of India, the power of superintendence and control over the Subordinate Courts has been vested in the respective High Courts. Therefore, the responsibility of proper functioning of the High Court in its judicial despatches and that of the Subordinate Courts for speedier disposal of cases lies with the High Court itself.

Judiciary as an Information System

The judicial exercise is essentially information and knowledge based. The information comprises of facts, on determination whereof, the legal principles are applied and thereupon, decisions are arrived at. The trained judicial mind follows a well-defined process. Because of failure of human agencies involved in judicial process, particularly at registry levels (that is departments handling the movement of case files within a court), the entire judicial process became mystic going beyond the comprehension of a common man. This has led to their exploitation, harassment and frustration.

There are various players/users interacting with the subordinate courts which contribute to its working and functioning, like:



Developing of customized software, connectivity and its effective use as a part of judicial culture only can bring about e-governance in the Indian Judiciary. For developing such a customized software application which necessarily has to be state-specific, the task/function discharged by each of the actors in the justice dispensation system has to be scrutinized, analyzed and appropriately incorporated in the software programming for securing the desired benefits.

III. WHY WE NEED IT?

The 124th Report of the Law Commission of India (1988)¹ as also the expert studies recently made for improving the performance of the Indian Judicial System like the Indo-US Group Study (1996), Report of the India Institute of Management, Bangalore prepared pursuant to a reference made by the First National Judicial Pay Commission, Malimath Committee on Criminal Justice Reforms (2003) and the Final Report of the Asian Development Bank on India Administration of Justice Project (2004) conclusively reflect that use of information and communication technology in the judiciary has become imperative for enhancing the quality of justice, reducing congestion in courts and timely disposal of cases. This has also been established through clinical researches conducted in the Indian context.²

The influence of computers on law has already effected significant changes, and there is likelihood that there will be many more with the increasing sophistication of equipment and techniques. Analysis of their impact should be sought in specialized works. Computers have brought with them a new jargon: 'input', 'output', 'print-out', 'processing', 'programming', 'storage', 'retrieval', 'software', 'hardware.' A fear that needs to be dispelled is that computers will replace the warmth of human

¹ 5.2. An institution which of necessity is required to be modern, abreast with thinking all over the world, to be in tune with changes can ill-afford to allow the technological revolution to pass by it and remain unaffected. The problem which the administration of justice today is facing and finding it difficult to cope with is the problem of backlog of arrears, delay in disposal of cases, overworked Judges and tools of business of Nineteenth Century. All these again contribute to slow motion approach in hearing of causes, controversies and cases. Situation cannot be improved unless modern equipments are made available and advances in the organisation and methods of management are adopted by Courts.

² See DR. JUSTICE G.C. BHARUKA, *REJUVENATING JUDICIAL SYSTEM THROUGH E-GOVERNANCE AND ATTITUDINAL CHANGE* (1st ed., 2003).

justice with an alien philosophy. On the contrary, all that is claimed for them is that they can help and improve human justice and relieve people of drudgery by performing routine jobs more efficiently.³

Implementational Difficulties

- a) The Court, as an institution, functions on the basis of its legal system. Any change in the system has its immediate impact on the functioning of the Judges, lawyers and the subordinate staff as also the litigants. The system is composed of its codified rules, the traditions and practices regularly followed in the Court and the procedures judicially recognized. All these governing rules of procedure and court management are not always uniform for all the jurisdictions. Therefore, no handy software providing whole-some solutions to the legal system is commercially available. It is required to be developed under the day-to-day guidance and supervision of persons well-versed with information technology and the particular justice delivery system.
- b) Implementation of e-governance in judicial system needs substantial finance and trained technical hands. Courts have to depend for all these on the Government which again moves with its own speed and discretion.
- c) There is a tendency of non-cooperation and/or obstruction by the functional staff at the registry level since they apprehend impeding of their interest.
- d) Beneficiaries of the pre-existing system try to obstruct the change over to IT since it makes the legal process more transparent.
- e) During the initial and transitional period of change over, IT application creates some apparent confusion showing its inaptness to cater to the needs of the legal process but it is always a passing phase.

³ DIAS, JURISPRUDENCE 307 (5th ed.).

IV. HOW IT CAN HELP?

Use of IT in courts can immensely help in implementing court management tools like caseflow management, case management, targeted clearance rates, online information of case laws, and statute laws and the like, which are key to the efficiency of judicial functioning. Automated support systems will reduce workload, delays and discretions at the registry level. All the registers, statements, returns, forms, summons and notices can be digitally generated and hard copies can be taken, as and when required. Video conferencing, digital transcription, digital signatures, digital storage of documents, document management tools, biomatrix/jurimatrix and inter and intra-courts e-connectivity can greatly improve the functioning of the judiciary. It will immediately start reflecting transparency and accountability.

V. PRESENT STATUS OF COMPUTERIZATION IN INDIAN COURTS

The process of computerization in Indian courts had started in 1990 beginning with the Supreme Court of India. Simultaneously, computerization process was initiated in the Patna High Court. Since then, in a phased manner, computers were introduced in all the High Courts. However, in most of the High Courts, real progress could be traced only to auto-preparation of cause lists and its publication on the internet and digital transcription of orders and judgments. So far as the subordinate courts were concerned, though in a centrally-sponsored scheme envisaged in 1997, the courts of all District Judges were sought to be computerized and machines, printers and cables were also purchased and sent to all such courts by the National Informatics Center, nothing beyond this happened and it remained a futile exercise. No efforts have so far been made for computerization of the courts of Munsifs and Magistrates which by and large account for the rural litigation. The use of IT could not be fully explored in Indian courts despite the lapse of one and a half decade due to lack of leadership, initiative, resources, will and above all, lack of desired understanding of the potentiality of the technology by the policy-makers. In this context, it should be noted that mere dumping of computer systems in the courts across the country is NOT automation or computerization or implementation of IT and e-governance in judiciary.

A. The Karnataka Experience

In the year 2000, the Karnataka High Court, on its own initiative, had undertaken the process of computerization of all the six hundred courts in the Karnataka state located up to taluka level. Within three years, the process was completed and all the courts had been connected with the High Court through Local Area Networking [LAN] and Wider Area Networking [WAN]. All the judicial officers and court staff were trained. Video-conferencing facilities were provided at some of the District Courts enabling digital production of under-trial prisoners and examination of witnesses, if required. All the relevant data was transferred to the High Court high-end server where ultimately the data warehouse was being enriched for generating appropriate reports which were essential for decision-making on the administrative side to monitor the disposal of cases and efficient functioning of courts. The software required for database operations for the District and Subordinate Courts was developed in the High Court's lab itself with the help of technicians employed on the High Court payrolls. It was named 'Litigation Management System.' The entire database was created by strictly adhering to the requirements of the domestic procedural laws namely, the Code of Civil Procedure, Code of Criminal Procedure, Indian Evidence Act, Limitation Act, Suits Valuation and Court Fees Act, Advocates Act, Family Courts Act, Notaries Act, Oaths Act, Power of Attorney Act, Karnataka Civil Courts Act, Bangalore City Civil Courts Act, Karnataka Small Causes Courts Act including Rules of Civil and Criminal Practice framed by the High Court of Karnataka and other related legal requirements.

The above customized software developed cannot, as it is, be usefully deployed in all the States across the country because of the rapid change in the technology over the past few years. Further, appropriate changes are also required to be made synchronizing the software with the local rules, practice and procedure.

B. Need for a National Scheme

Keeping in view the fact situation and the need of information and communication technology in the judicial wing of the state, it is necessary that a centrally sponsored National Policy and a centrally sponsored scheme be devised to equip all the courts in the country with IT tools

without any exception. The impediments, which have surfaced in implementing IT at state levels like lack of resources and initiative, planning, development and implementation can be taken care of only by evolving a national policy and devising a centrally-sponsored implementation scheme. Such a scheme will ensure uniform and quality installation of hardware, setting up of LAN/WAN, selection of uniform operating systems, software applications and development of specially designed application for the Indian Judicial System on an integrated basis.

This will help in creating a solid and strong National Grid of judicial textual and statistical data. Such an innovative step will accelerate the judicial functioning and its performance can be assessed and reviewed at all hierarchical levels in a real-time environment. The Grid will form the backbone for providing efficient justice mechanism with facilities for distributed and centralized research and development.

C. Establishment of E-Committee

It has been long-felt that the Indian judiciary has not had the full advantage of information and communication technology which is one of the factors contributing to backlog of arrears. At the initiative of Hon'ble Mr. Justice R.C. Lahoti, the present Chief Justice of India, the Government of India sanctioned⁴ the establishment of an E-Committee for the purpose of devising and formulating an ambitious blue-print of interconnectivity between all the courts in the country from the top court to the lowest situated in far-flung areas. It would function directly under the control of and report to the Chief Justice.

The present author has been appointed as its Chairman. This Committee has three more members, namely, Member (Judicial), Member (Technical) and Member (Management/Human Resource).

The E-Committee is to formulate and oversee the implementation of the project of introducing IT and administrative reforms in the judiciary. All technological and implementational aspects will be taken care of by the said E-Committee. It need not be re-emphasised that such implementation will greatly help the judicial system in delivering quality

⁴ Vide its Notification dated 28.12.2004 issued through the Ministry of Law and Justice.

and speedy justice as it will help in creating IT-based judicial and administrative support systems.

High Courts are showing keen interest in expanding and strengthening their own IT-in-Judiciary projects where the projects are on and those High Courts where concrete steps are yet to be taken are waiting for a beginning. The services of the Committee would be made available to the High Courts also for rendering such assistance as they may need. Customized and integrated software have to be developed for each State Judiciary in consonance with the rules, practice and procedures followed by the respective High Court and the Courts subordinate to them, which is proposed to be accomplished at a centralized development centre. The development team of technicians will be provided with well-analysed expert domain knowledge by a research team drawn from the judicial sector.

Within a short period the E-Committee has established web-enabled connectivity with all the High Courts successfully securing the details of all the courts in the country with their locations and pendencies. On an experimental basis, it has commenced designing the prototype of a flexible software application, which will accommodate the state specific rules, practice and procedure. It has also undertaken the drafting of a National IT Policy for the Indian Judiciary with a time and cost target action plan.

CONCLUSION

Destination is still far off and the judiciary has to cover a long path with commitment, co-operation and continuous endeavour to achieve its goal of re-engineering its processes.

ENHANCING JUDICIAL PERFORMANCE THROUGH BETTER SELECTION, TRAINING AND CONTINUING EDUCATION

Prof. (Dr.) N.R. Madhava Menon*

INTRODUCTION

It does not need any argument to establish the simple fact that performance at any level of the judicial hierarchy is directly related to the method of selection of judges on the one hand and the quality of education and training offered on the other. Admittedly, on both counts there are inadequacies in the existing practices thereby disabling the system to perform at optimum levels of efficiency. Of course, there are other systemic and environmental factors outside the control of the judiciary which undermine judicial efficiency and performance. However, in the world of intellectual activity including administration of justice, it is the quality and competence of the human material (judges and lawyers) who operate the system which is critical for the job rather than the physical infrastructure it commands or the professional tools it employs.

Every section of society is concerned with the efficiency and quality of its justice system. In liberal democracies under rule of law, the task of administration of justice is left largely in the hands of the professional body of lawyers and on an independent judiciary. It is they who determine eligibility criteria, selection norms and procedures, training needs and methods, performance evaluation and correction, accountability standards and efficiency. There is very little participation of government or the public in judicial selection, promotion, performance evaluation, discipline and accountability assessment. By and large, Indian judges

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have discharged their responsibilities reasonably well with the result that even today, the common people have unqualified faith in the competence and integrity of their judicial system. However, the times are changing and expectations are mounting as in every other department of governance. It is in this context that judicial performance has to be assessed and accountability established.

There have been a number of media reports in the recent past about judicial improprieties and misconduct even at the level of High Courts. The large accumulated arrears of cases pending in the system for long periods have raised the disturbing prospects of litigants being denied justice in reasonable time and costs. The increasing uncertainty involved in judicial decision-making at multiple levels of the system has led to genuine difficulties for the people not being able to know the law in particular situations. Even the quality of justice (judgments) is sometimes criticized by people who should know the system better. The innovative, people-friendly tool of public interest litigation evolved by our courts has not been an unmixed blessing as discovered by the Supreme Court itself. In all these matters, public discourses invariably focused attention on the scope of judicial performance and accountability placing the judiciary on the defensive. Norms of judicial discipline, propriety and independence would not allow judges to defend themselves in public. Use of contempt jurisdiction is inappropriate even if justified. In the circumstance, what the judiciary can possibly do is to re-examine the prevailing norms and procedures in the matter of judicial selection, education and accountability with a view to accommodate fair criticisms and streamline the system to the extent possible. In this regard, judicial education and training warrant serious attention as it has been a neglected subject for long. Since the nature of training is closely related to selection norms and procedures it also deserves careful consideration.

I. SELECTION OF JUDGES

In Common Law countries, judges are selected almost exclusively from amongst lawyers with some experience at the Bar. Depending upon the quality of education received at the law college and the opportunity extended to learn the skills during legal practice one could expect minimum competence in the performance of judicial personnel newly inducted into service. The Law Commission, the First National Judicial

Pay Commission and the Supreme Court felt it necessary for expanding the available pool for selection of judges and for attracting career-minded young law graduates at the beginning of their professional lives to the judiciary. This resulted in dropping the legal practice requirement from eligibility criteria for selection of judges and establishment of the All India Judicial Service with much better pay scales and opportunities for professional advancement. The widening of the universe of selection definitely provided better chances to select more talented and motivated persons. The next question is how far the process of selection (the selectors, the methods, the criteria, professionalism) is conducive to find the best available persons from the larger pool of candidates. The recommended process is of written examination with minimum prescribed grades and an interview test of shortlisted candidates both to be conducted by an empowered body of independent experts. It is too much to expect in the present circumstances in the country to have a totally unbiased professional approach in the choice of selectors and the method of selection. Consequently, there is no guarantee that the candidates finally chosen are the best available for holding judicial posts either in terms of professional competence or in terms of personal qualities and disposition. If this is a correct assessment of the prevailing scenario, the only strategy to achieve at least the minimum level of judicial performance is the training that is offered before assigning judicial functions. This underlines the importance of judicial training.

Induction training, however rigorous, at the initial stage of judicial recruitment is not a complete solution to the problem of occupational inadequacy of judicial personnel. Selection takes place directly to the higher levels of judicial establishment as well. At the level of District Judge, advocates with seven years of legal practice experience are also made eligible for appointment along with subordinate judges already in service. The method of selection again is not uniform and the best available talents are not necessarily inducted. It is here that the proposed All India Judicial Service to be constituted through nationwide examination and interview can possibly make a difference in the quality and competence of personnel in the higher judicial service. Similarly, at the level of High Court Judges, another round of selection either by promotion or through open selection from the practicing Bar takes place. Despite a lot of attention given to this stage of judicial selection, the process is said to be still unsatisfactory to attract the best of professionals

to the High Courts in the country. The result has been a number of High Court positions remaining unfilled for long periods. There is also reluctance on the part of successful advocates to accept judgeship. In respect of promotees from District Judges' cadre, there is criticism based on unfamiliarity with constitutional law and adjudication. A former Supreme Court judge cited the Peter Principle to say that:¹

... if a District Judge, for reasons of seniority or successful disposal (two criteria mainly adopted for promotion to High Court) is elevated to the High Court he may be incompetent in that office, not because he is a mediocre hand but because the jurisdiction and jurisprudence is somewhat new, the type of hearing is different and judgments have a different texture.

The obvious inference from the above discussion on judicial selection at different levels is that the system does not guarantee high level of professional competence expected of judges at the recruitment stage. If people are to be appointed without adequate knowledge, skills and experience there is the danger of distortion, delay and miscarriage of justice. This may result in too many appeals to higher courts. It will tend to create popular dissatisfaction with the entire justice system.

The problem of judicial competence is not unique to India. Given the increasing range of opportunities now available for legally qualified persons it is unlikely that by adopting improved methods of selection alone the judiciary will have people with required competence and experience. As such, the only way to enhance competence and compensate for lack of experience is a programme of rigorous education and training as part of the selection process itself. Judicial officers once appointed cannot be compelled to undergo any training. They have to be persuaded through a system of incentives and disincentives. The programmes should address the training needs at different levels of the judiciary. There must be a judicial policy towards self-assessment of performance, peer group consultation for professional development and scope for specialization in judicial tasks. These are happening in developed countries though they seem to be not yet in the priority agenda of the Indian judiciary.

¹ Justice V.R.Krishna Iyer, *INDIAN EXPRESS*, Nov. 27, 2003.

II. JUDICIAL TRAINING AND CONTINUING EDUCATION

The objectives of judicial education are primarily to provide the required knowledge on fair, efficient performance of judicial responsibilities. This includes knowledge of law and legal skills in areas where they are not familiar with for whatever reasons and the capacity to apply that knowledge correctly and fairly in the course of the proceedings. To be able to preside over adversarial adjudication and to manage the proceedings without undue delay, the judge has to have special expertise which can be imparted through training and education. Furthermore, it is the objective of judicial education to promote each judge's endeavour to the highest standards of personal development with social commitment and ethical conduct.

For continuing education after appointment, the objectives are slightly different. These include sharpening of decision making and judgment writing skills, fostering fairness through elimination of biases and prejudices, as well as promotion of awareness of cultural diversity and judicial detachment, improvement of management skills, adjustment to new perceptions of justice in the context of changing knowledge, values and technology and finally achieving higher levels of professional excellence in the administration of justice.

According to a study in the United States, the transition of a lawyer to a judge takes several years to complete. In the process of defining his or her role as a judge, the person has to resolve dilemmas in role perceptions organize changes in self-concept by adjusting role conflicts and strengthen commitment to the Bench marked by a satisfaction with judicial life. Technology is changing the role of the judge. Globalization demands an international dimension to the judge's perception and equipment. The explosion in knowledge and systems of communication warrants inter-disciplinarity in approaches and analysis. Ideas of human rights and democratic accountability are putting new parameters to judicial functioning in relation to other wings of government. In short, there is so much to be learnt by the contemporary judge which even experienced lawyers cannot get from professional work alone. The context in which judges are called upon to function today warrant a proper educational response which the judiciary will be well advised to consider on priority basis.

There are many recommendations on the table for judicial education and training, the latest being the one formulated by the First National Judicial Pay Commission. Since the Supreme Court has accepted the recommendations in toto and directed the newly established National Judicial Academy at Bhopal to implement them, it is appropriate to analyze briefly certain aspects of the scheme now being put in place for enhancing judicial performance through education and training.

- Firstly, it is important that the judiciary as a whole should accept that continuing education is an essential requirement for maintaining competence. Judicial independence will not be jeopardized by accepting training and related activities of modernization of courts.
- Secondly, the judiciary, the government, the legislature and the public should accept the close relationship between judicial selection on the one hand and training and education on the other. The policies and practices of judicial selection should accordingly be changed to give the judiciary a free hand in organizing reform and development.
- Thirdly, judicial training institutes should be properly funded to maintain the right kind of training staff and equipments. The quality of programmes should be of such a nature that judicial officers are attracted to participate in them. The institutes and academies presently in operation have a long way to go in this regard.
- Training academies for judges have to plan three basic things to move towards professional excellence. The kind of training and continuing education programmes which they should organize require great deal of consultation, deliberation and experimentation. It is to be founded on training needs and reform goals at each level of the judiciary. To find out the actual training needs, precisely and comprehensively, some experimentation and research are required which pre-supposes the acceptance of such experimentation by judicial authorities and the willingness of judges to participate in such exercises. Once the objectives are clear and the needs are ascertained, academies should plan the courses; evolve a curriculum and

a training methodology in consultation with judges themselves. For quite some years there should be a process of curriculum development towards standardization and fine tuning of the system to respond to educational expectations and professional needs. Another central issue for training is the kind of trainers that academies assemble. Lecturing even by experienced judges cannot amount to training. At best, it can achieve a degree of sensitization to issues. Adult learning is different from education imparted in schools and colleges. Interactive learning processes with the help of modern educational aids on the basis of trust and acceptance are essential to make attitudinal and behavioural changes in judges particularly when they have been on the job for varying periods. It is a task yet to be attempted with the seriousness it deserves. Though judges are eminently suited to train other judges, in the modern context where the demands are different and the challenges are many, it is axiomatic that the training faculty should represent a blend of learning and experience drawn not only from law but other behavioural sciences including management and technology. The nature of judicial function and objectives of training dictate the composition of training faculty. To be able to achieve the right mix and to enable them to work together for the common cause there has to be training for the trainers themselves.

A third aspect on which training institutions has to prepare themselves is on training methodology, study materials and evaluation techniques. On all these there are valuable suggestions given in the reports of the Law Commission and that of the Judicial Pay Commission. It is here that Indian training institutions can learn a great deal from their counterparts in other countries where some degree of proficiency has already been achieved after long periods of experimentation and adaptation. Of course, training needs in India may not be the same as in foreign countries; but there is not any vast difference in training methodology and goals. There is scope for mutual co-operation among the State and National academies in this regard particularly in the context of non-availability of trainers and training materials of the

kind contemplated.

- Finally, no effective training intended to reform the system can succeed without constant supply of reliable information on what is happening in the judiciary and why it is happening that way. Given the complexity and diversity of Indian legal cultures, it is misleading to generalise on the basis of experience of any one group, in any one region or period. This means multi-disciplinary research on a continuing basis generating useful information on judicial working is a *sine qua non* for conceptualizing the nature and scope of judicial training and continuing education. To illustrate the point one may consider implementation of two significant procedural reforms now being adopted to expedite judicial proceedings – one relating to Civil Procedure Code, 1908 through court initiated mediation to settle disputes prior to trial and the other relating to Criminal Procedure Code, 1973 through negotiated settlement or plea bargaining in criminal cases. Both are significant reforms conceived after great deal of consideration on the part of reformers and the government. The function of judicial education and training in this regard is to prepare the players and stakeholders of the system to play the game as intended by the law makers to achieve the expected results. A number of questions arise: What is intended by the law? What are the role and responsibilities of the different players and institutions? What are the possible bottlenecks and barriers that need to be overcome in the process? What are the possible consequences to the reform, known and unknown? What are the abuses possible in implementation? What resources are required and where? How does one evaluate the performance? How to tackle the existing mind-set and prevailing practices which are inimical to the reform process?

For all these questions and more, ready answers are often given based on experiences, convictions and on which side of the debate one is placed. However, for implementation based on training and continuing education of judges, one needs more accurate answers based on empirical data and pilot studies on the ground. This demands training institutions

to function as laboratories for monitoring the system, planning change and implementing reforms. Every training institution is necessarily a research and development center as well. It is R&D which injects relevance and realism to continuing education and training. Unfortunately, Indian judicial academies are not organized to perform research tasks of the nature and dimension as proposed here. It is costly and requires organized effort over a period of time among academic researchers and legal practitioners with some amount of freedom to change policy details if and when required. It is asking for too much in the present situation. Nevertheless, it needs to be acknowledged by those in charge of judicial education and training that without research back up, training will not influence change in any significant way.

CONCLUSION

The tasks before training academies are indeed complex and formidable. There are no easy or simple solutions. If the government and judiciary are serious on enhancing judicial performance and accountability, it is necessary to compensate for the neglect and put their acts together towards better selection methods and improved strategies of training and continuing education.

JUDICIAL EDUCATION FOR ARREARS REDUCTION AND BETTER COURT MANAGEMENT

Justice Lokeshwar Prasad*

INTRODUCTION

In the concept of 'divine right of kings,' the king, who used to be considered as incarnation of God, besides being the head of the administrative wing, the supreme commander of the armed forces, also functioned as the fountain-head of justice. The general belief held by those who believed in the theory of divine right of kings, was that "King can do no wrong." The Judges, in the eyes of general public, too had a concept of divinity attached to them and the common man believed that these 'divine' Judges knew everything on the universe and could not do any wrong. Till the latter part of twentieth century, not only in our country, but in other countries like England and U.S.A., the common view was that the Judges did not require any training and their vast experience at the Bar coupled with their intellect and instinct for fairness was considered as sufficient enough for the job. Educating Judges on judicial functions and training them on how to judge properly were new ideas which even till date are not yet fully accepted by the judicial fraternity as a whole. Some of the Judges believe that judicial education and training may in one way or the other amount to an interference with their judicial independence whereas others resent the very idea of educating the Judges on the ground that the same amounts to questioning their capacity and competence. However, with the explosion in knowledge and diversification of complex litigation, there has been an increasing demand from many of the Judges themselves for programmes of continuing education, tailored to specific problems and needs.

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I. JUDICIAL EDUCATION & TRAINING

A. The Indian Experience

In our country, despite realizing the importance of judicial education and repeated recommendations from various Commissions and Committees, the pre-service institutional training to the new entrants and in-service training to the judicial officers already in service had not received the desired attention. It was in the year 1992, that the Supreme Court took initiative in the matter, when in *All India Judges' Association v. Union of India*,¹ it directed in clear-cut terms that an All India Institute of In-Service Training for higher officers of the judiciary including the District Judges and a State level institute for training of other members of the subordinate judiciary in each State and Union Territory be set up within one year not later than 31st December, 1992.

B. Lessons from U.S.A & U.K.

The need for mandatory judicial education is now acknowledged throughout the world in one form or the other. In England, the proposal for organised judicial training initially came from a working group appointed in 1975 under the Chairmanship of Lord Justice Bridge. The dislike of the word 'training' led to the adoption of the common nomenclature of 'judicial studies' and therefore a 'Judicial Studies Board' was established for that purpose in the year 1978. In the early days in that Institute, the training was confined to the Judges sitting only in criminal courts. The remit of the 'Judicial Studies Board' was extended in 1987 to include civil and family courts work as well. Thereafter, the Institute also became responsible for supervising the training of Magistrates and members of various tribunals.

Judicial education in the United States of America started in early 1960s as a part of judicial conferences, training seminars which became popular and were in great demand among the trial Judges. Thereafter, a National Judicial College with a modest curriculum started functioning in U.S.A. in 1964. After the success of the National Judicial College, several States also became interested in having their own Judicial Education Programmes. Worth mentioning is the California Centre for

¹ AIR 1992 SC 165.

Judicial Education and Research. The commonwealth countries have also taken concrete steps in the direction of imparting Judicial Education to judicial functionaries from 1994 onwards.

C. Justification

The question of questions is why such training is necessary for judicial functionaries? Some may have a feeling that after basic routine education and professional education in the Law College, coupled with some years of experience at the Bar, why should one be required to have judicial education? There is no doubt that a person after considerable experience at the Bar acquires a sort of legal knowledge appropriate for the task, but the fact remains that probably he would not have acquired the package of skills needed for his new role as Judge. The requirements of the job of a Judge differ substantially from that of an Advocate. The Judge needs to be able to preside over a courtroom, make reasoned decisions, write a properly structured Judgment and above all listen rather than talk. It is said that the distinguished Judge, Desmond Ackner who subsequently became a Law Lord, on his first appointment to the Bench had written, "remember, you are paid to listen." It is absolutely essential that a judge fully understands the rules of procedure and evidence - whether criminal or civil. He must be able to deal with disruptive people and with reluctant witnesses in his court room. He must have an understanding of the different ways and customs of all those who appear in front of him, whatever their race or religion, their gender, their social background, state of health etc. The lack of appropriate knowledge on the part of the judge in the subject matter of his jurisdiction is bound to lead to delay and at times may even lead to a wrong exercise of discretion or a wrong decision not warranted by the facts or the law applicable leading to multiplicity of litigation. In our system of judicial administration where a judicial officer is bound to be transferred and posted in different places and different jurisdictions, there is every need for exposure to subjects with which a judicial officer or a Judge has not been familiar with while at the Bar or in service. For instance, a lawyer who all through has practiced on the criminal side, would upon appointment as a judicial officer or a Judge, find it extremely difficult to deal with a complex civil case involving declaration of title to immovable property or deciding a dispute relating to commercial transactions concerning sale of goods or contracts. Likewise, a Judge

who had practiced on the civil side would find it difficult to decide a criminal case because he would not be able to come out of his notions of deciding the issues on the basis of preponderance of probabilities, while in a criminal case proof of guilt would require an altogether different approach, namely, that the guilt must be established beyond all reasonable shadow of doubt. Examples like this can be multiplied. If a Judge does not fully understand the rules and the procedure and has no comprehension of what is expected of him as a judicial functionary, delay is bound to occur and arrears are bound to increase. Therefore, for achieving the object of reducing arrears and ensuring speedy disposal of cases, judicial education to all the judicial functionaries at the entry point and also in-service is absolutely essential.

II. JUDICIAL EDUCATION AND COURT MANAGEMENT

Judicial education has an important role to play in so far as better court management is concerned. The concept of court management, though of recent origin, has gained considerable importance because it has been tried and tested in many parts of the world and has been found to be a successful method of controlling the huge backlog of cases. Court management, as such, was first introduced in the United States of America in the year 1972 and over the years it has gained so much importance that now it has become imperative for all courts to use court management techniques to reduce the caseload. As regards our country, in the area of court management techniques, a lot requires to be done. The state of affairs in this area is virtually shocking as has been aptly mentioned by Justice V.R. Krishna Iyer in his work JUSTICE AT CROSSROADS which reads as under:

The shocking collapse of justice system is too serious and its salvaging operation too strategic for the plan of reconstruction to be left to the judges alone. They are *innocents in the art and arrogantly reject their naivety*. Management incompetence is writ so large in the system that a grocer's shop is better managed than a Munsiff's court and a business house has infinitely superior management skills than High Courts and Supreme Court. Of course, judges, wise in other ways, are *infants in judicial business management*.

The following observation by Prof. (Dr.) N.R. Madhava Menon,

the Director of the National Judicial Academy, on the prevailing system of court management in the country is also worth mentioning:

Management of judicial system is in very bad shape. Assuming every judge as an administrator and demanding time and attention of judges on managing systems in every court, has not been a useful policy. Corruption grew under the very nose of the judges without them realizing it. Statistics on disposals and pendency are often "manufactured" to satisfy formalities. Judge loses control of the functioning of courts and no one is clear about the flow of cases and the time of disposal. Everybody is dissatisfied except the corrupt court staff and the parties and their lawyers who want to use the judicial process to buy time or delay justice. Computers wherever supplied are mostly lying idle. Senseless routinisation, repeated adjournments on silly grounds, extended call hours wasting judicial time, scant regard for the witnesses summoned, total confusion with too many cases scheduled for the same period, lack of punctuality and preparedness on the part of lawyers and judges have all become characteristic features of many subordinate courts in the country. The regret is that nobody within the system seems to be concerned except in holding occasional meetings and seminars which invariably give the usual justification for the situation.

It is time that court management is taken out of the control of judges and entrusted to trained administrators who are made accountable to the tasks of modernizing, maintaining and showing performance at all levels of judicial establishment. Judicial time should be devoted to judicial work only.

The Report of the Indian Institute of Management submitted to the First National Judicial Pay Commission states that reduction of delays is a specific managerial task. The Indo-U.S. Study Group, organised by the then Chief Justice of India categorized 'discontinuity, repetition, and fragmentation of the legal processes, without early or accountable judicial interventions such as court administration and case management mechanisms' as one of the procedural causes of backlog and delay.

For understanding the need for court management, one is required to firmly bear in mind that the only object of establishing courts and

which alone justifies its existence is to resolve disputes between two or more persons approaching it in accordance with the relevant set of laws, which we commonly call impartation of justice. This needs to be done at an expected pace. If this does not happen, then it would result in delays and accumulation of arrears. It is the interest of the justice seeker which has to be considered as a matter of paramount concern. His interest can be served only by redressal of his grievances within a reasonable time frame.

A close analysis of the working of the present day courts in our country clearly demonstrates that the problem of delays and mounting arrears have primarily sprung up due to management crisis. In our country, though under the procedural laws, both civil and criminal, the control over the proceedings and its smooth and timely journey till its completion is with the trial judge, yet, the fact remains that for want of training to manage the Court and the court proceedings in a scientific manner with the goal of better justice dispensation at the forefront, Judges have failed to discharge the same. The control over the proceedings, except in passing orders and delivery of judgments, unfortunately in most of the cases has passed into the hands of other actors of the system like the court staff, advocates, touts or the influential and manipulative litigants.

Unless the Presiding Officer of the court knows how to organize his court work, decidedly, the working cannot be efficient and result oriented. Certain important points which constitute an integral part of court management is emphasised herein:

- The Presiding Officer should make it a point to hold his court at the appointed place during the period of time fixed for that purpose. In other words, he should take his seat in the court room for judicial work punctually at the right time, follow the court hours meticulously and make himself available and accessible in the open court during court hours.
- He should maintain utmost dignity while presiding over the court and is to ensure that his conduct and behaviour towards the lawyers and litigants is upright and fair.
- He should be properly robed in accordance with the

prescription and should exercise personal supervision and control over the staff attached with his court.

- The witnesses in attendance should not be allowed to be discharged or sent unexamined and he also has to be courteous to the witnesses who appear before him.
- In no circumstance should he delegate his judicial work to any subordinate functionary.
- He should be polite and firm and should ensure that orders and judgments in cases where arguments have been heard are pronounced without any delay.
- It would be appreciable if an actual date for the delivery of the judgment is fixed and the lawyers and the parties are made aware of the same well in advance.
- The officer should also conduct himself in such a manner that the parties appearing before him should have full faith in him that they would get justice.
- The working of the judicial officer has to be in such a manner that he should act with the belief that he is the repository of the trust which has been reposed on him by the society.
- He should work with the belief that behind every paper there is a person. If for any reason a paper is neglected, that would amount to neglecting a person which ultimately may result in miscarriage of justice.

CONCLUSION

For acquiring these qualities, which are absolutely essential for the efficient functioning of a judicial officer, judicial education is a must because if trained in a proper manner, the same may not only result in enlightening the understanding of a judicial officer but would also result in enriching his character, thereby enabling him to give his best.

EXPEDITING JUSTICE AND COMBATING CORRUPTION

P.P. Rao*

INTRODUCTION

Indian Judiciary has an impressive record. Its success on the constitutional front is without a parallel. The theory of basic structure has helped it to preserve the values underlying the Constitution. Its contribution in enlarging and enforcing human rights is widely appreciated. Its handling of public interest litigation has brought the institution closer to the have-nots. Among the three wings of the State, the Judiciary undoubtedly enjoys maximum credibility. However, when it comes to disposal of cases, the delay is disquieting. *Justice delayed is justice denied*. The right to speedy trial spelt out from Article 21¹ by the Court has no meaning if quick disposal of cases cannot be ensured. The situation is not so bad in the Supreme Court as it is in the subordinate courts and the High Courts where it is unmanageable indeed. In spite of the courts doing their best, they are unable to provide timely relief to the needy litigants. Some litigants reluctantly agree to go before Lok Adalats and are prepared to forego part of their genuine claims and accept whatever is offered by the Government or the public sector undertaking as they cannot withstand the agony of unending litigation. They feel that a bird in hand is worth two in the bush.

I. EXPEDITING JUSTICE

Aggrieved citizens must have recourse to an affordable, quick and

* Senior Advocate, Supreme Court of India. This Note is based on a paper presented at the All India Seminar on "Access to Justice" organized by Supreme Court Advocates-on-Record Association with the support of United Nations Development Programme in April, 2003 at New Delhi.

¹ *A.R. Antulay v. R.S. Nayak* (1992) 1 SCC 225.

satisfactory settlement of disputes from a credible forum. Arbitration is a well-known method of alternative dispute resolution. Of late, it has become time-consuming and expensive in many cases. The post-arbitration litigation is tiresome. Only the corporate sector can afford the luxury of high level arbitration. The new Arbitration and Conciliation Act, 1996 is not yielding the expected results. The Law Commission of India has suggested extensive amendments to make it more effective and satisfactory. The amendments made to the Civil Procedure Code in 2002 contain some well meaning provisions but a few of these have met with resistance from the Bar. Mediation and conciliation mentioned in Section 89 (1) are yet to catch the imagination of the litigating public.

None of these alternative methods of dispute resolution provided by law enjoy the confidence of the litigant public in the same measure as settlement of disputes by regular courts of law. It is, therefore, necessary to reform the system with the object of providing maximum satisfaction to the consumers of justice. The problem needs to be tackled within the framework of existing judicial structure with necessary modifications, procedural and substantive.

The National Commission to Review the Working of the Constitution expressed the view that the arrears can be substantially brought down with better management, computerization of court system, increased settlements by Lok Adalats, the effective and greater use of provisions of the Civil Procedure Code with all its congenial amendments with the cooperation of the lawyers and the court staff. The competence of the judges in terms of quality and quantity of disposals should be assessed by the superior court judges and reputed senior advocates. The Commission further suggested that the Presiding Officers in courts should be adequately trained and it is necessary to have continuing education for the Judges. The Government should ensure the basic infrastructure needed in all courts. The government should have a litigation policy directed towards reduction of government litigation and protection of public interest by preventive strategies. These are sound suggestions but cannot solve the immediate problem of arrears.

The efforts made by the Government, acting on the suggestion made by the Eleventh Finance Commission, to establish fast track courts,

have in some States encountered rough weather. The idea of appointing retired Judges is good, but it has met with resistance. In Rajasthan, for instance, when fast track courts were sanctioned at two levels as recommended by the High Court after making an assessment of the needs at the level of District and Sessions Courts and Courts of Chief Judicial Magistrates/Civil Judges (Senior Division), the judicial officers of the State challenged creation of courts at the level of Chief Judicial Magistrate/Civil Judges (Senior Division) claiming that all fast track courts should be created only at the level of District Courts. The continuance of these courts was debated before the Supreme Court recently. The Court has directed the Centre and the States to ensure that the courts continue for some more period as it is their constitutional obligation to provide speedy justice to under-trials.

A. Shift System

Establishment of additional courts at any level involves enormous expenditure – capital as well as recurring. Appointment of whole-time staff – judicial and administrative, to new courts involves considerable recurring expenditure. On the other hand, if the existing courts could be made to function in two shifts, with the same infrastructure, utilising the services of retired Judges and judicial officers, reputed for their integrity and ability who are physically and mentally fit, it would ease the situation considerably and provide immense relief to the litigants. The accumulated arrears can be liquidated quickly and smoothly. The Law Commission in its 125th Report dated 11th May, 1988 had recommended, inter alia, introducing shift system in the Supreme Court to clear the backlog of cases by deploying retired judges. On 5th November, 1999 the then Union Law Minister, Mr. Ram Jethmalani proposed introducing the shift system in all courts where the backlog of arrears was high. This proposal merits serious consideration. Shift system has been in vogue in industrial establishments since long. It has been introduced subsequently in educational institutions to cope up with increased demand. It is time that it is introduced in Courts as well. As the then Law Minister rightly pointed out, the advantage of the shift system is that with minimum expenditure there can be maximum output. More recently, the Justice Malimath Committee on Reforms in the Criminal Justice System has also recommended shift system in courts and establishment of part-time courts which could function even on

holidays. The existing court buildings, furniture, library and other infrastructure and equipment could be used for the second shift. Re-employment of retired judges, judicial officers and administrative staff would be far less burdensome to the exchequer, as they would be paid only the difference between the salaries and emoluments payable to serving judges and officers of the same rank and their pension. The induction of experienced judicial personnel who enjoy high reputation for their integrity and ability will add to the credibility of the judicial system as a whole. With their rich experience they will be able to dispose of cases quickly and clear the arrears fast. For this reason, the duration of the second shift could be less than the first one.

The prospect of re-employment after retirement of the most upright and efficient judges and judicial officers will act as an incentive to serving judges and judicial officers to remain honest and discharge their duties effectively to the satisfaction of all concerned. The reservoir of judicial experience readily available in the shape of retired judges and judicial officers is a precious human resource which is being wasted now. They can be easily persuaded to accept re-employment in public interest for running the second shift in courts, assuring them of their pre-retirement seniority *inter se*. To them, to be Judges in the second shift would be more dignified and satisfying than looking up to the Executive for discretionary assignments. The rule of law will lose its vitality if the justice-delivery system continues to move at a snail's pace. One of the contributory causes for the growing crime rate and low rate of convictions is undue delay in criminal trials. Chronic problems warrant radical solutions.

B. Settlement at Threshold through Non-Partisan Approach

The Civil Procedure Code, 1908, as amended in 1976, inserted Rule 5B in Order XXVII casting a duty on the court in suits against the Government or a public officer to assist in arriving at a settlement in the first instance. The potential of this provision does not appear to have been tapped fully. The reason is obvious. Unless the Government or the public officer or their lawyer is prepared to settle the dispute at that stage, the trial court can do nothing. It is necessary to extend this duty of the court, namely, to assist in arriving at a settlement, not only in suits against the Government or public officers, but in every suit. If the

trial judge makes sincere efforts and the members of the Bar too assist in settling disputes, the litigants will have immediate relief. Settlement of disputes in the court of first instance will leave no scope for any appeal or revision. Even if it requires two or three sittings involving a couple of adjournments, the settlement would be worth the trouble. A similar provision can be made requiring the appellate and revisional courts also to endeavour to bring about settlement of disputes pending before them to the extent possible. Unless the legal profession switches over to a non-combative and conciliatory approach, such provisions cannot bear fruit. The Bar Councils and Bar Associations should come forward to promote change of attitude on the part of advocates by impressing upon them that speedy resolution of disputes will result in more and not less work for lawyers, as the volume of litigation will go up as more and more aggrieved citizens will rush to courts.

C. Saving Judicial Time

Section 80 of the Civil Procedure Code is not being utilized at all by government departments for settling cases out of court as no one wants to take responsibility for the decision. Moreover, governments tend to prefer appeals and revisions against adverse orders as a matter of course instead of implementing just orders. Government counsel appointed on considerations other than merit adds to the woes of Governments. The tendency to raise all technical pleas to defeat just claims of citizens is widely prevalent notwithstanding the admonition of the Supreme Court in *Madras Port Trust v. Hymanshu International*,² that in all morality and justice claims a public authority should not take up a technical plea to defeat just claims of the citizen. "It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens."

Of late, there is a tendency on the part of the governments and their instrumentalities to evade or delay implementation of judicial writs and orders giving rise to a large volume of contempt petitions which consume precious judicial time. This could be saved if public authorities are sensitive to their duty to obey the orders and injunctions of courts promptly and the same could be utilised for disposal of pending cases.

² (1979) 4 SCC 176.

Independent of Article 144 of the Constitution which mandates all authorities, civil and judicial, in the territory of India, to act in aid of the Supreme Court, it is the duty of every party to abide by the decree or order. Rule of law requires respectful compliance with court orders.

II. COMBATING CORRUPTION

People not only want quick relief but also want justice of quality from all courts. There was a time when nobody could dare complain of corruption in the Judiciary. The reputation of the Judges was so high that even if there were some stray complaints, people would dismiss them as motivated. Times have changed. Now there are complaints questioning the integrity of judicial officers and Judges of superior courts in some parts of the country. Successive Chief Justices have in the recent past frankly admitted that there is corruption, mostly at the lower levels of the Judiciary. The recent probing into allegations of corruption and moral turpitude on the part of certain Judges of High Courts by different in-house committees constituted by the Chief Justice of India and the action that followed in the case of some of the judges involved have to some extent confirmed the suspicion that all is not well with the Judiciary. The institution of Judiciary cannot afford to tolerate corruption even to a limited extent. Experience shows that it is impossible to combat corruption through Prevention of Corruption Acts. The 1947 Act miserably failed to prevent corruption. Far from prevention, during the four decades that it was in operation, corruption spread like a virulent disease and assumed alarming proportions. The 1988 Act has cast its net wider, with an enlarged definition of 'public servant' which received liberal interpretation from the Supreme Court in *P.V. Narasimha Rao v. State*,³ so as to bring within its fold Members of Parliament and of States Legislatures. Even though the Act did not specify the authority competent to sanction prosecution of MPs, MLCs and MLAs, the Supreme Court going out of its way supplied the omission by empowering the presiding officers of the respective Houses to sanction prosecution. There is no evidence that this has helped in checking corruption at the political level. The dismal rate of conviction under the Act shows that the malady of corruption cannot be checked through criminal prosecutions alone in the present set up.

³ (1998) 4 SCC 626.

In the case of judicial officers who are subject to the control of the High Courts, it is necessary to amend the Rules governing their conditions of service and make a provision for compulsory retirement of officers of doubtful integrity, at any time, on payment of some compensation, depending upon the length of service put in. Fundamental Rule 56 provides for premature retirement in public interest, but only after a person has attained the age of fifty-five years or has put in a qualifying service of thirty years. This provision is inadequate. It needs to be substituted by a provision to facilitate retirement of a public servant of doubtful integrity or who is considered deadwood at any time irrespective of his length of service or age, as such a person has no place in public employment and more so in the Judiciary. Without such an enabling provision, it is not possible to weed out the corrupt elements from the system and purify the streams of justice. The observations of the Supreme Court in *O.P. Bhandari v. ITDC Ltd.*,⁴ suggest that such a provision will not be unconstitutional. Does this apply to government servants who are entitled to the constitutional safeguards contained in Article 311 in the matter of dismissal and removal? In *Gurdev Singh Sidhu v. State of Punjab*,⁵ the Supreme Court struck down a regulation providing for compulsory retirement of a government servant after he has completed ten years of service in public interest on account of inefficiency, dishonesty, corruption or infamous conduct, relying on certain observation in *Motiram Deka v. UOI*.⁶ The reason given is that to retire a permanent servant at a very early stage of his career would amount to "removal" within the meaning of Article 311 (2). Compulsory retirement of a person of doubtful integrity after completion of the qualifying service of twenty or twenty-five years would be in public interest and valid but not earlier – not even after ten years of service. This appears to be anomalous. Public interest warrants getting rid of public servants of doubtful integrity straightaway irrespective of the length of service subject to payment of proportionate pension. There has to be a way out of this impasse. As observed by P.B. Gajendragadkar in *Gurdev Singh Sidhu's Case* itself, "a claim for security to tenure does not mean security of tenure for dishonest, corrupt, or inefficient public servants."

⁴ (1986) 4 SCC 337, 344.

⁵ AIR 1964 SC 1585.

⁶ AIR 1964 SC 600.

There are two ways of tackling the problem. One is to leave it to a larger bench of the Supreme Court itself to appreciate the need to get rid of the black sheep and hold that compulsory retirement of public servants of doubtful integrity at any stage of their service does not amount to removal and does not attract Article 311 (2). This is not likely to happen in the foreseeable future. The only other course open is to amend the Constitution to provide for compulsory retirement of a public servant at any stage of his service on grounds of doubtful integrity without any inquiry. It is necessary to lodge the power in the safest hands possible and ensure that the power is not misused. That will take care of all civil servants covered by Article 311.

To ease out Judges of High Courts and the Supreme Court on the same ground, the Constitution will have to be amended. A Proviso needs to be inserted in Articles 124 and 217 of the Constitution, making an exception to the method of removal by impeachment. In order to safeguard the independence of the judiciary, the power of compulsory retirement of a judge of a High Court or of Supreme Court may be vested either in the Full Court of the Supreme Court or the collegium of the Supreme Court consisting of the Chief Justice and four senior-most judges.

Getting rid of rotten apples is not enough. Their replacement by most deserving young men and women by amending the rules of recruitment is equally important. Now there are seven National Law School Universities functioning at Bangalore, Hyderabad, Bhopal, Calcutta, Jodhpur, Raipur and Gandhinagar. In addition, there are a number of law schools with five-year degree course and some of them like those in Pune are imparting legal education of a high quality. They are able to attract bright students. In order to tone up the quality of justice, it is necessary to provide an opening for outstanding candidates at the entry level of the Judiciary, as is being done, in the case of All-India Services like IAS, IFS, IPS etc. Young law graduates who have done well in the five-year degree course could be recruited as Civil Judges/Magistrates straightaway and given intensive in-service training for at least one or two years at the National Judicial Academy before posting them as judicial officers. A provision for fast track promotions at reasonable intervals, depending upon their overall performance, merit and integrity, would act as an incentive and encourage them to opt for

the judicial career.

Prior to Independence and for several years thereafter, the practice was to appoint the most competent lawyers as law officers, public prosecutors and government pleaders and, in due course, consider the most deserving among them for elevation to the High Court Bench of the Province. Since a few decades, political considerations came to prevail over considerations of merit and ability in the matter of appointment of government counsel. There have been several instances of appointment of undeserving persons as High Court Judges because of their proximity to the powers that be. As a consequence, public interest has suffered and the quality of justice delivered has deteriorated. The assumption of exclusive power of selection for appointment of Judges by the Judiciary has not made as much difference as was expected. It is, therefore, necessary to revert back to the old practice to improve the standards. In the matter of public employment, particularly appointment of law officers etc. and Judges of High Courts or the Supreme Court, merit and merit alone should be the overriding consideration. A minimum tenure of not less than five years on the Bench is necessary for a Judge to make his contribution. Seniority should be considered only when merit and ability are equal. Political will is needed to improve the system.

THE JUDGE AND THE JURIST

D.K. Sampath*

A recent perusal of "Judicial Review in the New Millennium" edited by Richard Gordon Q.C. and published by Thomson, Sweet and Maxwell which includes as Chapter 8, "The Academic Influences on Judicial Review" by Michael J. Beloff QC, President, Trinity College, Oxford has prompted writing this Note on 'The Judge and the Jurist.'

The way a jurist or even an author of a book examines law is different from the manner of consideration of the same problem by a judge while delivering a judgment. It is often intriguing to find them running on parallel lines without one enriching the views of the other. Of course, there are obvious differences in their approaches.

The jurist, often starts from the first principles and builds up the examination step by step while discussing what follows from each proposition. The sweep of the comments is characteristic of his uninhibited analysis. Flying high with his generalisations, he swoops down with unerring accuracy to his particularisations. The judge on the other hand, is blinkered by the narrow facts of the case on hand. The context not only limits his area of examination but also trims the terms of his enunciation of the law relevant for the purpose on hand. He may not have any use for the broad delineation of the theory of law or the history of the evolution of the particular principle stage by stage or how the legislature has shaped the principle into practical propositions capable of compliance or enforcement. Except in contexts where the matter is still at large, even the highest court does not feel persuaded to examine the roots of a given principle of law. Perhaps there is no need for it. The judge is not an educator. He proclaims the law on the question

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through his pronouncements. The facts of the case at hand fetter his elbows leaving no room for him to make any roving search for the principles behind any given proposition. Relevancy lays down the rails on which he has to move without swerving. Perhaps this is the reason why judges rarely turn to treatises or authoritative books as a source of credibility for judicial pronouncements.

The principle of *stare decisis* casts an obligation on the judge to craft his decision in conformity with the earlier pronouncements of the courts. Thus, consistency is an expected virtue. This is observed in the breach only when there is a call for reversal of the till then held view. This again leaves very little scope for the judge to examine and re-examine the principles of law underlying a proposition. For the sake of credibility of the system which demands predictability, research and perceptions are sacrificed. In the case of an author, occasionally, there may be a further refinement of his views in a later edition. There may even be a revision of the judgment or conclusion. The convention that living authors are not relied on in courts took care of this risk. But, in recent years, even the English judges have had occasion to quote and rely on living authors. Whenever editors of the works of distinguished authors no longer alive have to question the views of the original authors, they cite the original view and their own thinking on the subject, indicating why the view called for a fresh look. That would leave the judge free to prefer one or the other view according to his perceptions.

Thus, the focus furnished by the compulsion of facts under consideration by a judge is missing in the broad generalisations of the academic. There are certain other practical difficulties in relying on the articles, lectures and books of jurists. But are they enough to justify their total elimination as a source of material for the pronouncements of judges? It may not be appropriate to explain it in terms of the difference between theory and practice. So long as the judge is required to write a speaking order, he has to base his conclusion on rational reasoning. To be rational, it has to be logical. It has to go back to the first principle unless the judgment is to rest on an earlier decision. Borrowed feathers. The doctrine of *stare decisis* is part of the law of precedents. This exercise of examination of the law on a given question from the first principles would be called for only on topics which are still at large or where the established positions have to be stretched to cover the context on hand.

There is a difference even in the manner of discourse between an author's presentation and a judge's pronouncement. An author, in his lecture or discourse may meander, giving it a tone of relaxed consideration with unevenness of speed. But a judge has to be compact, concise and free of digressions, if his judgment is to have any persuasiveness. His search for law can range only as wide as the fact situation would warrant. A roving treatment of the legal point in issue would land the judge away from the ideal standards of judicial focus. An aimless drifter projects an image of an off course wanderer. A judge can never hop from point to point without coming to any conclusion. An author may leave certain lines of reasoning dangling without tying them up with conclusions and may sometimes even suggest further research on those lines. The judge has no use for such passages. They do not furnish a framework for tight reasoning. May be such a luxury is open to an author ambling along in a leisurely way with many starts and stops, suggestive of his mood. Thus, the structure of his judgment itself is not conducive to accommodating a long extract from a text of a treatise or thesis. Sometimes, authors are cited at the Bar as experts of some branch of knowledge. In such cases, the judge may look for evidence that the author has credibility as an expert. The author's academic distinctions, designations, his standing as an author and how his book in question has been received by his profession and the public. If the judge has some familiarity with the literature on the subject, he has to look to other authors for contra views when he plans to differ from what the cited author says. To be persuasive the judge would build up the other author by citing his academic qualifications, designations, and his experience, how his views have found a ready acceptance in courts in other contexts. Such reliance on views expressed by the academics is a sophisticated exercise unlike citing a precedent by a higher court which is automatically binding by virtue of the hierarchical system of the courts. This is perhaps one of the reasons why judges are loath to invite authors into the forensic field. The reluctance is not seen if the author is a respected and recognised authority on the subject. For instance, *THE FRAMING OF INDIA'S CONSTITUTION: A STUDY* by B. SHIVA RAO has been unhesitatingly referred to by Constitutional Benches of the Supreme Court of India.¹ It may not be so readily relied upon if the author is not so well established amongst his peers.

¹ AIR 1984 SC 684, 701.

For example, in *Jawed Ahmed Abdul Hamid Panwala v. State of Maharashtra*,² while dealing with the cruel effect of long wait in the death row, the Supreme Court quoted Robert Johnson's CONDEMNED TO DIE; LIFE UNDER SENTENCE OF DEATH for support. This is an indirect reliance on what is quoted in *T.E. Vaitheeswaran v. State of Tamil Nadu*.³ Thus, while canvassing the judicial attitude towards constitutional implications of prolonged delay in the execution of a sentence of death, the author Robert Johnson is only obliquely referred to indirectly.

In *Olga Tellis v. Bombay Municipal Corporation*,⁴ while discussing the question of "procedure established by law," the Supreme Court of India relies on a passage quoted from, *Methodology and Criteria in Due Process Adjudication – A Survey and Criticism*.⁵ It is not often that University law journals are referred to and relied upon by courts in India.

There is no need to multiply instances; some of the above instances are referred to only to illustrate the reluctance of the judiciary to rely on academics. It behoves the members of the judiciary to examine why. Is it not all the more necessary to do so when the Constitution of India contemplates recruitment of judges from jurists also?

² AIR 1985 SC 231.

³ AIR 1983 SC 361.

⁴ AIR 1986 SC 180.

⁵ 66 YALE L. J. 319 (1957).

TRIALS, ERRORS AND HOPE: INDIAN EXPERIMENTS WITH ACCESS TO JUSTICE

Dr. S. Muralidhar*

INTRODUCTION

Fifty-five years of the working of the Constitution in an independent nation is long enough a period to make a reasonable assessment of its working and of the experiments with one of its principal features - access to justice. This feature of our constitutional dispensation, by no means it's most important, underscores the omnipresence of law in governing our daily lives, our relationships with each other and with the state and its institutions. It constitutes the core of the basic assumptions on which the edifice of the justice delivery system is erected; others being:

- acceptable and valid statutes enacted within the framework of constitutional powers;
- non-violent means of grievance redressal within the framework of the rule of law;
- acceptance of judicial verdicts and their binding nature as commanding obedience; and
- equal and effective access to justice irrespective of the social, educational and economic standing of the person seeking justice.

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While the undermining of any of these basic assumptions constitutes a threat to the legitimacy of the legal system, access to justice is central to its functioning. It also constitutes a legitimate device to check abuse of state power. The denial of access to justice can have grave implications in times, as the present, where the state increasingly resorts to assumption of drastic and coercive powers to control violent crimes by procedures that dispense with basic constitutional protections.

Part I of this Note dwells briefly on what has been acknowledged ad nauseam: the ongoing failure of the legal system as presently ordered. Two case histories are narrated to illustrate the breakdown - one in the context of the working of the criminal justice system and the other in the civil legal system. Part II recapitulates the responses to the failure - by the state, by the judiciary and by the civil society. The barriers to justice that can, if not accounted for, prevent meaningful changes are discussed in Part III. Part IV suggests the approaches to redeeming the constitutional promise of effective and equal access to justice.

I. THE BREAKDOWN SCENARIO

The Indian legal system, a continuity with its colonial past, appears reluctant to break away from the pattern of institutionalisation of mechanisms of adjudication, practices of enforcement and resistance to change. Those who favour the continuance of the present model point to its role in:

- spreading of awareness of the laws and rights;
- ensuring systems of accountability and enforcement of rule of law;
- promoting independence of the judiciary and the ability to check arbitrary laws made by Parliament and abuse of power by the Executive; and
- fostering overall confidence by the people in the judiciary.

Nevertheless, there are drawbacks that have been highlighted time and again, which have stayed with the system from earlier times. We lament the breakdown of the justice delivery system, a breakdown which

is a work in progress for over two hundred years. For instance, the problem of huge arrears of cases and backlog coupled with a poor judge population ratio appears no different from what it was at the inception of the formal legal system. M.P. Jain in his study on the legal history of this country, notes that the changes brought about by Lord Cornwallis in 1790 failed to tackle the problem of "the inadequacy of criminal courts, the pressure of work on the magistrates, the absence of Indian judges, the reluctance of people plagued by the prospect of an uncertain and delayed justice to prosecute offenders."¹ He notes that even in 1833, the criminal justice reforms, "had failed to achieve the twin objects of a court, viz., cheap and quick decision of cases."² Another historian, Radhika Singha, notes that the hallmark of the period between the late eighteenth century up to the mid-nineteenth century was "a preference for administrative solutions to control agency rather than substantial reform in judicial procedure, or provision for judicial redress."³

The official statistics of the Department of Justice, Government of India for 2000, 2001, 2002 and 2003 reveal that there is a constant backlog in the civil and criminal courts of about 2.19 crore cases despite 1.30 crores cases being disposed of every year. This is explained by the fact that there is an influx of about 1.45 crore cases every year. Nearly 70% of these figures constitute criminal cases. The strength of the subordinate judiciary has remained static at about 13,000 and a judge, on an average, is able to dispose of 1,150 cases per year. Our judge population ratio is less than ten per million whereas what is prescribed as the right number is fifty. Even if we expect to clear the backlog in a staggered manner over five years, an increase of about thrice the present number of judges is called for. There has been no move by the government to increase the existing strength of subordinate judges. Instead, with every new statute, civil or criminal, the workload on the subordinate judiciary correspondingly increases.

As far as the High Courts are concerned, the total annual pendency of cases since 2000 has remained in the region of thirty-five lakhs cases. Every year there is an average of twelve to thirteen lakhs cases filed

¹ M.P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY 139 (2000 Reprint).

² *Id.* at 200.

³ RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA 304 (1998).

afresh in the High Courts and the corresponding disposal is around fifteen lakhs. The average annual disposal per High Court judge is around 1,500 cases. Thus, we have pendency of criminal appeals in certain High Courts since 1981 and civil appeals of even earlier years. We have around 700 posts of High Court Judges but at any given point in time there are at least 200 vacancies. The backlog of thirty-five lakh cases requires an extra 1,500 High Court Judges if we calculate the rate of disposal at 2,300 cases per judge. If this disposal of backlog is spread over five years we might require about 300 more High Court Judges. This is compounded by the fact that the process of filling vacancies is so slow that at any given point there are nearly 200 unfilled vacancies of judges of the High Court.

The general indifference to the need to strengthen judicial infrastructure is best demonstrated by the figures concerning allocation of funds. The Ninth Five Year Plan made an allocation of 0.071% of the total plan outlay. This rose to 0.078% in the Tenth Five Year Plan.

So much for lack of judicial infrastructure, which is but one of the factors impinging on access to justice. The other institutions that comprise the system, for instance, the prisons, also suffer from similar problems. The position in the jails as of 2000 was that of the 2,72,079 prisoners, 1,92,440 were undertrials and 64,960 were convicts.⁴ There was overcrowding in excess of 100% in the jails in seventeen states and in Delhi it was 292.1%.⁵

Access to Justice for the Poor

The problems of the legal system become acute when examined in the context of the needs of the poor. The expense of pursuing cases in courts, the intimidating structure of the legal profession and the courts, and the inability of the legal aid system to reach all sections of the population constitute the major institutional barriers to justice for the socially and economically marginalised sections of the population. The inability of the poor to access the justice system is also attributed to illiteracy, cultural inhibitions, bureaucratic and political corruption. More fundamentally, the basic needs of the poor to shelter, to food, to health, to access common property resources and basic means of livelihood do

⁴ NCRB, PRISON STATISTICS INDIA 2000 23-24 (2002).

⁵ *Id.* at 12-13.

not find avenues for redress within the formal legal system.

The law as constructed itself constitutes the barrier. To explain, many of these issues of protection and enforcement of survival rights are caught in the judicially constructed limitations of justiciability, the law and policy divide and the constitutionally drawn lines between enforceable fundamental rights and non-enforceable directive principles of state policy. While it is true that the judicially innovated tool of public interest litigation [hereinafter PIL] has sought to deal with some of these issues, this has neither been consistent nor satisfactory. The poor therefore don't in that sense 'access' the legal system. They are drawn into it unwittingly in situations of conflict with the law. Thus, it has been observed, "the poor come to use the legal system only when so compelled by being drawn into it as accused and defendants."⁶ This is where the denial of access to justice, to basic legal services, results in grave violations of their lives and liberty.

The importance of access to justice for the poor is now sought to be illustrated with reference to two specific case histories, one in the context of the criminal justice system and the other in the context of the civil justice process.

Criminal Law and Poverty

It is a fact that among those who interact with the criminal justice process either as victims or offenders, those belonging to the economically and socially disadvantaged strata constitute a large number. Apart from being arrested for keeping peace and good behaviour under the Cr.P.C. 1973,⁷ a large number are apprehended under the penal provisions of local laws that deal with gambling,⁸ excise⁹ and prohibition.¹⁰ The poor are also apprehended under the Indian Railways

⁶ N.R. Madhava Menon, *Legal Aid and Justice for the Poor*, in LAW AND POVERTY: CRITICAL ESSAYS, 341, 345 (Upendra Baxi ed., 1989).

⁷ Sections 106-110 & 151. For an increasing trend of arrests under these provisions, see LAW COMMISSION OF INDIA, 177TH REPORT ON THE LAW RELATING TO ARREST 11 (2001).

⁸ The figure for 2001 under this head is 3,11,186. See CRIME IN INDIA, Table 67 (2001).

⁹ 1,25,553 persons were arrested under laws relating to excise. *Id.*

¹⁰ *Id.* 5,27,475 were arrested under laws relating to prohibition of manufacture and sale of alcohol. In Tamil Nadu alone as of 2001, 2,52,616 persons were arrested of which 53,061 were women. The next highest was Maharashtra where 1,43,979 persons were arrested (16,856 women) followed by Gujarat where 1,18,837 were arrested (36,730 women). See CRIME IN INDIA, TABLE 68 (2001).

Act, 1989 for the 'offences' of ticketless travelling, hawking and begging and travelling on roof, step or engine of train. Then there are those laws that actually punish a poor person not for what is done by that person but for whom that person is. Among these statutes, reference is made to the Mental Health Act, 1987 [hereinafter MHA].¹¹ Under the MHA, the wandering and destitute mentally ill person is viewed as a deviant from whom the society requires to be protected. In other words, the person who is sought to be 'punished' under the MHA are 'status offenders' who are characterised by the following features:

- their activities are as a result of economic and social deprivations;
- they encounter rejection either by the family or by the society or by both and are left to fend for themselves; and
- they are viewed as a nuisance or a parasite needing to be isolated and segregated from society.

The law in this case, the MHA, steps in to first describe the activities of these persons as offences and therefore requiring to be dealt with by the criminal justice system. These 'offenders' differ from others in the realm of criminal behaviour in many ways, and yet get treated no differently within the criminal justice system. The MHA then permits the police and the magistracy to deal with such persons in a manner that renders them 'invisible' and out of bounds behind the high walls of penal custodial institutions.

The Sheela Barse Case

The large scale abuses in the states of West Bengal and Assam of the powers of the Executive Magistracy under the Indian Lunacy Act were brought to the notice of the Supreme Court in a public interest litigation which commenced at the instance of a journalist, *Sheela Barse* through a letter petition in 1989. The Commissioners appointed by the court to visit the jails in these states found horrific violations of basic

¹¹ The earlier legislation was the Indian Lunacy Act, 1912 [hereinafter ILA]. Other such statutes include the Bombay Prevention of Begging Act, 1959, which punishes the offence of 'begging' and the Immoral Traffic (Prevention) Act, 1956 which punishes the offence of sex work.

rights by the official machinery which functioned with impunity. Their reports revealed that:¹²

- The entire process of having a person picked up by the police and remanded to the jail under the orders of the Magistrate was done casually, and without any attention to the requirements of the law.¹³ The ASSAM REPORT explained the process thus: "An unethical parent/husband/family member may connive with the police, or sometimes the police itself may take action for purely extraneous reasons. Money is paid to the police and very often the police usually tell the unscrupulous person how they should invoke the process. This starts with an application usually very neatly written in Assamese which is signed by the relative stating the alleged facts about the mentally ill person. Then upon this report, the police shows an arrest and after the arrest, the papers are forwarded to the prosecuting Sub-Inspector. The prosecuting Sub-Inspector is a kingpin in the whole affair. He places or alleges to place these papers before a Magistrate . . . In one case at least, the Commissioner was able to get proof that possibly these orders are not even signed by Magistrates. These are possibly signed by prosecuting Sub-Inspectors with duplicate seals of the Magistrate and may even have been initialled." Thus, the brothers of a girl who opposed her marriage,¹⁴ a landlord seeking to evict a seventy year old widow,¹⁵ a tea company seeking to get rid of its

¹² *Unlock the Padlock: Mental Health Care in West Bengal*, REPORT OF THE SUPREME COURT COMMISSION ON MENTALLY ILL IN THE JAILS OF WEST BENGAL (January 1993) [hereinafter WEST BENGAL REPORT] submitted in two volumes and *Justitia Virtutum Regina* REPORT OF THE COMMISSIONER APPOINTED BY THE HON'BLE SUPREME COURT OF INDIA vide Order dated 13.5.1994 in Writ Petition (Crl.) No.237 of 1989 *Sheela Barse v. Union of India*, September 23, 1994 [hereinafter ASSAM REPORT].

¹³ The ASSAM REPORT at 235 reveals that the District Magistrates and Senior Police Officers "did not know a thing about the Indian Lunacy Act . . . what is the purpose of the Act, what are the safeguards."

¹⁴ The case of S.S. in the WEST BENGAL REPORT, 39, read with the WEST BENGAL REPORT, Vol. II, 135-37 and 177. For an instance of a Telugu speaking female being confined in the Silchar jail for over three years and not being released despite being declared fit by a visiting psychiatrist. See ASSAM REPORT, 347.

¹⁵ The case of LPS recorded in the ASSAM REPORT, 383-90. The Commissioner explained the process thus (at 384): "It is the landlord who took this lady to the police station and obviously paying nothing but bribes that the police decided to produce her before the Judicial Magistrate. The Judicial Magistrate's motives are equally open to suspicion. It is most unfortunate that this lady has been detained as an NCL."

employee¹⁶ and those wanting to get rid of a 'nuisance'¹⁷ could, with the connivance of the police and a doctor supported by the tacit endorsement of the magistracy,¹⁸ have a person committed to jail on the ground of mental illness.

- Jails were routinely used as places of safe custody and treatment for the mentally ill. Prisoners were transferred from sub-jails to central jails for 'better treatment facilities.'¹⁹ The period of such incarceration in some cases exceeded thirty years.²⁰ Despite the law prohibiting a person being kept in "suitable custody" for a period exceeding thirty days,²¹ in several instances standard format orders were passed where in the column meant for indicating the next date of production, the Magistrate simply wrote "for treatment."
- The orders of commitment were not preceded by certification by a qualified mental health professional of the mental health

¹⁶ The case of PC recorded in the ASSAM REPORT, Vol. I, 213-15. A simple certificate issued by Medical Officer (and not a psychiatrist) certifying that, "there is a relapse of the mental (illness) and the man is becoming violent" (*id.* at 215) was enough to persuade the District Magistrate, Dibrugarh to merely endorse the word "seen" on the certificate itself and thereafter PC came to be lodged in the Dibrugarh jail till the Commissioner had him released. There were other similar instances of tea estates getting rid of its employees this way: ASSAM REPORT, 177, 275-76, 280 & 300.

¹⁷ The cases of BK and MKP, ASSAM REPORT 271 & 391-95. A large number of persons were those rejected by families.

¹⁸ Both in West Bengal and in Assam, the powers of passing orders of commitment were exercised by Executive Magistrates (and not necessarily Judicial Magistrates). This has been sought to be rectified under the MHA by giving such powers only to Judicial Magistrates.

¹⁹ See the case of TNB, WEST BENGAL REPORT, 76.

²⁰ The WEST BENGAL REPORT contains the statistics furnished in relation to the Alipore special jail. At least six persons there had been detained for over thirty years. One of them had been there since 5.3.1956 and another since 31.8.1957. Nineteen persons had been detained for over twenty years and forty-three persons in the range of 10-20 years: WEST BENGAL REPORT Vol. II, 48-5. The ASSAM REPORT records the case of RS who had been in custody since April 14, 1967 and, since none of his relatives were found, he was brought back to the jail.

²¹ Section 16 ILA & Section 28 MHA. It is disturbing that under Section 21 MHA a Magistrate may direct that pending removal of mentally ill person to a psychiatric hospital (on the application of the relative or medical officer), he may be "detained for such period not exceeding thirty days *in such place as he may deem appropriate.*" [emphasis supplied].

status of the person apprehended. On their part, the medical officers, who invariably were not mental health professionals, could easily be persuaded to issue certificates of mental illness.²²

- The Magistrates did not require an examination of either the policeman or the doctors.²³ It is doubtful that the Magistrates ever spoke to the persons they were sending to the jail, much less inform them of their right to legal aid and of the consequences of their being sent to jail.
- None of the orders passed by the Magistrates recorded the presence of any lawyer. Nor do they indicate that the judicial officer explained to the person what he was doing to such person or what the consequence was of the order being passed or of the person's right to appeal against the order.
- Rehabilitating a person recommended for discharge was rendered difficult on account of the family refusing to take the person back. This is perhaps explained by the fact that, very often, family rejection is the reason for the person entering the criminal justice system after being labelled as a mentally unsound person.²⁴
- The situation was doubly poignant for women. Under the practice adopted by the jail authorities, they could not, unlike

²² The ASSAM REPORT records that there is possibly a "nexus between the doctor, the jail authorities as well as the prosecuting Inspector who presents the applications for release before the Magistrate." ASSAM REPORT, 209.

²³ In Assam, the orders of commitment "are in fact prepared and drafted by prosecuting Sub Inspectors who obtained the signature of the Magistrate. After the signatures of the Magistrate are obtained, the entire case record is usually with the prosecuting Sub Inspector. The Magistrate obviously signs on a one time basis, without even knowing what he is doing." ASSAM REPORT, 265. Further the Commissioner who visited the Assam jails found that not one of the applications for commitment had been dismissed by the Magistrates and in fact every one of them had been allowed. ASSAM REPORT, 296.

²⁴ A son who insisted on marrying a girl of his choice (case of BST): ASSAM REPORT, 294, persons with drug and drinking problems (cases of LB, RP, JD and SKD): ASSAM REPORT, 233, 292, 375-76, a first wife seen as obstructing the second marriage (Case of MRS): ASSAM REPORT, 325 were dumped in jail as NCLs by the families in connivance with the police.

men, be released on their personal surety,²⁵ no matter how old or how confident and able they were.²⁶ This brought them back to the jail or to a half-way home or the mental hospital for an uncertain future.²⁷

- The root cause was poverty itself. The WEST BENGAL REPORT noted that the "rejection is actuated by the poverty of the family; the stigma of mental illness; the fear of a relapse and the family's inability to cope with it."²⁸ The ASSAM REPORT noted that most of the prisoners were, "people who are grossly illiterate and are unable to even speak fluently. They are the poorest of the poor."

The Supreme Court in this case, in August 1993, declared that the jailing of mentally ill persons was unconstitutional.²⁹ Nevertheless, even a year later the practice was continuing in Assam and further directions had to be issued by a dismayed court.

The Second Case Scenario - The Bhopal Gas Leak Disaster

When the lethal MIC gas leaked from the factory of Union Carbide India Limited (now Eveready Industries India Limited) on the intervening night of December 2/3, 1984, it triggered off not just one mass disaster, but several of them. Twenty years after the event, we have voluminous data that reveals a mind-boggling myriad of multiple disasters on several fronts.

²⁵ WEST BENGAL REPORT, 81 & ASSAM REPORT, 319.

²⁶ Case of SG, declared fit but remained in jail on account of refusal by the family to take her back: WEST BENGAL REPORT, 40 and Vol. II 189-90; cases of CRA, dumped for six years since 1988, but refused to be accepted by the husband on discharge: ASSAM REPORT, 329, MD, a Telugu speaking girl abandoned by her brother: ASSAM REPORT, 344, UD dumped by the family on false pretext and rejected upon release as well: ASSAM REPORT, 323, all of whom had to be asked to be given shelter by the Missionaries of Charity, Lucknow.

²⁷ Long after the judgment in *Sheela Barse*, the women declared fit for discharge continued to remain in the jails in West Bengal. The State Government ingeniously renamed the Purulia jail as the Purulia hospital. It was stated that "the response of family members of the persons who are fit for discharge still continue to be poor." See AFFIDAVIT dated Sept. 1, 1995 of Secretary, Health and Family Welfare Department, Government of West Bengal in *Sheela Barse v. Union of India*, Supreme Court, W.P. (CrL.) No.237/89, 2.

²⁸ WEST BENGAL REPORT, 104.

²⁹ *Sheela Barse v. Union of India* (1993) 4 SCC 204.

Soon after the disaster, the Indian Parliament in 1985 enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 by which the Union of India would be the sole plaintiff representing all the victims of the disaster who would be potential claimants for compensation in a court of law. This, it was believed, would ensure effective access to justice for the Bhopal gas victims. Armed with this Act, the Union of India filed a suit for compensation against Union Carbide Corporation [hereinafter UCC] in the Court of Judge Keenan of the Southern District Court, New York. Here UCC erected a preliminary defence. It sought to demonstrate that the proper forum for adjudication of this suit was not the court in New York but the one in India. UCC's expert witness in those proceedings, Nani Palkhivala, glibly asserted on affidavit, "there is no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation."³⁰ He compounded this with an undeserved praise of the Indian Bar. He took umbrage to the criticism of the Indian Bar in the affidavit of Union of India's expert Marc S. Galanter which had stated that, "the pessimism and passivity that Bhopal has inspired in India's leading lawyers is a realistic recognition that it calls for a kind of law practice worlds away from the individualistic doctrine-centered courtroom advocacy that makes up their repertoire."³¹ Palkhivala retorted, "to say that the Bar in India is ill-equipped to deal with the Bhopal cases is a slanderous reflection on the legal profession in India, unredeemable by the plea of truth."³²

Accepting Palkhivala's description of the Indian legal system, Judge Keenan dismissed the suit subject to UCC submitting to the jurisdiction of Indian courts. Thereafter, in September 1986, the Union of India filed its suit against the UCC in the District Court in Bhopal. In February 1989, the Supreme Court of India approved a settlement whereby UCC would pay the victims 470 million U.S. Dollars in full and final settlement of all civil and criminal claims, in present and in future. There was a huge public outcry that the settlement was a sell out. Review petitions were filed challenging it. The Supreme Court justified its acceptance of

³⁰ Affidavit dated December 18, 1985 of Nani Ardeshir Palkhivala in support of defendant UCC's motion for dismissal on Forum Non Conveniens Grounds – reproduced in UPENDRA BAXI & THOMAS PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* 222, 225 (1986).

³¹ AFFIDAVIT dated Dec. 5, 1985 of Marc Selig Galanter in support of Union of India's Claim. *Id.* at 161, 185-186.

³² JAIN, *supra* note 1, at 226.

the settlement on February 14, 1989 on the ground that, "this Court, considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims."³³

Twenty years after the settlement, neither has the relief to the victim been adequate nor immediate. The presumptions, on which the settlement was worked out - 3,000 dead and 100,000 injured, were underestimations of five times the actual figure. In March 2003, the official figures of the awarded death claims stood at 15,180 and awarded injury claims at 5,53,015. The underestimation was slightly above five times. The range of compensation which was assumed in the settlement order would be payable was Rs.1 to 3 lakhs for a death claim, Rs.25,000/- to Rs.1 lakh for temporary disablement and Rs.50,000/- to Rs.2 lakhs for permanent disablement. Each death claim has been awarded not more than Rs.1 lakh and on an average an injury claim has been settled for as little as Rs.25,000/-.

A stark feature of the adjudication of claims of the Bhopal gas victims has been the complete absence of legal aid. On the contrary, every lawyer handling a claim has worked on a contingency fee basis, a practice disallowed by the Advocates Act, 1961.

There have also been failures in acknowledging the victims of the disaster by the devices of exclusion, arbitrary categorisation and arbitrary re-categorisation. Further, the costs and losses arising out of the Bhopal gas leak disaster have had to be borne by the victim. As pointed out by a legal scholar, "there is considerable neglect of the costs that are generated in an accident or disaster which, therefore, remains beyond the reckoning that is undertaken in determining compensation. The externalising of losses and costs, apart from making of compensation an inadequate guide to understanding the cost of the accident or disaster, also reveals the law's expectation that a victim bear a part of the cost. The consequent impoverishment that results is not, it would appear, within the law's ken."³⁴

The truth is now plain for everyone to see. Few would now disagree

³³ *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38, 43.

³⁴ Usha Ramanathan, A Critical Analysis of the Laws Relating to Compensation for Personal Injury 356 (2001) (unpublished thesis submitted for the Degree of Doctor of Philosophy, Delhi University) (on file with the Delhi University).

with Marc Galanter that, "at its best, the Indian legal system's treatment of civil claims is slow and cumbersome."³⁵

The above two case studies amply demonstrate how the present legal system in fact operates to deny access to justice to the poor whether in the criminal justice context or in the civil justice context. Some where, some thing is going wrong and we are unable to cope with the overwhelming nature of the problem. These problems have been known and even anticipated for a long time now but has anything been done at all? We proceed to examine this query in the next section.

II. THE RESPONSE

In their monumental comparative work on civil justice systems, Cappelletti and Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.³⁶ It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice.

These two authors point out how in the U.S.A., the U.K. and certain European countries, beginning in 1965, there were three practical approaches to the notion of access to justice, or in other words, the *three waves of access to justice*:

- the first wave was legal aid, which really meant providing a lawyer to an indigent litigant in a case before a court or tribunal;
- the second wave concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection. This would mean expanding the notion of 'standing,' permitting others like public spirited persons to represent an indeterminate mass

³⁵ BAXI & PAUL, *supra* note 30, at 178.

³⁶ M. CAPPELLETTI & B. GARTH, ACCESS TO JUSTICE - THE WORLDWIDE MOVEMENT TO MAKE RIGHTS EFFECTIVE: A GENERAL REPORT *in* I ACCESS TO JUSTICE—A WORLD SURVEY 5, 8-9 (1978). This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

of litigants with a common grievance; and

- the third wave was the 'access-to-justice approach,' which includes, but goes much beyond, the earlier approaches.³⁷ The last mentioned approach required, "a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and para-professionals both on the Bench and in the Bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go beyond the sphere of legal representation."³⁸

A. Response of the State

The pattern of access to justice measures in India more or less confirms the prevalence of the three waves described by Cappelletti and Garth. But more in form than in substance.

Although the Constitution of India contains provisions that underscore the non-derogable nature of guaranteed fundamental rights to equality, to life and liberty and against arbitrary arrests and detentions, there was no specific provision guaranteeing the right to legal aid and legal services at the expense of the state. It was in 1976, by the Constitution (Forty-Second Amendment) Act that Article 39A was introduced in Chapter IV which lists out the non-enforceable directive principles of state policy. This provision requires the state to secure that "the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."³⁹

³⁷ *Id.* at 21. The authors explain, "We call it the 'access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access." *Id.* at 49.

³⁸ *Id.* at 52.

³⁹ The National Commission to Review the Working of the Constitution has recommended that Article 39A be shifted to Part III as a fundamental right and be numbered as Article 30B.

Expert Committees and their Prescriptions

Prior to this, there was reluctance by the governments both at the Centre and the States to take any concrete measures to enable equal and effective access to justice for the poor. This was inexplicable given the number of expert bodies set up by these governments since 1950 to study the problem and suggest remedial measures. Thus, we had erudite reports of the Bombay Committee of 1950 headed by Justice N.H. Bhagwati, of the First Law Commission chaired by Motilal Setalvad,⁴⁰ the 1971 Report of the Gujarat Committee headed by Justice P.N. Bhagwati, the 1973 Report of the Expert Committee chaired by Justice V.R. Krishna Iyer, the 1977 Report of the Juridicare Committee of which both Justices Bhagwati and Krishna Iyer were members. The last three Reports were unanimous and consistent in the position that:

- legal aid was primarily a responsibility of the state;
- a concerted shift had to be made from confining the legal service programme to its remedial role of dealing with individual problems to a preventive and rehabilitative legal service programme that would tackle the reasons for the economic and social marginalisation of the people; legal aid was not confined to providing legal representation but included legal advice, counselling and rehabilitation;
- in the criminal justice system, legal aid would be available at every stage from the point of arrest and custody to the disposal of the judicial proceedings at all levels including appeal, review or revision; legal aid would have to be made available in jails and other custodial institutions;
- legal aid was part of the larger agenda of reformation of the legal system, and could not be effective independent of the latter;
- consistent with this reorientation, law and institutional reform was to be a part of the legal aid agenda; legal aid committees

⁴⁰ This was the 14th Report submitted in 1958 dealing with judicial reforms in general and legal aid in the criminal.

and lawyers' cooperatives were expected to initiate test cases and PILs to challenge arbitrary laws and practices that discriminated against the poor;

- the role of the lawyer would be more than that of the authorised representative of a client in an adversarial proceeding; legal services had to reach the poor rather than the other way round; a public sector in the legal profession was envisaged where salaried lawyers would be engaged whole time in legal aid offices located within and in proximity to communities;
- legal aid institutions created at different administrative levels were expected to be autonomous and independent of executive control or interference; and
- the right to legal aid was not a measure of welfare or charity but a manifestation of an enforceable fundamental right of equal access to justice.

The central government did not immediately bring in any comprehensive legislation for legal aid. Instead, between 1980 and 1992, it constituted the Committee for Implementation of Legal Aid Schemes [hereinafter CILAS] headed by a Judge of the Supreme Court to suggest the programmatic content of the dispensation of legal services for the poor. The experiment was not a happy one.

The Legal Services Authorities Act, 1987

In 1987, Parliament enacted the Legal Services Authorities Act [hereinafter LSAA] which created a network of legal services institutions at the state, district and taluk levels. This was a heavily watered down version of the model that the expert committees had envisioned. *First*, the legislation confined the entitlement of a person to legal aid to filing or defending a case. The emphasis has thus remained on litigation-oriented assistance.⁴¹

Secondly, the institutional model of legal services delivery envisioned by the LSAA has its limitations. The manner of their

⁴¹ Section 12 of the LSAA confines entitlement to legal assistance to those filing or defending a case.

constitution, the structure, the funding and the functioning of the legal aid institutions involve a pervasive control by the executive and a co-optation of the judiciary for a collaborative venture. The lack of autonomy of the legal aid institutions challenges their ability to mount a credible challenge to the laws, policies and practices of the state that may result in deprivation or violation of fundamental rights including the right of access to justice. This also questions the ability to maintain the independence of the judiciary vis-à-vis the executive.

Thirdly, this also has a negative fallout from the point of view of the assisted person. Legal aid institutions are part of the institutions of the state and subject to state control. In effect, those requiring legal assistance have little participation in designing the legal services programme or in overseeing its implementation. As in many similar state-administered welfare programmes, the 'consumers' are disabled from demanding quality of services or accountability of the legal aid bureaucracy. This explains, in part, the reluctance on the part of the indigent person to look to legal aid as a reliable defence in a criminal trial.

Fourthly, the Rules and Regulations under the LSAA, which detail the structure and contents of the legal aid schemes in the different states, fail to account for the factors that led to the failure of the earlier schemes. For instance:

- they do not recognise the facets peculiar to the two broad divisions of the justice system – civil and criminal – that require a different approach to the question of providing legal aid; barring a few exceptions, there is no system in the states and union territories for making legal assistance available at police stations, magistrates' courts and prisons;
- the preventive and rehabilitative aspects of legal aid are not built into the programme; legal aid invariably begins and ends with court proceedings and is not made available at the pre-trial and post-trial stages; further, the legal aid needs of the victims of crime are not accounted for;
- the problems of the justice system are not addressed in a composite manner; the present schemes do not view the need for legal reforms as having to be simultaneously undertaken with the implementation of the programme for legal services;

- they offer few incentives to the competent lawyer to participate in the legal services programme – whether in the matter of preparation of panels of lawyers, or in fixing of fees payable for legal aid work or in developing certain measurable minimum standards of performance; they also do not encourage the participation of a wider base of legal service providers like paralegals, law academics and students; and
- there is absent a mechanism for evaluating the scheme with a view to examining its relevance to the needs of the people requiring legal assistance.

Lok Adalats: A Cause for Concern

State intervention in legal aid through the LSAA has shifted the focus of the legal aid programmes from persons in need of assistance to the institutions in which they are located. Two features demonstrate this. The first is the principal activity of the legal aid institutions under the LSAA - organising *lok adalats* for both civil and criminal cases pending in courts. The term 'lok' adalat is perhaps a misnomer since there is little involvement of the people in the actual decision-making process. This distinguishes lok adalats from the traditional modes of mediation and informal dispute resolution mechanisms. They are held within the court premises and the 'benches' comprise a judge, a lawyer and a social worker.⁴² A reference to the lok adalat can be made by any one of the parties to the litigation. The reasons offered for persuading the litigant to participate in the lok adalat – delay, prohibitive costs and uncertain result – acknowledge the failure of the justice delivery system. There are no appeals from the decisions of the lok adalat that record a compromise.⁴³ Lok adalats can dispose of compoundable criminal cases.⁴⁴

⁴² This is different from the concept of *lok nyayalayas* or 'people's courts' that the REPORT OF THE JURIDICARE COMMITTEE, 1977 [hereinafter 1977 REPORT] had suggested.

⁴³ The number of all lok adalats held up to June 30, 2001 is 1,06,552. In 1999, the figure was 15,198, in 2000 it was 26,025 and in the first six months of 2001 it was 9,066. According to Mr. S.M. Chopra, Secretary, NALSA, "so far about 38 lakh persons have availed of free legal aid in advice in the country." Interview on Oct. 18, 2001.

⁴⁴ In Delhi, for instance, on every second Saturday of the month lok adalats for criminal cases are held in the subordinate courts. Cases are listed for disposal before the magistrates in the courts. Lawyers appear as usual. Interview with the Secretary, Delhi State Legal Services Authority (Feb. 26, 2002).

Encouraged by the 'settlement' of a large number of cases,⁴⁵ the government has proposed to 'strengthen' the LSAA by permitting the lok adalats to dispose of a case on merits if no settlement is reached.⁴⁶ On the one hand, the holding of lok adalats is encouraged by the judiciary to settle accident claims cases, insurance claims and claims by banks against defaulters.⁴⁷ On the other, it is unclear what is happening to the litigant in individual cases on account of the mass 'settling' of cases. The organisation of lok adalats and legal aid camps has not necessarily been a success either because of the manner in which they were conducted, or because they were a farce with the cases being referred to the lok adalat even after a settlement had already been arrived at.⁴⁸ In criminal cases too, such exercises raise more questions than they resolve.

A second feature has been the co-option of legal aid institutions and legal aid lawyers in holding criminal courts inside jail premises. In sittings held periodically as part of the legal aid programme, petty criminal cases involving offences punishable with short sentences of three years and less are sought to be disposed of in bulk. At the hearing, legal aid lawyers appear for the accused but go along with the object of quick disposal of the cases by encouraging guilty pleas. The prospect of immediate release after being sentenced to the period of detention already undergone is enough of an incentive to an accused to admit guilt. This manner of disposal does not answer the demand of the accused for a fair, just and reasonable procedure but perhaps answers the need to preserve the legitimacy of the legal system that is beleaguered by lack of infrastructure and resources.

⁴⁵ According to Mr. S.M. Chopra, Secretary NALSA compensation of Rs.31.84 crores has been awarded in about 6.74 lakh cases.

⁴⁶ *Scope of Lok Adalat to be Widened*, THE HINDU, Jan. 9, 2002, at 13. This would be limited to cases relating to public utility services, other than banks and the railways, and to cases involving a claim of up to Rs.10 lakhs. The National Commission to Review the Working of the Constitution has also recommended that legal services authorities should make efforts to bring victims of crime and the accused together "to work out compounding of offences."

⁴⁷ In Rajasthan alone since 1985, 15,23,964 cases are said to have been settled and 39,624 persons benefited through the 11,574 Lok Adalats held up to June 2000. See Address by Dr. Justice A.R. Lakshmanan, Chief Justice Rajasthan High Court, 2 (3) NYAYA DEEP, 2000, at 16, 19.

⁴⁸ SUJAN SINGH, LEGAL AID: HUMAN RIGHT TO EQUALITY 313 (1998) (where he notes that 36% of the lok adalat cases were "already settled and kept pending for declaring an agreement at the next lok adalat").

Unutilised Resources

The experience gained in the implementation of the schemes that existed prior to the LSAA has not been systematically documented and analysed and then fed into the process of devising new schemes. For instance, the analyses have pointed out that:

- Legal aid does not account for all the costs that an assisted person has to bear. Worse still, each of the assisted persons ends up spending his/her own money.⁴⁹
- The actual coverage of legal aid schemes in a state is unsatisfactory with the most disadvantaged classes not benefiting from them.⁵⁰
- Legal aid committees may end up not spending the amounts allocated to them on legal aid.⁵¹

The irony of unutilised resources, in a situation where the extent of the 'unmet area' of legal services is formidable, continues even seven years after the implementation in 1995 of the LSAA. A substantial portion of the funding of the state legal services authorities is by grants made by the National Legal Services Authority. For the legal services authorities of thirty-three states and union territories including the Supreme Court Legal Services Committee, NALSA made an aggregate grant of Rs.23.55 lakhs in 1995-96. This rose to Rs.59.91 lakhs in 1997-98 and Rs.2.54 crores in 1999-2000. In 2000-2001 NALSA made an aggregate grant of Rs.3.32 crores for only thirteen of the thirty-three

⁴⁹ *Id.* at 312. "The sample study brings to surface that every beneficiary of legal aid has to spend money from his own pocket and 94.6% of such beneficiaries spend from Rs.200 to Rs.500 or more. In none of the cases the aid is given during investigation but it get delayed even during court proceedings."

⁵⁰ In Himachal Pradesh only 57 persons in 1982-83, 77 persons in 1983-84 and 77 persons in 1984-85 could receive legal aid. Further not a single person belonging to the scheduled castes and scheduled tribes could get legal aid even up to 1984-85 in the tribal districts i.e. Kinnaur and Lahaul-Spiti. See P.L. Mehta, *Free Legal Aid Movement: A Theory and Practice in Himachal Pradesh*, 13 ISLJ 77, 89 (1987).

⁵¹ *Id.* "There are about thirty district/sub-divisional legal aid committees which did not spend even a single penny on the legal aid scheme. The position of utilisation of grants reveals that out of Rs.2,38,000 given to various legal aid committees, only a sum of Rs.53,498.82 could be utilised up to 30.9.84."

states and union territories and the Supreme Court Legal Services Committee which indicated that only these many authorities had been able to spend the grants made in the previous year.⁵²

Unaffordability of the costs of legal aid cannot therefore be a legitimate ground for its ineffective implementation and reach.

Unlike the Committees that examined the issue in 1973 and 1977, the state no longer views legal aid as constituting a tool for reform of the legal system and as being integral to it. Neither in the planning for improving the substantive and procedural content of criminal laws nor in the efficient working of the courts, does the need to provide legal services to the poor form an important component. Legal aid is seen as a welfare measure to which the recipient has no 'right.' It therefore does not come as a surprise that the legal services that are presently available are poorly utilised. The reasons could be general lack of awareness of the availability of legal aid, the belief that a person who gets help for 'free' is disabled from demanding quality service and thirdly, the disinterestedness of lawyers and legal aid administrators in providing competent legal assistance. Resultantly, there has been a poor utilisation of the funds available for legal aid.

Fast Tracking Criminal Cases

The Central Government in April, 2001 accepted the recommendations of the Eleventh Finance Commission and commenced the establishment of fast track courts throughout the country to tackle the mounting arrears of civil and criminal cases.⁵³ This was essentially aimed at speedier disposal of pending cases and the costs budgeted for included the salaries payable to the judge and court personnel, and infrastructural facilities like building and transport. It did not account for either the need or the costs involved in providing legal aid to indigent accused, if any, in the cases assigned to these courts.

⁵² Of these only Mizoram, Rajasthan and West Bengal applied for further grants in the first quarter of April-June 2000. See 4 (2) NYAYA DEEP, 2001, at 27. The other ten states had not utilised the grants made to them.

⁵³ A total of 1,015 fast track courts have been set up till January 31, 2002 and an amount of Rs.188.93 crores had been released by the central government to the state governments for the purpose. See PIB Press Release (Mar. 4, 2002) cited in 32 CHARTERED SECRETARY, 2002, at 533-34.

Tribunalisation

Among the devices that the state has adopted is the tribunalisation of disputes, with the ostensible purpose of relieving burden of the judiciary even while not strengthening its basic infrastructure. Thus, we have specialised tribunals for dealing with disputes relating to tax, labour, services and consumer disputes. Recently, the Code of Civil Procedure was amended to encourage parties to a litigation to be persuaded to opt for alternate dispute resolution [hereinafter ADR] mechanisms like mediation, conciliation, arbitration or lok adalats.

B. Response of the Judiciary

Following the landmark decision of the Supreme Court in *Maneka Gandhi v. Union of India*,⁵⁴ there were a series of decisions declaring legal aid as a fundamental right and integral to a just, fair and reasonable procedure as contemplated by Article 21 of the Constitution. The judiciary played a decisive role in raising it beyond a statutory right to an enforceable fundamental right.⁵⁵ The directive principle regarding free legal aid in Article 39-A was used to interpret the scope and content of the right.⁵⁶

Public Interest Litigation

The judicial innovation of public interest litigation [hereinafter PIL] was activated essentially in response to the need for access to justice for a large number of under trial prisoners languishing in jails in Bihar for periods of time long beyond the maximum sentence they would have had to serve had each of them been convicted. In the earliest of the PIL cases, *Hussainara Khatoon v. State of Bihar*,⁵⁷ the Supreme Court recommended release of the indigent prisoner on personal recognisance bonds, rather than on unaffordable monetary bail bonds. Another instance of creative judicial activism was in moulding reliefs for rickshaw pullers from Punjab facing problems of obtaining finances to purchase rickshaws.⁵⁸

⁵⁴ (1978) 1 SCC 248.

⁵⁵ *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 544; *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81; *Khatris v. State of Bihar* (1981) 1 SCC 623; *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

⁵⁶ *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 544.

⁵⁷ (1980) 1 SCC 81.

⁵⁸ *Azad Rickshaw Pullers' Union v. State of Punjab* (1980) Suppl. SCC 601.

PIL was seen by the judiciary as answering many of the problems thrown up by the formal legal system in providing access to justice. Thus, any public spirited person could bring forth a case before the High Courts or the Supreme Court even though such person was not seeking any relief but agitating the case on behalf of and for the benefit of an indeterminate mass of people with a similar grievance. Secondly, the requirement of a formal petition, drawn up in legal language, was dispensed with. Any letter or even a telegram addressed to the court would suffice. Thirdly, the court would go on with the case on the basis of the facts, however brief, brought before it as long as the issue was one of genuine public interest. It would appoint *amicus curiae* to present the case before it, appoint commissioners to verify the facts and expert committees to advice on how to deal with matters of a technical nature. The past two decades have witnessed a range of PIL cases on diverse issues – human rights, environment, public accountability, judicial accountability, education, to name a few. With it has come the inevitable attempt at misuse of the jurisdiction by interlopers and busy bodies on the one hand and the overreaching of their own powers and jurisdiction by the courts on the other.⁵⁹

The trend of PIL cases and decisions in the recent past reveal a distinct shift from issues concerning access to justice for the poor to other issues of public interest which at times even conflict with the rights of the poor. Thus, PIL raising environmental concerns like protection of forests may bring about judicial verdicts that curtail the rights of forest dwellers and tribals to access community resources essential for their livelihood.⁶⁰ In the context of the criminal justice system, there has been an increased concern with the rights of the victims of crime,⁶¹ and more importantly, to the problems of the judiciary.⁶² Thus, the right to speedy trial of an accused was seen from the perspective of the legitimacy of the institution in the eyes of the victim as well as

⁵⁹ See generally Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 159 (B.N. Kirpal *et al.* eds., 2000).

⁶⁰ *Pradeep Krishen v. Union of India* (1996) 8 SCC 599; *Animal & Environmental Legal Defence Fund v. Union of India* (1997) 3 SCC 549.

⁶¹ *Delhi Domestic Working Women's Forum v. National Commission for Women* (1995) 1 SCC 14.

⁶² *P. Ramachandra Rao v. State of Karnataka* (2002) 4 SCC 607.

the manageability of the problem from the point of view of the institution. Nevertheless, given the number of areas in the functioning of the justice system that require to be reformed to respect the right of access to justice, the use of PIL in initiating law and institutional reform requires to be encouraged and persisted with.

Role of the Judiciary under the LSAA

The central role of the judiciary in the scheme of the LSAA and the committees constituted under it and also its role in the organising of lok adalats have already been mentioned. What makes this proposition attractive to the judiciary is the possibility of reduction of the case load arrears with the mass disposal of cases. However, it requires to be emphasised that the quality of justice that is ultimately meted out to the litigant is what will determine the legitimacy of the system. There is every reason to believe that a person who is agreeing for a settled verdict in a lok adalat is not doing it out of a sense of satisfaction at having been dealt with fairly. The reasons actuating the decision to settle are negative and reflect poorly on the functioning of the judicial system itself. A litigant is moved to settle the dispute for reasons of uncertainties, delays and expense in pursuing litigation in courts. The judiciary also plays an important role in constructing the legal services programmes as well as the preparation of panels of lawyers who will participate in such programme. The question of fixing fees to be paid to such lawyers is also within the domain of the committees which are headed by judicial officers. A concrete response to the expectations of its role under the LSAA is still awaited from the judiciary.

C. Civil Society's Response

Every system throws up a set of reactions among civil society. Those refusing to acknowledge the growth of mass movements and peoples' home grown responses to the need for access to justice do so at their own peril. One of the principal problems is the formal legal system's inability to accommodate the demands for change from peoples' movements.

However, there have been instances where the system has been compelled to respond as it did to the women's movement in the early 1980s. The changes in the substantive criminal law governing the

offences relating to violence against women including cruelty and rape are due to the concerted campaign by women's groups.

But not all movements have been able to persuade policy changes by the State. Witness the massive struggle for protection and enforcement of economic and social rights of tribal populations in the form of the Narmada Bachao Andolan. While the movement may have succeeded in giving the issue visibility, it has been unable to change institutional behaviour that acknowledges the needs of access to justice of people facing displacement on account of large 'developmental' projects. The law and policy divide deters courts from intervening to protect the basic rights of people.⁶³ A positive instance of an NGO persuading the courts to intervene in the area of economic rights is the right to food petition filed in the Supreme Court two years ago by the Peoples Union for Civil Liberties. Faced with the undisputed facts of government godowns overflowing with food grains and people in Rajasthan below the poverty line [hereinafter BPL] facing starvation deaths, the Supreme Court gave a series of directions to ensure distribution of free supplies of food grains to BPL families and to the "aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them."⁶⁴ In addition, the court appointed a committee of two highly respected and committed individuals to oversee the implementation of its directions. The case now involves not just the State of Rajasthan but every state in the country.

Yet another example of a mass movement compelling law and policy changes is the Mazdoor Kisan Shakti Sangathan [hereinafter MKSS] based in Rajasthan. The movement for freedom of information has received tremendous impetus from the concerted campaign of the MKSS which began with demanding information from panchayats on the expenditure incurred on projects meant to serve the needs of villagers. The right to information is an invaluable tool in the struggle for access to justice. We now have the Right to Information Act, but it has to be operationalised both at the centre and the states. A small beginning nevertheless.

⁶³ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664.

⁶⁴ *Peoples Union for Civil Liberties v. Union of India* (2001) 5 SCALE 303.

The informal dispute adjudication mechanisms constructed by peoples' movements also needs to be studied and understood. While some of the decisions handed down by caste panchayats or informal bodies set up by armed resistance groups may militate against our sense of justice, we need to acknowledge that these mechanisms may often be the only one available for redress to vast sections of the rural population. We cannot talk of access to justice to this section, which constitutes the majority, if we do not address the challenges posed by the alternate mechanisms. Within the urban set up, there is a growing consumer movement that demands quality service and government accountability. The available avenues of redress to such movements are invariably the courts (through PIL) or the consumer tribunals, both of which are already overworked. The response of civil society serves to remind that there is yet a large uncovered and unmet area of legal services which the formal legal system is unable to meet. The answers to the need for legal reform to make the system relevant and respond to the needs of people lies in the experiences of peoples' movements.

III. INFORMAL BARRIERS TO JUSTICE

We have already noticed the acknowledged barriers that are encountered by the disadvantaged in their interaction with the legal system. What is significant though are those barriers that are never fully and formally acknowledged. It is these that challenge the legitimacy of the system and threaten to render meaningless any attempt at reform.

A. 'Hidden' and Other Costs

One disincentive for a person to avail of legal aid offered is the problem of uncompensated costs that have to be incurred. Legal aid schemes do not account for the 'hidden' costs incurred by those brought involuntarily into the system either as victims or as accused. While the legal aid programme may pay for court fees, cost of legal representation, obtaining certified copies and the like, it usually does not account for the bribes paid to the court staff,⁶⁵ the extra fees to the legal aid

⁶⁵ For a study pointing to corruption prevalent in the district and subordinate courts in Delhi see, V.N.Rajan & M.Z. Khan, *Delay in Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi* (Institute of Criminology and Forensic Science, 1982). (It was seen that those who greased the palm of the readers and peons were able to get adjournments readily while others waited outside the court helplessly, to those who were unwilling to part with money, these court officials were not prepared even to tell whether the presiding officer would come and the cases would be heard or not). *Id.* at 42.

lawyer,⁶⁶ the cost of transport to the court, the bribes paid to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours.⁶⁷ Legal aid beneficiaries do not get services for 'free' after all.⁶⁸

At the end of a long litigation, where the person emerges innocent, he is not awarded the costs of the litigation.⁶⁹ Thus, the amount of time and money spent on establishing innocence remains unrecoverable and non-compensable. Equally it is a loss to the victim of the crime and to the taxpayer whose money has gone into funding the entire prosecution exercise. There are other disincentives too.

B. Lawyers Resistant to Change

The 1977 Judicare Committee had commented on the inappropriateness of the legal profession, as presently ordered, to deal with the problems of the poor. It noted:⁷⁰

The two major touchstones of traditional legal practice - the solving of legal problems and one to-one relationship between attorney and client - are either not relevant to poor people or harmful to them. Traditional practice treats poor people by isolating them from each other and fails to meet their need for a lawyer by completely misunderstanding that need. Poor

⁶⁶ What is galling is that many sleazy lawyers who get legal aid cases tell the poor victims that if they want result they must pay them extra over what the Tamil Nadu Legal Aid Board pays them. Siraj Sait, *Save the Legal Aid Movement*, THE HINDU, June 29, 1997, at 5.

⁶⁷ KUMKUM CHADHA, THE INDIAN JAIL: A CONTEMPORARY DOCUMENT 31 (Vikas Publishing Pvt. Ltd.) (describing the system of a 'setting' for various tasks involving the prisoner having to depend on the jail official in Tihar Jail in Delhi: "A minimum 'setting' even for the official to *consider* the request is Rs.500." [emphasis in original])

⁶⁸ An empirical study of the working of legal aid schemes in Punjab showed that beneficiaries of legal aid complained that "they were provided only the services of a counsel and nothing beyond" and that they "had to spend amounts varying between Rs.100 to 900 for their cases in lower courts." SINGH, *supra* note 48, at 272.

⁶⁹ In the *Rajiv Gandhi Assassination case*, *State v. Nalini* (1999) 5 SCC 253, nineteen of the twenty-six accused were acquitted of all the serious charges by the Supreme Court eight years after they had been arrested and kept in custody throughout without a single day's bail. The trial court had sentenced each of them to death. The Supreme Court awarded them no costs for the wrongful conviction.

⁷⁰ 1977 REPORT, at 24.

people have few individual legal problems in the traditional sense; their problems are the product of poverty and common to all poor people.”

Therefore, it recommended that, “the legal services programme should not identify lawyers with law but should even pose them against law, wherever law is the reflection of an unjust social order, for, after all the objective of the legal services programme should be social and economic justice.”⁷¹ The legal profession is yet to respond to this demand for change.

On the contrary, a recurring feature of every attempt at bringing in changes in the legal system is the protest it invokes amongst the community of lawyers. The recent example is the protest by lawyers to changes in the Code of Civil Procedure including one that sought to curtail the number of adjournments that could be granted in a case. Lawyers also protest against tribunalisation particularly where, as in family courts, the presence of a lawyer can be dispensed with. The memories of the violent protests by lawyers in Chennai to the creation of a Bench of the High Court in Madurai still linger. One would wonder why lawyers would not be concerned with improving access to justice for the litigants. One reason may lie in the fact that the development of the legal profession reflects in many senses the inequalities, both economic and social, that are to be found in society itself. A small percentage of successful lawyers control most of the work. Lawyers also get co-opted in the ways and means of institutional functioning. They are unable to resist the gradual deterioration in the functioning of the institutions and appear to have lost the moral standing to enforce accountability. Richard Schwartz, in a study of the Indian legal profession, has noted that, “limitation of legal activity largely to litigation leaves the Indian lawyer far from the centre of power in contemporary India” and that “a significant failure of the legal profession was to produce real changes in the life conditions of the underprivileged segments of Indian society.”⁷²

The unrealistically low levels of fees offered to lawyers on legal aid panels, the non-insistence on minimum standards of professional

⁷¹ *Id.* at 25.

⁷² Schwartz, *Reflections on the Status and Functions of the Indian Lawyer*, 1 KERALA U. L. REV. 17, 21(1968).

competence in legal aid work and the failure to consult lawyers in developing legal services programmes explains the general indifference displayed by lawyers to improve access to justice. It is unfair to expect lawyers to subsidise what is essentially the responsibility of the state.

C. The Legal System as Oppressor

Even an ideal mix of a legal aid programme may have to overcome obstacles before it can attract consumers. This may be on account of a variety of factors – distrust of the legal system including its processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian; seeing the whole legal process as of nuisance value resulting in irreversible consequences, an uninvited ‘trouble’ that has to be got rid of.

There is a need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. Since it operates to oppress and disempower them, they have to devise ways of avoiding it rather than engage with it. Without fundamental systemic changes, if legal aid attempts at getting people to engage with the system, however promising the results may seem, it is bound to be viewed with suspicion.

The economic stakes for those currently working the system to suit their ends is too high to permit any meaningful change that can threaten their source of living. As demonstrated by Hernando de Soto in the context of Lima, the parallel system, which started as a by-product of the formal system, has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.⁷³ For the last of the groups mentioned, the engagement with the criminal justice system as accused is not a matter of choice. For the others, it becomes a source of additional means of livelihood. The attitude towards maintaining the status quo therefore gets firmly entrenched. This constituency has also managed to use the existing system for their own benefit. There exists a system of pre-paid legal services for those involved in organised crime rackets and other ‘criminalised’ trades. This indeed demonstrates how ‘violators’ are able to organise themselves

⁷³ HERNANDO DE SOTO, *THE OTHER PATH* (1989). This seminal work could form a model for initiating a study of the working of the criminal justice system. This might reveal the actual costs involved in several stages of the system.

better and engage with the system to the mutual benefit of the police, the court staff, the lawyers and themselves.

Thus, without fundamental changes in the behaviour of the personnel manning the institutions that comprise the legal system, the mere provision of legal services may not alter the way in which the poor are treated within it.

D. Failure to Integrate the Non-Formal Legal System

Not accounting for the impact of the non-formal legal system might hamper the acceptability of the legal aid programmes, located as they are at present, within the formal legal system and more particularly within the institutions of the latter. It must be noticed in this context that although non-state legal systems may not be the most appropriate to deal with complex criminal law issues, they continue to be relevant to a majority of the rural masses in the country, to whom the formal legal system remains alien and oppressive.⁷⁴ Professor Upendra Baxi tells us:

The state legal system, pervasive in urban areas, is only slenderly present in rural areas. The low visibility of the state legal system, and its slender presence, renders official law (its values and processes) inaccessible and even irrelevant for people. Other factors (such as the language of the law, which is alien to about 95 per cent of the people) compound the distance between the state's law and the subjects.

The 114th Report of the Law Commission on Gram Nyayalayas sought to increase the jurisdiction of these grass roots adjudicatory mechanisms in a significant way in order to make justice accessible to the rural masses. This report, like the many preceding it and succeeding it, has gathered dust.

IV: REDEEMING THE CONSTITUTIONAL PROMISE

A. We may have tried, we may have erred, but we have to begin again, with hope

The need for law reform as an integral part of the larger legal aid agenda, particularly in the law and poverty context, cannot be

⁷⁴ For an illuminating account of the conflict between the state and non-state mechanisms in the context of a criminal trial arising out of the death of a young woman in a village in Gujarat see, Upendra Baxi, *Popular Justice, Participatory Development and Power Politics: The Lok Adalat in Turmoil*, in FROM PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS 171 (A. Állot & G.R.Woodman eds., 1985).

overemphasised. While legal aid cannot claim to solve the problems of the legal system or of the poor, it can initiate law and institutional reform, prevent abuse of power and violations of rights and ensure equal access to justice.⁷⁵ It can "make the rule of law a dependable ally of the weak and liaison between the statute book and the deprived."⁷⁶

The general apathy towards the poor and the problems of providing legal aid to them is perhaps rooted in the perception that, "those who fail deserve condemnation for their failure rather than assistance from its consequences. Aid, if granted, is merely a matter of 'grace' or 'charity,' dispensable welfare which also serves the giver's psychic needs."⁷⁷ The continued criminalisation of activities of the poor only exemplifies the truism that, "law is an important mode of symbolic communication of community value judgments."⁷⁸ While it certainly poses challenges to those who believe in equality of the law and equal protection of the law, it provides an opportunity to demonstrate that, "adequate resources allocated to the entire defence of impoverished accused persons – from the station house to final release – may well lead to greater realism and less mythology about crime and criminals."⁷⁹ Legal aid schemes will require to pay special attention to persons brought within the criminal justice system not for committing crimes, but for being poor.

Institution centric model must give way to a people centric model. The approach to the problem has to be posited on firm jurisprudential and constitutional footing. At another level, we need to re-look at the programmatic content of our legal services delivery mechanisms.

⁷⁵ Legal aid cannot be a substitute or a panacea for the ills of our system of justice. It can be a watchdog, it can be a catalyst, it can spur research and reform but it cannot reach every injustice, every client, every cause. Nevertheless we believe that a commitment to legal and procedural reform is a key element of legal aid, as is its commitment to assistance in litigation and advice, and machinery for both must be implemented. It must dedicate itself to being a movement of reformation. See MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, PROCESSUAL JUSTICE TO THE PEOPLE, REPORT OF THE EXPERT COMMITTEE ON LEGAL AID, MAY, 1973 at 16 [hereinafter 1973 REPORT].

⁷⁶ *Id.* at 10.

⁷⁷ Harold Solomon, 'This New Fetish for Indigency': *Justice and Poverty in an Affluent Society*, 66 COLUM. L. REV. 248, 256 (1966).

⁷⁸ *Id.* at 269.

⁷⁹ *Id.*

Jurisprudential Basis

The talisman of Mahatma Gandhi offers the most convincing principle yet on which to base our laws, policies and programmes. This talisman requires us to ask if the step contemplated would benefit the weakest person. The rubric 'weakest' encompasses not only social or educational or economic disadvantage. It envisaged a functional incapacity which can be experienced by anyone, at anytime, anywhere. In the context of the interaction of poverty and the criminal justice system, the report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (Allen Committee) in the U.S. in 1963 is both instructive and relevant. The Committee rejected the concept of 'indigency' with its notion of total financial destitution and its welfare ideology. It preferred a flexible concept of poverty which it recognised as, "the functional incapacity to obtain in adequate measure the representation and services required by issues, *whenever and wherever they appear.*" It is perhaps a matter of coincidence that the same basic principle finds an echo in John Rawls' formulation of the two principles of justice:⁸⁰

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions; first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

This offers us a useful jurisprudential basis for the legal services programme premised as it is on the acceptance of the non-derogable constitutional tenet of equal access to justice for every person. What this translates essentially into is this. We proceed on the footing that society's social and economic inequalities are given; that although every person does have the same claim to basic liberties as every other person irrespective of their situational disadvantage (for instance on social,

⁸⁰ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 42 (Erin Kelly ed., 2004, Indian Reprint).

economic or political standing), it is more realistic to aim to minimise the disadvantage through laws, programmes and policies rather than seek to bring about equality in every sense of the term. That is how we understand the term, "greatest benefit of the least-advantaged members of society."

Models of Legal Services Delivery: Lessons from other Countries

We now turn to the programmatic content of the kind of legal services delivery system that we contemplate. The need to provide legal representation in cases continues to be the principal form of legal aid. The types of representation that are prevalent in our system are:

- the judicare model
- the *pro bono* system and
- the amicus curiae system.

Given the extent of the 'uncovered' area and 'unmet' need of legal services, a combination of these models, as is being mooted at present in the United Kingdom, requires to be tried out. For instance, in serious criminal cases involving offences punishable with imprisonment of over seven years, the judicare model could be adopted where the legal aid bodies will engage the services of an experienced lawyer and pay fees on a reasonable scale - not perhaps what the market is able to afford but something less but then again not illusory as it tends to be at present.

What has not yet been tried, except once (and that too unsuccessfully) in Kerala in 1978, is the public defender or salaried lawyer model. Under this system, lawyers work full-time as legal aid counsel and are paid a fixed sum as salary. The public defender model has been tried and tested in the U.S.A and is being sought to be introduced in the U.K. largely on account of its cost efficiency. Although concerns have been expressed in the U.S.A about the institution of public defender, in terms of effectiveness and independence, it may be a mode worth emulating since the Indian situation would require a combination of approaches. The salaried model may work well in the disposal of petty cases involving large numbers of individual defendants, involving similar circumstances and not requiring complex trials. It may also work well in cases that may be disposed of by a summary procedure. Care should

be taken to ensure that competent and committed persons are chosen and that they should be paid salaries on par with government advocates.

The questions of quality and of choice require to be addressed. This lends assurance to the person assisted that the right to access to justice is not a formal but a substantive right. It should be possible, in consultation with the legal profession, to evolve standards on the lines of those developed by the American Bar Association in the context of the public defender programme. The criticism that standards need to be evolved *in advance* and not wait to be evolved on a case by case basis holds good for the Indian scene as well.

On the lines of the proposals now mooted in the U.K. it should be possible to offer the indigent defendant a choice of counsel at least in those cases involving serious consequences for life and liberty, for e.g., cases involving the death penalty.

The other system that can be adapted is the duty solicitor scheme, which has been tried and tested in the U.K. It may serve the criminal legal aid system in India well, particularly in the areas of poverty law and legal aid. The reasons for the failure of the earlier attempts need to be analysed in order to design a model that would suit the present needs. The presence of duty counsel at police stations might serve a dual purpose. It could act as a deterrent to custodial violence and it might also help in enforcing accountability for state action. Thus, it could perform a crucial preventive role.

With a view to expand the legal service provider base, the South African model which accommodates paralegals, law academics and law students is capable of being adapted to the Indian context. In the area of poverty, law and legal aid, this could provide the necessary back-up service to the legal aid lawyer. Thus, paralegals and students could be deputed to visit custodial institutions to ascertain the details of the inmates in need of legal assistance and provide the input to the lawyer for the case in the court.

B. Law Reform Facilitating Access to Justice

It bears repetition that access to justice is not only about ensuring that a poor litigant does not go unrepresented in court. A series of other

measures will have to be put in place so that the legal system itself does not become so oppressive as to dissuade a person from invoking its remedial processes. What are these measures that cannot be delayed any longer? A few have been listed out:

- *Simplification of procedures* that at present tend to obfuscate and confuse the lay person. This, however, should not lead to dispensing with basic procedural safeguards that are essential for fair justice.
- *Standardising of forms of pleadings* that vary from the courts at the ground level to the Supreme Court. In fact, this is a major stumbling block in the attempt at computerising the system of filing of cases in courts.
- *Demystification of the law and the legal process* which too often intimidates and confuses the user of the system. The archaic forms of address, the imposing nature of the garb of lawyers and judges needs to be re-examined from the point of view of those for whose benefit the system functions.
- *Dialoguing with other disciplines.* The concern with access to justice is not, and ought not, to be the exclusive concern of judges and lawyers. Inputs from other disciplines are an essential part of any decision taken to improve the system. The issues that are brought forth for adjudication increasingly involve questions that properly belong to other disciplines. Thus, an economist, a sociologist, an anthropologist, a linguist and a historian may have useful suggestions to make on how to improve the system to make it accessible and affordable.
- *Auditing the system from several angles.* It would be from the point of view of:
 - *Physical accessibility.* For e.g., the question that needs to be addressed is, 'Is this court building designed to facilitate access to a disabled or differently enabled person?' At another level, 'Is there a place in the court premises where the litigant can readily access information about her case, the lawyer and where to find

public utility services?’ The system prevalent in the courts in U.K. is the best example of this and can be adapted here with no unmanageable cost. Geographical proximity of the court to the largest divisional sector of the population is a relevant factor. In this context, it is submitted that the recent decision of the Supreme Court to turn down the request for establishing benches in four different regions in the country cannot be based, as it appears to have been, only on concerns of unity of the institution. Such a decision will have to account for the needs of easy access to justice for those invoking the court’s jurisdiction.

- *Language comprehensibility.* The language of the law must adapt itself to the language of the user of the legal system. The language of the law should help in rendering the legal system comprehensible to its user. There could be, as is prevalent in England, a periodic audit and correction of the language used in the Rules/Acts, forms etc to ensure that they are comprehensible to the person on whose behalf they are being invoked/challenged.
- *Affordability.* How much does it cost the tax payer to have the legal system functional and what are the losses incurred by a litigant if any period of the court’s functioning is disrupted? Analysis of the same would help assess whether the system is cost-efficient and what must be done in order to set it right.
- *Non-discrimination.* This is to ensure that everyone has equal and effective access and the barriers in terms of economic, educational and social disadvantages or account of age or sex do not affect the quality of such access.

Enhancing Accountability of Institutions

A second set of reform proposals touchstone are based on the need for accountability of the institutions that comprise the legal system, of which the legal services institutions form part. This entails:

- *Transparency* in the functioning of both the Bar and the Judiciary. Decisions affecting the system in general and the litigants in particular must be taken in an informed manner after an effective consultation with as representative a cross-section of the users of the system.
- *Sharing of relevant information.* This is happening in a small measure through the device of websites on the internet. However, the reach of the internet vis-à-vis a large majority of the litigant public is undoubtedly minimal. Alternate ways of dissemination of information would have to be thought of.
- *Willingness to receive and deal with complaints.* This would involve introspection on the strengths and weaknesses in the functioning, frank assessment of what requires to be done. The promptitude with which a complaint is attended to would determine its efficacy.
- *Introspection and interrogation.* This involves a periodic review of the efficacy of the system failing which it can cease to be relevant to a large majority of those who are vitally interested in the functioning of the legal system. The system derives its legitimacy from those whom it seeks to serve.

Agenda of Legal Services Committees

The third set of proposals is about the optimum utilisation of the existing network of Legal Services Committees. How should they reorder their priorities so that the system responds to the needs of the people for whom it is supposed to function? In this context, we have to re-examine the notion of legal aid as providing 'quality' justice, not just in terms of providing legal representation in cases in courts but legal services even at the point of entry into the system.

- *Law and institutional reform litigation.* One of the key activities of the legal services committees which has remained unrecognised, and remain neglected is the initiation of law and institutional reform litigation particularly in the context of laws that criminalise the activities of the poor. Thus, it is important to question the validity of vagrancy laws, the

justification for the insistence on monetary bail bonds and sureties irrespective of the capacity of the accused, the functioning of penal custodial institutions that hold vagrants, mentally ill, sex workers and women and children in prison like conditions. PIL and test litigation would continue to be a strategic arm of the legal aid movement.

- *Identifying core areas for intervention.* For the legal service committees to perform an effective interventionist role they have to start identifying the core areas which have been neglected for long. For instance, the problem of untouchability which is practised with impunity. How else do we explain the continuance of the abhorrent and demeaning practice of manual scavenging of dry latrines? What can we do to ensure that the law enacted in 1993 prohibiting such practice is actually enforced and those made to work in such degrading tasks are actually rehabilitated? Then there are the issues of female infanticide, child prostitution, child labour . . . the list may seem long but each of them requires action by civil society.
- *Neighbourhood law offices.* Legal services committees could experiment with working on the pattern of neighbourhood law offices. They would be located in the community and employ a few lawyers as well as other legal service providers belonging to different disciplines on a full time basis. Such offices would coordinate with other agencies including the government offices, police, the courts and the various commissions. They would depute panel lawyers or paralegals or law students to visit these offices, police stations, prisons and other custodial institutions to ascertain the details of those in need of legal assistance and help set the legal processes in motion. They would also act as advice centres that could be accessed at any time of the day.

A long wish list indeed. However, the same is not a matter of choice as it involves the lives of our fellow beings. Roger Cramton points out that, "in a society that values the dignity of the individual, the role of legal services in helping the poor to help themselves must remain the

basic justification."⁸¹ An even more powerful justification, rooted in the very legitimacy of the legal system, was provided in 1963 in the U.S.A by the Allen Committee which studied poverty and the administration of criminal justice. It pointed out that:⁸²

The survival of our system of criminal justice and the values which it advances depends upon constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.

Similar observations were made by the 1973 Expert Committee chaired by Justice Krishna Iyer while explaining the core principles that comprise the concept of legal aid:⁸³

The *spiritual essence* of a legal aid movement consists in investing law with a human soul; its *constitutional core* is the provision of equal legal service as much to the weak and in want as to the strong and affluent, and the dispensation of social justice through the legal order. The *political thrust* of the movement is that if legality lets down the masses and protects, in actual working, only the upper bracket, anti-law will become a way of life of the numerous poor, the people being prone to seek justice in the streets in preference to the law in the courts. [emphasis supplied]

CONCLUSION

In the ultimate analysis, what the situation demands is a transformation from within each one of us. To tell ourselves that as a

⁸¹ Roger Cramton, *Why Legal Services for the Poor?*, 68 A.B.A.J. 550, 554 (1982) (observing that representation of the poor often reduces the workload of government agencies by putting the claims of poor people into a comprehensive form so that they may be handled easily and cheaply. Even if the increased costs exceed the savings, the government's compliance with the rule of law enhances its legitimacy, which is itself of substantial value).

⁸² REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE cited in Solomon, *supra* note 77, at 252.

⁸³ 1973 REPORT, at 10.

society, we care. That we care about human dignity and basic rights and that we believe that each of us has to preserve them for everyone else. Access to justice cannot be the concern of only the state, the lawyers and the judges. It has to and does concern every one of us.

BOOK REVIEWS

THE NEW UNIVERSE OF HUMAN RIGHTS

By Justice J.S. Verma

Universal Law Publishing Co. Pvt. Ltd. (2004)

Pp. 377; Rs.395/-

There are very few subjects in contemporary times on which so much is written by so many persons from different walks of life as 'human rights.' Yet, so much still remains to be discerned and discussed to make human rights a central concern of justice and governance, nationally as well as internationally. In this context, the book under review is a welcome contribution coming as it does from a person who interpreted human rights while he was a Judge of the Apex Court and later monitored its implementation when he assumed the role of a Commissioner in the National Human Rights Commission [hereinafter NHRC]. He seeks a broad vision of the meaning of human rights encompassing human dignity in every aspect of human life. This is indeed the author's concept of the "new universe" of human rights as reflected in the collection of essays contained in the volume. The major part of the Book is based on lectures delivered on different occasions. The author has attempted with some degree of success to link them all together under the broad theme of Constitutional Governance. The message is that the degree of human rights protection will determine the quality of governance and the ultimate test of justice lies in promising life with dignity to all the citizens.

Whether one goes by Amartya Sen's approach of highlighting "Freedom" as the essence of human rights or Justice Verma's attempt to locate it on "Dignity," the fact remains that for a vast majority of people in the developing world, the key question continues to be survival or basic needs. Unfortunately, public discourse on human rights has been almost exclusively on civil and political rights leaving very little space for "survival rights." They were seen as part of the development debate,

a third generation issue in human rights agenda to be addressed by each country according to its needs and resources. The consequent tensions between the two Covenants were explained in terms of indivisibility and inter-dependence which did not help to advance "dignity" as the central issue in human rights protection. One can see the predicament reflected in the Convention on Child Rights where a feeble attempt has been made to integrate the two sets of rights to make it meaningful to the right-holder.

A similar approach was adopted at the domestic level also, where socio-economic rights were consigned, as Directive Principles not enforceable through Courts. The legislative route to realise survival rights for those below the poverty line proved to be uncertain and too little too late. The Supreme Court's attempt to read some of the Directives into the interpretation of right to life and right to equality therefore was of great strategic significance in mainstreaming basic needs in the human rights discourse. Between the Supreme Court and the NHRC a 'new universe of human rights' was discovered and a set of appropriate reliefs/remedies identified to make human dignity an issue in Constitutional governance. As the author puts it, "... If we fail here, all talk of human rights movement would only sound a verbal jugglery against large portion of humanity suffering destitution and indignity." (p.21) According to the author, Human Rights Agenda for the twenty-first century, at least for India, should focus on distributive justice, inclusive democracy (democracy involving all sections with substantive equality), gender justice, poverty eradication, sustainable development and human resource development.

A large part of the Book is devoted to the role assumed and played by the Indian Judiciary in the matter of protection and expansion of human rights. Public Interest Litigation, democratisation of judicial remedies, concept of constitutional torts, domestication of international human rights instruments, correlation of rights and duties, enhancing standards of compliance through partnerships and continuing mandamus, are all steps which judicial activism generated in the cause of human rights. In the process, concepts of democracy, development, accountability, equality and freedom have gathered new meanings enriching the reference point to judge governance and mobilising more and more people to repose faith in the system of governance under rule

of law.

The second part of the Book consisting of fifteen short pieces cover disparate topics ranging from ethics, judicial delays, civil services and humanism, which the author suggests, relate to 'governance.' He justifies their inclusion stating that there are clear linkages between human rights and governance. In a couple of pieces in this part, the judge reflects on few of his own judgements and demonstrates how he tried to use the human rights jurisprudence to reform governance using judicial processes.

In the Preface to the Book the author has explained the object of publication of the miscellany in the following words, "... it is intended as an insight into my perception of human rights, which guided my role as the Chairperson of the National Human Rights Commission." While readers may make their own conclusions on the same, it is to be admitted that the author has fairly succeeded in articulating the "new universe" of human rights, a universe full of hopes and promises, bitter struggles and possible successes. Let the issue of "human dignity" continue to inspire judges involved in protection and promotion of rights particularly of the disadvantaged sections of humanity!

The Book is no doubt a valuable collection for everyone concerned with human rights, particularly those involved in their implementation, within government and outside.

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RELIGION AND LAW IN INDEPENDENT INDIA*

(Robert D. Baird ed.)

Manohar Publishers & Distributors (2d. Enlarged ed., 2005)

Pp. 518; Rs.750/-

The Book under review is an enlarged version of a 1993 publication which examined the relationship between religion and law in modern India. Its editor, Prof. Baird teaches history of religions in the University of Iowa in the U.S., which hosted a multi-disciplinary conference on the subject in 1991. Even though the enlarged edition published this year carries few additional contributions, it has failed to comprehend a number of changes in legislative and decisional law which happened during the last decade and more. Nevertheless, the volume is unique in as much as its approach is multi-disciplinary, methods of analysis are diverse and logical and the issues explored are part of that Indian social reality which still remain as enigmatic as ever. Anyone seeking to know the status of religion under a secular legal regime will be immensely benefited by reading the collection of essays written by eminent jurists, scholars and historians from India and abroad. The issues discussed include secularism, Hinduism as a legal category, political identity and personal law, Uniform Civil Code, renunciation and the law, conversion, religious endowments, politics and religion and the role of courts "in adjusting to the sacred and the secular." It gives an instructive and interesting analysis of diverse viewpoints of the complex and often confusing relationship of law and religion in a plural democratic society which lives in the ancient and modern systems contemporaneously.

Cultural diversity and religious pluralism in the Indian sub-continent have been subjects of unending curiosity to the Westerners who tried to interpret the society according to their perceptions and

* Courtesy: THE HINDU.

models. However, when India adopted a secular Constitution and a guaranteed set of fundamental rights including religious freedom some observers apprehended unending religious and ethnic conflicts and perhaps the disintegration of the secular model itself. On the contrary, religious identities got strengthened, personal laws based on religion continued and a new secular jurisprudence evolved sometimes with the intervention of State and Courts. Secularism assumed a new meaning and content difficult to capture in the European experience. Hinduism got interpreted as a way of life rather than as a religion in the conventional sense, thus accommodating non-believers, agnostics and even people professing other religions! There are contradictions and complexities in this scenario which the contributors of the volume have attempted to unravel according to their perceptions and experience.

In his introduction, the editor makes a significant observation which reveals the foundation of the inquiry. "In traditional India religion is not something that is part of life, but that which gives meaning to all of life." If that is the case, the editor says, the issue to be explored on law-religion relationship is only what happened as a result of secularization. The essays in the volume attempt to answer this question from the religious, legal, social and philosophical angles. A further dilemma in this regard arises from the multiplicity of laws and systems and the differences in what is legislated and what is practised. There are number of essays which study the gap which exist between law in the statute book and law "on the ground." There are other papers which try to explain the contemporary issues in terms of ancient religious texts and practices. The question how politics and governance are influenced by religious differences and judicial pronouncements on religious issues are discussed in few articles.

Few important issues on law-religion relationship discussed in the volume and which continue to agitate public mind are the issues of status of women under different religions, the case of Uniform Civil Code, the scope of minority rights and the legitimacy of conversion. In a thought provoking analysis on "Personal Law v. Uniform Civil Code," Prof. John Mansfield of Harvard Law School questions whether Personal Law can be treated as 'law' at all under the secular Constitution. Among the many reasons for the continuation of personal laws, the author cites the value of affirming the identities of ethnic and religious groups.

According to him, the threshold questions in this regard are what qualifies a group for the purpose of receiving recognition for the imposition of that group law (personal law) on an individual, who decides the content of such law and what will be the status of personal laws after the adoption of a Uniform Civil Code? What is striking to the author is that all these different laws are determined and administered by a single judicial system, that of State Courts. Indian experience questions the popular assumption that, "a nation-state cannot exist without a uniform substantive law on all subjects." Mansfield's conclusion is that, "the nation-state that India needs is one that is adapted to its special circumstances." In this regard he finds wisdom in the Framers of the Indian Constitution who let unforeseeable future to decide the solution to the complexities of the socio-religious situation in the country.

Taking a different view of the situation, Vasudha Dhagamwar in her piece on *Women, Children and the Constitution* argues that, "it is not by accident that personal law is also known as Family law. If the pluralistically, fundamentalist model of secularism gains ground, family and family law will make stronger claims on the polity and the Constitutional promises of creating a more just and egalitarian society would not be implemented to the extent to which they are countermanded by various religions or personal laws. Women, children and the Constitution will become, more than ever, hostages to religion, denied by the law of their own land." An alarming scenario for human rights and democracy under rule of law!

The Book can well provide the basis for yet another international conference looking at how the Indian legal and judicial system is managing to sustain the democratic polity and basic individual rights amidst such strong ethnic and religious groups strengthening their respective identities supported by religion-based laws enforced through secular Courts. The Book raises fundamental questions relevant for plural societies everywhere. One will not be surprised if there is demand for a still enlarged third edition very soon.

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JUSTICE AS FAIRNESS - A RESTATEMENT

By John Rawls (Erin Kelly ed.)

Universal Law Publishing Co. Pvt. Ltd. (1st Indian Reprint, 2004)

Pp. 214; Rs.170/-

John Rawls, the famous political philosopher of the United States published *A THEORY OF JUSTICE* in 1971 in which he propounded the idea of justice as fairness. The American society and the rest of the world including Europe and Asia, moved away from the idea of justice as fairness, particularly after the dominance of neo-individualism and free market economy, its re-assertion in Nozick's libertarian theory of justice extolling the virtues of free market economy, the demise of socialism in East Europe and China, and economic liberalisation gripping the Asian society. Yet the idea of justice as fairness retains its relevance in all pluralistic societies, including the U.S. as well as in the developing societies where the vast differences in distribution of resources leads to avoidable social tensions. Justice as fairness is relevant in toning down the excesses of free market economy and tensions inherent in pluralistic multi-cultural society.

JUSTICE AS FAIRNESS: A RESTATEMENT, published in 2001 and in India in 2004 by John Rawls and edited by Erin Kelly is a re-statement of his *A THEORY OF JUSTICE*. The Book was written primarily to meet the criticism levelled against Rawls. Both these books must be read together as *JUSTICE AS FAIRNESS* cannot be appreciated and understood properly without frequently referring to *A THEORY OF JUSTICE*. The Book is not only relevant to Indian society on grounds of political morality; it also provides ideological material to reinterpret the Indian Constitution particularly in favour of different deprived sections of the society.

Rawls himself introduces three changes in the Book to meet the criticism leveled against *A THEORY OF JUSTICE*. First is the change in the

formulation and contents of two principles of Justice; second, how argument for those principle from original position is organized; and third how justice as fairness itself is to be understood; namely, as a political conception of justice rather than as a comprehensive moral code. (p.xvi)

Rawls may or may not be so relevant in the developed West but he certainly is in developing countries like India in both pre-liberalization as well as in post-liberalization periods. In pre-liberal era, because his philosophy was broadly in conformity with Gandhian and Nehruvian philosophy of collectivism and empowerment to the weak and in post-liberalization period because it moderates the rigours of free market forces that hit the deprived section of our society hard.

Rawls becomes more important in post-liberal period because (a) the market forces tend to marginalize the forest dwellers, the illiterates, the dalits, the tribals, the semi-skilled and unskilled and others similarly situated who cannot keep pace with the fast developments in technology and (b) assertion of neo-individualism even in India which finds re-statement in Robert Nozick's theory of justice (*Anarchy State and Utopia*, New York 1974). In Nozick's philosophy there is no place for the deprived, the unskilled and those who lag behind, there is also no scope for state sponsored welfare in favour of these sections of society.

India is a pluralistic, multicultural, secular democratic society with highly uneven pattern of growth. In our society, the gulf between the haves and have-nots is unacceptably wide which in the long run is not going to be conducive to the interest of even the affluent sections of the society and the entrepreneurs and to the economic development of the society. Moderation in the free market economy is necessary. This is exactly what Rawls theory of justice does.

Rawls theory has three basic components namely, fairness, liberty and equality. Fairness is the basic and most important component of his theory. Fairness is a methodology to arrive at principles of justice which are acceptable to all and biased in favour of none. If rational individuals have willingly and knowingly joined a cooperative scheme from an original position of equal ignorance, if they have borne equal risk in doing so and if they persist in their willing cooperation and have no wish to retract and no complaints to make, then the scheme is fair or at

least not unfair. To arrive at fair principles of justice he falls back on the sixteenth century social compact theories propounded during renaissance, which assumes that people living in the state of nature, being tired of the state and law entered into a compact and gave themselves a charter of government and formed a civil society. The Kantian in Rawls uses this imaginary compact and switches over from state of nature to a civil society as an opportunity to put people behind a veil of ignorance to arrive at fair principles of justice as behind the veil of ignorance, people do not know what the civil society has in store for them. Behind the veil of ignorance no one is biased as every one is ignorant of what will happen in civil society.

According to this methodology only those who, live outside the civil society and decide to form a civil society can agree on fair principles of justice because they are ignorant as to what the civil society has in store for each of them. To arrive at this methodology his reliance on John Locke, a sixteenth century social contract theorist is basic. Though historically and anthropologically, there is no evidence to show that people in the state of nature have ever entered into a compact to form a civil society, the neo-Kantian in Rawls grabbed this opportunity to accept the compact as a hypothesis as opposed to a factual reality.

The other two components of his theory are liberty and equality. His maximin principle allowed people to have maximum of liberty compatible with like liberty of others. There are two components of equality principle namely equality of opportunity principle and difference principle. He insists that equality of opportunity to be meaningful must be fair equality of opportunity. There cannot be a fair competition between dissimilarly situated people, the emphasis being on providing capacities. By difference principle, he means that the positions of inequality are just only if they are for the advantage of the least advantaged. Political, social and economic unequal positions cannot be justified unless the benefit of these unequal positions percolates to the lowest stratum of the society. But lexical priority is given to maximin principle of liberty and in *JUSTICE AS FAIRNESS* priority is accorded to equality of opportunity principle over difference principle.

These principles as well as lexical priority accorded to one principle over the other are controversial. In countries like India for a large number

of deprived people, concretisation of equality of opportunity such as access to nutrition and education is a condition precedent to availability of liberty. Further, even if the methodology of choosing the principles of justice behind the veil of ignorance is correct, it is not clear why these principles should be same for all the time and all the societies. Cannot different society according to their different needs and exigencies choose different principles of justice? Only a neo-Kantian can universalise the principles of justice. It was because of intense criticism of his Kantian ideal position that in *JUSTICE AS FAIRNESS* he translates these moral principles to real political plane.

However, the greatest contribution of Rawls, particularly in the Indian context is that he raised welfare to the status of an enforceable political right which neo-individualists and protagonists of free market economy tend to reduce to charity. Rawls also insists that the basic necessities of life must be guaranteed to all, specially who fail in a competitive society, as a matter of right on the basis of average utility. He does not agree with Bentham's greatest happiness of greatest number of people. To him it must be the happiness of all even if it is not the greatest.

RAWLS AND INDIAN CONSTITUTIONAL VALUES

If the word 'socialist' in the Preamble of the Indian Constitution is not treated as an ideologically loaded value, it will be possible to treat it as the starting point of Rawls cooperative scheme. A cooperative scheme to operate requires, democracy, i.e., respect for every legitimate type of pluralism, secularism and non-parochial liberalism as its starting point. A cooperative society can also not function unless there is respect for liberty and equality of all. Most importantly, a cooperative society pauses and waits for those who lag behind. If through progressive interpretation of the constitution we have to achieve these ideals, fulfilling the aspirations of the people particularly that of the deprived people, Rawls theory is very useful. Particularly his concept of fulfillment of basic needs on the basis of average utility and not the greatest happiness of greatest number, of conceptualisation of society as a cooperative scheme, his fair equality of opportunity principle according to which equality of opportunity is fair only if initial conditions of participation in an institutional competition are similar, his concern for the least advantaged

may be found very useful in reinterpreting the constitution.

His theory opens many interesting possibilities as far the enforcement of fundamental rights guaranteed under Articles 14, 15, 16, 17, 21 and 23 in favour of SC & ST, weaker women, children, the illiterate, landless labour and other deprived sections are concerned. He provides us with a strong ideological value loaded background for incorporating many of the unfulfilled values enshrined in the Directive Principles of State Policy into Fundamental Rights.

His insistence that goods and services which were available in the state of nature (read basic needs and welfare schemes) must be guaranteed in a civil society, may be another moral and political ground to make Constitutional Directives more strictly enforceable.

The idea of fair equality of opportunity and his difference principle, i.e., positions of inequality are just only if they are for the advantage of the least advantaged, may add another moral ground for the enforcement of the rights of diverse disadvantaged groups such as SC & ST, forest dwellers, persons with disability, women and children. His theory of justice may provide a rich moral and ideological background for taking new legal positions for the benefit of these disadvantaged sections of society.

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**INFORMATION TECHNOLOGY LAW AND PRACTICE
(CYBER LAW & E-COMMERCE)**

By Vakul Sharma

Universal Law Publishing Co. Pvt. Ltd., (Updated reprint 2005)

Pp. 454; Price Rs.350/.

The legislative response to IT related issues was found for the first time in the Information Technology Act, 2000. In fact, this statute does not coin any word like "Cyber law" but it is an enabling legislation for promoting e-commerce and e-governance with the help of the new technology. Information Technology law is still unfolding in the Indian legal horizon and it is an appreciable attempt of the author to provide a hand book on Information Technology Law and Practice. The Book gives section wise commentaries and illustrations and the author has attempted to simplify the language of technology involved.

Part-I (first two hundred forty six pages) contains a commentary on each and every section and subsection with numerous illustrations, concept notes and examples. It is a fact that Information Technology Act does not cover each and every aspect of Cyber world. The crimes identified in the Act are not exhaustive as day by day new type of criminal activities relating to computer and internet are unfolding. It is remarkable that in this part the computer glossaries of common parlance are annexed and explained.

The Book covers well the regulation of emerging problems of confidentiality and authenticity in the cyber world especially in the Internet, the creation of Public Key Infrastructure (Controller of Certifying Authority) regulatory regime (Cyber Regulations Appellate Tribunal) under the Information Technology Act.

Offences under the Act

Cyber crimes are either "cyber offences" or "cyber contraventions." The differences between these two are of a degree and the extent of criminality and the Information Technology Act includes both of them. Explanation of both by a comparative table clarifies the same.

This Book is also helpful to investigating and prosecution agencies as it classifies the "offences under the Act," according to the "offences against the other laws" as enumerated in the Code of Criminal Procedure. Relying on that classification, the author has provided a tabular presentation of crimes as cognizable/non-cognizable, bailable/ non-bailable and by what court they are triable.

Amendments to other Acts

Certain other laws have also been amended by Information Technology Act 2000, namely Indian Penal Code, Reserve Bank of India Act, Bankers' Books Evidence Act, Indian Evidence Act and Negotiable Instruments Act. Therefore, dispute relating to the electronic medium are finding their way to the courts. For this purpose, the commentary on these amended provisions with illustrations provided in the Book is very useful to lawyers and judges.

Readers will really feel that in this part references to cases are focusing only on the questions of "interpretations of statutes" – a futuristic approach to judicial function of the courts. Discussion of cases from foreign jurisdictions would be found very useful for a comparative understanding of the subject. However, the chapter on Cyber Forensic, the most difficult aspect of the law for practitioners has not been discussed very satisfactorily particularly since billions of dollars are stolen each year by criminals, and in today's digitally dominated world, computers are rapidly becoming a vector for these criminals to carry out their crime. Computer forensics is an emerging practice which helps victims of computer crimes to discover evidence, and prosecute criminals in a court of law. As computer forensic is a relatively new area in the field of law enforcement, its discussion could have been made more exhaustive. The author could have provided more on this subject which is fundamental to investigation as well as prosecution.

Part II of the Book deals with jurisdiction of cyber space, defamation through internet, freedom of speech and expression and Intellectual property rights. "Extraterritorial jurisdiction in Cyber crimes," is discussed in the realm of International Law as well as how things are developing to affect the extraterritorial jurisdiction of the Information Technology Act, 2000.

In the realm of on-line activities, the traditional concept of international jurisdiction is now extended to the cyber space to formulate a new paradigm of cyber jurisdiction. The author looks into judicial pronouncements in the U.S. and Europe to evaluate whether the courts have been able to develop any legal principle to resolve online disputes.

The nature of internet technology itself makes it virtually impossible, or prohibitively expensive and cumbersome, to prevent the content of a given website from being accessed in specific legal jurisdictions when an Internet user in such jurisdictions seeks to do so. In effect, once information is posted on the Internet, it is usually accessible to all Internet users anywhere in the world. Even if the correct jurisdiction of an Internet user could be ascertained accurately, there is presently no adequate technology that would enable non-subscription content providers to isolate and exclude all access to all users in specified jurisdictions. These special features of the Internet present peculiar difficulties for the legal regulation of its content and, specifically, for the exclusion of access in defined jurisdictions. Such difficulties may have a bearing on the question of whether a particular jurisdiction has an advantage in regulating content published and accessed on the Internet. This does not mean that the Internet is, or should be, a law-free zone.

Keeping in view the contribution of internet to the human understanding, it is argued in the Book that the law should generally facilitate and encourage such advances, not attempt to restrict or impede them by inconsistent and ineffective, or only partly effective, interventions, as such attempt is likely to interrupt the benefit that the Internet has already brought and the greater benefits that its continued expansion promises.

In the last three chapters of this part, the author takes us to the nature and scope of e-taxation and protection of Intellectual Property

Rights in Cyber space. The author argues for redefining the basis of taxation in online environment. He believes that it is a myth that the electronic tax is an additional tax burden.

On Intellectual property rights issues, it is elaborated that law makers and adjudicators have started appreciating the limitations of the existing copy right laws to regulate activities emerging from the use of internet. The Book supplies latest and elaborate international documents on this subject.

The attempt of the author while discussing the Indian perspective on global issues in all chapters of the Book is appreciable. Part – II of the Book is very comprehensive and it gives a comparative picture of recent developments along with international documents, enactments and judicial pronouncements.

The Book is a significant contribution to the field of Information Technology Law. As there are very few books on the subject, it is all the more commendable on the part of the author to explain a technology based subject in a lucid manner, understandable even to novices on the subject.

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GUIDE TO NEW PATENTS LAW

By Manish Arora

Universal Law Publishing Co. Pvt. Ltd. (3rd ed., 2005)

Pp. 572; Rs. 425/-

Patents grant an inventor the right to exclude others from producing or using the invention for a limited period of time. In India, the evolution of patents law can be traced back to the British Rulers, who in order to protect the rights of inventors, enacted the Indian Patents and Designs Act, 1911. Since then due to substantial changes in the political and economic conditions of the country, this law has undergone drastic changes. The Parliament passed a new Patents Act in 1970, and since then many revisions have been made in this area of law. In April 2005, the third amendment to the Act was carried out amidst a number of controversies and apprehensions.

GUIDE TO NEW PATENTS LAW is surely required for knowing all the changes brought about so far to the statute concerning patents. It is a useful source for accessing successive amended legislations concerning patents law. It also discusses decisions of courts, which have played an important role in the development of the law. It is simple to understand and is without 'legalese.'

The author's aim can be said to be exploratory rather than definitive. The effort to write for both the general reader and the specialist is not often successful. This is probably the reason why the author has devoted this guide primarily for students of law who are in the need of statutory provisions to learn the elements of patents law. It is also an excellent overview for the uninitiated student seeking to learn patents law.

This single updated volume is moderate sized that could be considered as nutshell on statutory provisions relating to patents law which can reasonably be kept as part of a personal collection. It is written in a concise and easily readable style. In about 572 pages, it incorporates

all legislative attempts on patents law, international instruments bearing on the subject and includes a series of cases on procedures relating to procurement of patent.

There are many generalized legal guides available on patents law. However, it is unlikely that they will provide users all the possible statutory material for a general understanding of legal principles as is done through this Book. The Book has been substantially revised and updated since the last edition.

The Book is divided into four parts under the following headings - Part I-Patents Law, Part II-Case Law Digests, Part III-Protection of Plant Varieties and Part IV-International Agreements and Treaties. The central concern of *Guide to New Patents Law* is the latest amended statute of 2005. It begins with introduction on the evolution of patents law in India. This brief history of development of law in India is very helpful.

Part I is titled "Patents Law." The provisions of the Patents Act, 1970 as amended in the year 2005, and related Patent Rules, 2003 as amended in the year 2005 are examined under this title. Pages 3 to 92 reproduce amended Patents Act of 2005 with useful comments that help in clarifying complex procedures given by the statute. From page 93 onwards the amended Patents Rules are reproduced. This part will be very useful to inventors seeking patents. It highlights some of the practical aspects of the changes, particularly as they relate to procedural requirements. The author in *Annexe* (at p. 204) has discussed about the provisions which have been omitted or substituted by Amendment Act of 2005 and thereby the distinction between the new enactment and old one has been effectively brought about. The changes carried out to Act and the Rules have also been described in detail.

Further, this part will prove to be useful to businessmen, inventor, patent attorney as it enlists all the important notifications till date, all possible places where application for patent can be filed, location of patent offices in India, with their complete addresses, telephone numbers and e-mail IDs, etc.

Part II is titled "Digest of Important Cases on Patents Law." It discusses in brief and in simple language, the judicial interpretation of patent statutes. In its broad aspect this subject is made exceedingly simple

by the author. Each case is titled by the subject under which it has been decided. The cases are crisply edited for the understanding of even laymen.

Part III sets forth laws relating to Protection of Plant Varieties. It gives the Protection of Plant Varieties and Farmers' Rights Act, 2001 with appropriate comments in simple language (section 3 at p. 254).

In Part IV, titled "International Agreements and Treaties," extensive materials relating to various aspects of patent related law have been incorporated. It has reproduced the Agreement on Trade-Related Aspects of Intellectual Property [TRIPS]. Further, it also gives the lists of countries which have ratified the PCT, the Paris Convention, and the agreement for the establishment of WTO.

However, it must be pointed out that *Guide to New Patents Law* fails to provide a complete description of the techniques and industry know-how that underlie successful patent practice and portfolio management. It provides no answer to many important issues that are arising due to application of the new patents law, its impact on the chemicals, pharmaceuticals and biotechnology industries, and problems due to commercial rewards. It does not guide the reader through the legal and procedural complexities of the patent systems, nor does it explain in detail the role of patent practitioners. It only provides updating on the latest legal developments, while not focusing upon the relevant technology and industry practices in this sector which could have set it apart from more general books on patents law and procedure. The value would have been greater if the Book had included information on useful topics like history, types of patents, requirements for patentability, the patent application, patent office practice, courts, trial and appellate procedure, etc. to attract more readers.

Many judges hearing patent cases are not scientists, and therefore patent litigation presents a large challenge with the complexity of patents law, often accompanied by complex technology. Judges do need a concise guide to patents law. The Book does not address this need adequately. For improvement in its next edition, the book should briefly cover the history of patents law, the process of obtaining a patent, an overview of the patent statute, the judicial approaches towards the patent statutes, to provide a fuller understanding of patents law on the ground or in action.

In spite of these shortcomings, GUIDE TO NEW PATENTS LAW is surely a required reading for anyone seriously concerned with the nature of the patentability process and, for any student /teacher/researcher engaged in the study of intellectual property laws.

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I, Jagdish Baheti, Registrar, hereby declare that the particulars given
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Date: 20th June, 2005

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