

Judicial Education and Training

Journal of the International Organization for Judicial Training

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JUDICIAL EDUCATION AND TRAINING

Journal of the International Organization for Judicial Training

MISSION

The journal *Judicial Education and Training* publishes topical articles on the education and training of judges and justice sector professionals around the world.

This journal aims to stimulate a community of learning in judicial education by showcasing selected papers presented to the biennial conferences of the International Organization for Judicial Training (IOJT). Additionally, it solicits original research, practical experience, and critical analysis on issues and trends in judicial education. It also provides a medium for informed discussion, the exchange of professional experience, and the development of knowledge in judicial education for a global readership.

Contributions are invited from chief justices and senior judges, judicial educators and academic researchers with an interest in this field. Earlier issues of this online journal may be found at:

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The Journal welcomes original manuscript submissions written in English that are between 3,000-5,000 words in length, including references. Manuscripts should be double-spaced using Times New Roman font, 12-point font size. A concise, informative title along with the names and institutional/court affiliations of each author should be included. Abbreviations should be clearly defined. All tables, figures, and appendices should be noted in the manuscript and submitted as a separate document with sufficient detail to recreate the graphic or appendix. Manuscripts should use a reference-list style of citations to books, articles, and reports. A style sheet is available upon request by contacting the Editor at iojt-journal@judcom.nsw.gov.au.

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Journal of the International Organization for Judicial Training

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Contents

Introduction	9
The principles of judicial training: towards international recognition? <i>Xavier Ronsin</i>	11
Forging collaborative partnerships: judges, judicial educators & the academy <i>Matthew Weatherson</i>	19
Continuing education for judges <i>Richard Reaves</i>	29
Current models of judicial training: an updated review of initial and continuous training models across Western democratic jurisdictions <i>Diana Richards</i>	41
Triumphs and trials of judicial education in a small jurisdiction — the Judicial Education Institute of Trinidad & Tobago story <i>The Honourable Mr Justice Peter Jamadar JA and Mr Kent Jardine</i>	53
Judicial education on “gender awareness” in Australia <i>The Honourable Justice John Basten</i>	69

Introduction

The theme for the fifth edition of *Judicial Education and Training*, the Journal of the International Organization for Judicial Training (IOJT), focusses on the core work of the IOJT. The articles chosen explore and enrich the theme of judicial education and training and drive necessary discussion and debate. Many of the articles directly result from the IOJT's successful 7th International Conference on the Training of the Judiciary, held in Recife, Brazil, in November 2015. Judicial education and training is constantly evolving and, as will be seen from this issue, different jurisdictions manage judicial education and training in a variety of ways. We can learn from the diverse experiences of our colleagues and by examining and discussing these varied regimes, we can perhaps think about ways to improve our own programmes so they remain vital and relevant for the judicial members we serve.

The first article by Xavier Ronsin, former Director of the *Ecole Nationale de la Magistrature*, France, examines the principles of judicial training and the development of universal principles for judicial training throughout the world. Ronsin discusses how judicial training is a relatively new concept in the history of the judicial system and as a result of this infancy, there is no global instrument or international charter that brings together the principles and participants in this area. Ronsin discusses the principles common to all judicial systems, whether born of the common law or the civil law and, outlines the qualities that make a competent, independent and impartial judicial officer. Ronsin explores the rationale for implementing objective and independent training, the conditions for effective training and asks the fundamental question as to whether we should move towards a judicial training charter.

In the second article, Matthew Weatherson, Director, Research and Publications, Judicial College of Victoria, Australia, discusses the concept of collaborative partnerships between judges, judicial educators and academia and gives practical examples of how the Judicial College of Victoria is developing a collaborative model. Weatherson argues that transformative learning as opposed to transactional learning is a powerful tool through which a learner constructs new personal meaning which results in a paradigm shift and shapes future perceptions of experiences, both intellectual and affective. He argues that a collaborative approach between judges, educators and academics has the potential to unlock a transformative approach to change and development. Weatherson outlines examples such as the Judicial Wellbeing project — a collaborative effort that examines current court systems for managing judicial stress, stimulating judicial engagement and fostering judicial contributions to academic publications. He also discusses establishing systems for court-oriented research and managing change.

In the third article, Richard Reaves, Executive Director at the Institute of Continuing Judicial Education, Athens, Georgia, USA, outlines what he regards as the most important elements of continuing education for judges and judicial education generally. These include focusing upon the tone, demeanor and engagement styles that judges bring to the resolution of disputes; how performance measures for courts, working in concert with judicial disciplinary authorities and the judicial education agencies, ensure that judicial professionalism is addressed; and how the courts must maintain their independence against government overreach especially when pursuing resources or circumscribing court powers. The article goes on to examine instruction and learning in judicial education with a particular focus on formal academic education, life experience, pragmatic orientation and remote learning resources that also incorporate self-study

and reference materials. Reaves also discusses the phases of judicial career influences on judicial education including the provision of judicial orientation courses, mentor-coaching, surveys and mid-career personal and professional development.

In the fourth article, Diana Richards, Associate Fellow, Institute of Advanced Legal Studies, UK, examines current models of judicial training. This article is an updated review of a study conducted by Professor Cheryl Thomas for the English judiciary in 2006. Richards' study has particular emphasis on the jurisdiction of Romania and includes the England and Wales model in the updated review. Richards looks at models and trends in initial and induction training, continuous training and new developments in the role of judicial training. This is supported by extensive research and statistics. Issues explored include the increased importance of judicial training throughout many jurisdictions in the world. The paper also examines the issue of judicial recruitment and how there has been an increasing demand that the composition of the judiciary reflects the wider demographic profile of a particular population. She concludes with some thoughts on the hybridization of judicial training models and how the appointment and promotion practices of the civil and common law systems continue to shrink.

In the fifth article, Justice Peter Jamadar, Puisne Judge of the High Court of Trinidad & Tobago and Kent Jardine, Judicial Educator, Judicial Education Institute of Trinidad & Tobago, give a history of the triumphs and trials of judicial education in Trinidad & Tobago. This paper weaves an interesting narrative of the development and history of the jurisdiction and how judicial education was introduced and developed over the last two decades. The authors discuss the particular issues that have been encountered in establishing judicial education and give insight into how it was implemented. This includes the rationale and importance of judicial education as set down by their visionary Chief Justice, Michael de la Bastide, and how judicial education committees were organised and established and pilot projects instituted. The paper also covers the establishment of the Judicial Education Institute of Trinidad and Tobago from 2011 and how this has transformed the judiciary, aiding in its ongoing development and sustainability.

In the sixth and final article, Justice John Basten, Court of Appeal, Supreme Court of NSW, Australia, explores the role of "gender awareness" in educational programs for judicial officers in Australia. He first considers the need for diversity in the gender composition of Australian courts and opines that the need for judicial education on gender is likely to reduce as women constitute a significant proportion of a court. The author refers to the effect on male judges of their own experiences with the increasing professional profiles of women in the legal profession and professions generally. He considers the vexed question of whether gender differences are reflected in judicial decision-making.

We trust you find that this issue of the journal continues its mission of publishing topical articles that stimulate a community of learning in judicial education. We are determined to maintain the journal as a medium for informed discussion, the exchange of professional experience and the development of knowledge in judicial education for a global readership. To that end, we encourage submissions for future editions so that we may continue to fulfil the journal's mission to further the education and training of judges and justice sector professionals around the world.

Ernest Schmatt PSM and Dr Rainer Hornung, Joint Editors-in-Chief

The principles of judicial training: towards international recognition?

Xavier Ronsin*

Introduction

The 7th conference of the International Organization for Judicial Training (IOJT) will open with a discussion of the “principles of judicial training.” After a presentation of the 20 principles established by Canada’s judicial training institution in 2006, discussion will focus on the main principles that unite and distinguish the many countries taking part in this event.

That such a conference should open with work based around the broad principles that guide or should guide the action of the bodies responsible for judicial training shows a real maturity in regard to judicial training. Its importance and the purpose of its existence are no longer in question; we have now moved on to discussing its modalities, and how it should be organized and implemented. It has thus attained proven legitimacy.

Despite this maturity, the evocation of principles that have been developed at Member State level highlights the absence of more universal principles on which all players in judicial training could agree, principles that could then be set forth in a text with international scope, following the example of the principles established in Bangalore¹ in regard to legal ethics and deontology. There is indeed no global instrument, no international charter bringing together all participants of judicial training.

Paradoxically, this situation is not in fact the result of any lack of consensus among the different actors in judicial training, or of any irreconcilable differences among the various judicial systems. The judges’ and prosecutors’ profession has enough common denominators in the world for its training process to be established on the basis of a few broad fundamental principles, already established on the European level, which we will discuss below.

The absence of an overarching global text to define the principles of judicial training is probably due to how new it is. The training of judges and prosecutors was only institutionalized in the second half of the twentieth century. The first schools for the judiciary opened their doors at the beginning of the 1960s.² So this is a rather new idea in terms of the centuries-old history of the justice system, one that the founders of our democracies would not necessarily have all supported. Montesquieu, who was nevertheless a theorist of the separation of powers, opposed any professionalization of the judiciary — and therefore any training of judges — considering

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¹ The Bangalore Principles of Judicial Conduct UN Doc E/CN.4/2003/65, at www.unodc.org/pdf/corruption/bangalore_e.pdf, accessed 8 December 2016.

² 1959 for the French National School for the Judiciary, 1960 for the SSR in the Netherlands, 1963 for the National Judicial College in the USA.

that the “power to judge” should be granted to temporary judges, “drawn from among the people at certain times over the course of the year” to form “a court that lasts only as long as necessity demands.”³

Though the idea of using judges that have come directly from society persists in many judicial systems, as the example of criminal juries demonstrates, the growing complexity of law and litigation has in recent years rendered the increased professionalization of judiciaries necessary. All judicial systems at their highest levels incorporate professional judges and prosecutors, implementing skills specific to their duties, which a citizen chosen randomly or appointed for a short period of time cannot master. The debate today is no longer so much about the professionalization of judges and prosecutors as it is their specialization; many judicial systems have created specialized clusters made up of judges and prosecutors who are experts in the fields in question, whether anti-terrorism in criminal matters or intellectual property in civil matters. From professionalization arises the need for training in specific and complex professional techniques, now recognized as such, while respecting the particularities of the various judicial functions.

The guiding principles of judicial training are indeed closely related to the particular position occupied by judges and prosecutors in our democratic societies. The principle of the separation of powers places them at the heart of society, engaged with its issues and debates, in a position of independence constituting both a guarantee and a duty. This particularity must necessarily reflect upon their training, which must guide them sufficiently to enable them to perform their functions competently, while not undermining the impartiality and independence they must demonstrate. Defining the principles of judicial training thus has to do with issues of democracy. It is therefore essential to endeavour to define them, in order to provide guidance for the existing judicial training bodies and those that will be established in the years to come.

Principles common to all judicial systems

Can judicial training be guided by similar principles in common law systems as well as in countries with civil law systems? Can it be conceptualized in a similar manner when it is intended to train small groups of experienced attorneys selected for their recognized skills, and young students admitted after graduation from a judicial training institute? In spite of the diversity of judicial systems, an analysis of existing texts and practices does show a broad convergence among the approaches taken by the different systems, even if the wide variety of training provided results in a large number of variants.

At European level, this convergence was highlighted by the Consultative Council of European Judges.⁴ This institution, a body within the Council of Europe, gathers judges from the 47 member states of the Council of Europe, composed of countries following the tradition of Romano-Germanic law as well as common law countries. These judges, from different backgrounds, have nevertheless managed to lay the foundation for a Europe-wide unified approach to judicial training. In particular, they point out that “regardless of the diversity of national institutional systems and the problems arising in certain countries” judicial training should “be seen as essential in view of the need to improve not only the skills of those in the

³ Montesquieu, *The Spirit of the Laws*, Book XI, Chapter VI.

⁴ Consultative Council of European Judges, Opinion No 4, CCJE (2003) Op No 4, issued 27 September 2003, at www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp, accessed 8 December 2016.

judicial public service but also the very functioning of that service.”⁵ They emphasize the broad principles that should guide judicial training, within a vision common to European States, with which the French National School for the Judiciary identifies for the most part, and which will be put into perspective below.

Principles intended to help judges and prosecutors to be competent, independent and impartial⁶

In whatever system of law, judicial training has only one goal: to make a student or professional into a competent, independent and impartial prosecutor or judge; such are the qualities set forth by the European Charter on the Statute for Judges.⁷ The principles guiding judicial training must constantly aim to build these fundamental and universal qualities.

The definition of what constitutes a competent prosecutor or judge, which requires the preparation of a competency framework, casts light on the primary content of judicial training. The French National School for the Judiciary, on the occasion of its last major reform, has worked out a definition of the qualities expected of judges and prosecutors for 2008. Thirteen fundamental skills were deemed necessary to the exercise of the profession of prosecutor or judge. It is this institution’s responsibility to detect among candidates for the judiciary the existence of these 13 qualities, which are simply potential, and then to transform these qualities into skills in the course of the training provided to future judges and prosecutors.

These 13 qualities can be grouped in three blocks:

- understanding of human relationships
- mastery of judicial techniques
- environmental and managerial analysis.

It thus appears that legal study is not at the heart of the training of judges and prosecutors. The transmission of professional techniques and values lies at the heart of the principles of judicial training, rather than the transmission of legal knowledge, which merely constitutes a necessary but insufficient prerequisite to become a judge or prosecutor. It is a matter of learning how to question, learning how to work with investigators, how to conduct a hearing, how to determine the right position to take, how to treat the victims and the accused, or the parties to a civil trial with fairness, how to draft a rigorous decision, precise but intelligible. These are all practices which require training of an essentially practical nature.

⁵ *ibid* at 7.

⁶ The French National School for the Judiciary trains both judges and prosecutors. The matter of independence is more directly about judges than prosecutors, whose activity falls within a chain of command. It should however be noted that as public judicial officers, French judges and prosecutors for the most part share the same values, and share the common mission, as stipulated by the French Constitution, of safeguarding individual freedoms. French prosecutors also have total freedom of speech at hearings, during which they act independently. Independence and impartiality thus constitute fundamental values among prosecutors as well.

⁷ European Charter on the Statute for Judges, DAJ/DOC (98) 23, adopted on 8-10 July 1998 by the Council of Europe, article 1.1, at www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf, accessed 8 December 2016.

As the Consultative Council of European Judges indicates, referring to the European Charter on the Statute for Judges, “the training of judges should not be limited to technical legal training, but should also take into account the fact that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.”⁸

Besides professional skills, understanding these complex situations obviously requires knowledge in the human and social sciences, a good understanding of the socio-economic context, a sharp ear, a natural authority. These are all qualities that a technician of the law, who knows the law and how to articulate the legal texts, must also acquire in order to become a judge or prosecutor.

Judges and prosecutors also need such skills to discharge their duties with independence and impartiality. Contrary to popular opinion, these values are acquired and can be taught. Independence and impartiality must be developed relative to external elements, in particular in regard to all the various sorts of pressures to which judges may be subject when making a decision, but they must also include an internal and personal dimension. Judges and prosecutors must also be independent and impartial vis-à-vis their social environment, their own prejudices, and even their own deep convictions, if they would tend to decrease their objectivity. Judicial training should therefore teach them how to know themselves, to question themselves, and to challenge themselves, without however sacrificing the fundamental values of justice.

Competence, independence and impartiality are indeed fundamental to the legitimacy of the judiciary. In systems where the judiciary is the only power not elected by the citizens, their legitimacy can only come from their ability to understand and apply the law in a manner coherent with the society in which they operate. But the increasing emergence of general standards without precise definition, allowing judges and prosecutors broad latitude of interpretation, has been disrupting the practices of judges and prosecutors in countries operating in the Roman-Germanic tradition, who are not necessarily used to having such latitude of interpretation. Such is particularly the case in Europe for the provisions of the European Convention on Human Rights, which is essentially made up of standards that are not very precise, interpreted by a court that has been increasingly granting national judges a nationwide margin of appraisal, even when crucial social questions are being asked.⁹

In the presence of such standards, judges and prosecutors increasingly need to be able to understand the society in which they operate, in order to remain up to speed with it and make their decisions understood and accepted. Judicial training has a crucial role to play in this understanding of society. It should give judges and prosecutors the tools needed to understand and act fairly in their societies.

To do so, the institutions in charge of judicial training must remain consistently up to speed with their environments. In societies facing rapid and far-reaching changes, the institutions need to constantly think about current and future developments, so that their judges and prosecutors will not fall behind or out of touch with any new phenomenon that may be afoot, whether changes in family structure or new forms of criminality.

These institutions must also allow judges and prosecutors to adapt to major changes made to the legal framework they operate in. In recent years, intrusions made by international law,

⁸ *ibid*, n 4 at 13.

⁹ For example, the Grand Chamber ruling in the case of *Lambert and others v France* ECHR 185 (2015), 5 June 2015, concerning the end of life.

Community law or the decisions of the European Court of Human Rights have disrupted the traditional legal systems in which judges and prosecutors had operated up to the present. It is of course necessary to assist all judges and prosecutors in these changes so as to achieve a uniform and rigorous application of the law. Judicial training must therefore be fundamentally multidisciplinary.

Given these major changes and the constant evolution of legal systems and societies, initial training alone is insufficient to ensure that judges and prosecutors are in tune with their environment. Judges and prosecutors must have judicial training before they first enter into service, and then continue such training over the entire course of their careers. Both initial and in-service training are needed.

The training of competent and impartial judges and prosecutors, by means of practical, multidisciplinary education conducted over the entire course of their careers, should be carried out with a focus on two fundamental principles: the training itself must be objective and independent; and it must be effective.

The implementation of objective and independent training

The transmission of knowledge and values, which is the very vocation of judicial training, must be accompanied by certain conditions and precautions in order to operate effectively. The training context implies an imbalanced relationship — at least initially — between the trainer and the trainee, who necessarily has less perspective, and therefore needs to be given the proper preparation to form his or her own opinion.

It is therefore essential, in view of forming an independent and impartial judiciary, that the institution in charge of designing and implementing the training process must act in an independent, autonomous manner in providing training.

The European Charter on the Statute for Judges stipulates in this regard that preparing judges with the proper training to administer justice independently and impartially must involve certain precautions, “that ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties,”¹⁰ and calls for oversight by high councils of the judiciary on this point.

The autonomy of the judicial training organization may, however, take different forms depending on the different legal systems and administrative structures of the various States. The mere fact that a Ministerial directorate is in charge of judicial training does not imply that such training will lack independence, since the program content is not ultimately defined by executive power.

It is indeed quite possible to entrust a scientific committee or council representing the judicial institutions and civil society with the design of programs that will later be implemented by a body that is not autonomous but does not directly interfere in their content.

In the example of the National School for the Judiciary, which is an autonomous judicial training institution, the training curricula and their content are defined with the assistance of a Scientific Council, made up of members of the school management, high-level figures, elected representatives of the faculty, and probationer judges and prosecutors currently undergoing

¹⁰ *ibid*, n 7 at 2.3.

training. Despite an explicit connection between the school and the Ministry of Justice, the essential decisions in the life of this school are also subject to review by a Board of Directors headed by the most senior French judges and prosecutors, in the presence of representatives of the Ministry of Justice, and representatives from courts of law, universities, and other administrations. These institutions and their compositions are meant to ensure pluralism in the definition of programs and their suitability to meet the needs of judges as well as those of society.

Even beyond issues of independence, the involvement of the highest judicial authorities in the life of the judicial training institute is essential for its success. With their profound knowledge of the justice system, their vision of its development, their legitimacy, and their weight within the judiciary, the Supreme Courts¹¹ are blazing the trail for the justice system of tomorrow. It is their responsibility to guide judicial training along that same path, with the help of figures associated with the governance of the judicial training institutions.

In the absence of involvement by the high courts, differences and misunderstandings would be likely to arise between them and the newly trained judges, who could end up out of step with the changing justice system in their countries. Aside from the negative effects this would have on the justice system, judicial training would then be discredited in the eyes of the courts, which could then distance themselves even more from the judicial training institution, fuelling a vicious cycle that would be difficult to break.

The conditions for effective training

It is no simple job to transmit professional practices and values to a high-level audience amongst whom qualities of independence and perspective are to be cultivated. Unlike the Faculty of Law, which is mainly in charge of transmitting knowledge, judicial training is firmly rooted within the domain of vocational training for adults, and must adopt its methods.

It is thus essential to use active training methods placing learners in situations that they will encounter in the course of their duties, particularly with the use of role plays, since these methods have proven effective in training adults. Judicial training institutions must be accustomed to using these techniques and must transmit them to their trainers. Just as a surgeon cannot master surgical technique simply by consulting books, a judge or prosecutor needs practice to learn how to conduct an examination, hold a hearing or prepare a ruling. The acquisition of good practices should take place both within the institute providing their training and during internships in courts, according to the work-study principle, during which future judges or prosecutors will come face to face with the reality of their future duties.¹²

The profile of the trainers also plays a key role in the transmission of knowledge. In order to transmit them, they must themselves have implemented and mastered the proper professional techniques. Judicial training should be provided primarily by judges and prosecutors who have been previously trained in modern teaching techniques.¹³

¹¹ This includes the Supreme Prosecutors' Office (when they are separate) and the High Judicial Councils, usually headed by the most senior judges of the Supreme Court and Supreme Prosecutors' Office.

¹² *ibid*, n 4 at 30, "it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc)".

¹³ *ibid*, n 4 at 20: "It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills."

This assertion does not of course exclude the use of external participants, even in significant proportions. The multidisciplinary nature of judicial training necessarily implies that an important role must be given to persons other than judges and prosecutors, whether other legal professionals, academics, forensic scientists or sociologists. The core training nevertheless must be provided by persons who have recently been or are currently engaged in the profession in question and are closely linked to the everyday justice courts, with a clear perception of the issues they face.

An analysis of the various systems reveals a broad diversity in the ways the implementation of these principles is organized. Some States appoint judges and prosecutors to the body handling the provision of training for a given period by temporarily removing them from their judicial functions. Some prefer to mainly make use of judges and prosecutors currently in service, having them participate only sporadically in the training activities, but ensuring that they have sufficient availability to be fully involved in their educational activities.

Judicial training at the heart of the judiciary

The presence of judges and prosecutors within the body responsible for judicial training also helps to strengthen the link between that body and the judiciary of the country concerned. It is indeed fundamental that the judicial training institution be at the heart of the judiciary of its country.

A nation's judicial training institute must be in close and constant contact with its justice system, both in regard to the Supreme Court (for the reasons already mentioned) and everyday justice courts. This contact is necessary for properly adapting the training to be offered, but also for enabling the institute to constitute a benchmark for judges and prosecutors, and thus increase efficiency. Judges and prosecutors will indeed be more likely to get training during their careers if they feel that they identify with the training establishment, if they derive a tangible benefit from their training, and if they enjoy coming to training.

Considering its age, the French National School for the Judiciary is the institution that has trained all of the judges and prosecutors serving today, both for their initial training and for their continuing education. This has allowed it to become, in a way, "the judges and prosecutors' home," a place much appreciated by judges and prosecutors, where they can take a break from their normal duties for a few days each year and have time for reflection and discussion. A real closeness has been created, nourished by a referral network present in all the various jurisdictions, and by the regular distribution of publications intended specifically for judges and prosecutors. This situation of trust puts them in conditions favourable for learning, strengthens the effectiveness of their training and success, encouraging them to continue their training throughout their careers. A close link between the judicial training institution and the judiciary thus benefits the entire judicial system.

Towards a judicial training charter?

Whatever the legal and judicial system, judicial training serves certain universal fundamental purposes, directly related to the functions of judges and prosecutors and the specific nature of their work, empirically constructed over nearly 60 years of practice by the bodies in charge of judicial training.

This article has outlined the fundamental principles of judicial training, as highlighted by several institutions, including the Consultative Council of European Judges (CCJE). They converge around the following ideas:

- judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values, which goes beyond simple legal education
- judges and prosecutors must have the support of judicial training both before first taking office and throughout their careers
- the institution in charge of designing and implementing such training must act autonomously and independently
- the highest judicial authorities must be involved in the major decisions and the life of the body in charge of the training
- active and modern educational techniques should be given primacy, as part of a training course organized on the basis of work-study principles between periods of education and internship work
- training should be provided primarily by judges and prosecutors who have been previously trained in these teaching techniques
- the institution providing judicial training must be at the heart of the judiciary of its country.

In view of the issues of democracy involved in judicial training, these principles would seem to deserve discussion, a more precise definition, and international recognition beyond the European continent. Such recognition would then justify the establishment of international standards for judicial training, to be discussed and adopted by all parties involved in judicial training.

The IOJT is the ideal framework to discuss these principles. This organization's 8th international conference to be held in 2017 could serve as an opportunity to finalize and adopt a charter to bring those principles together.

Forging collaborative partnerships: judges, judicial educators & the academy

Matthew Weatherson*

Introduction

Judicial education typically recognises three dimensions of learning: substantive law, skills development and social context.¹ Within Victoria, academic insight and partnership is emerging as a fourth dimension of education.

In this paper, I will discuss the evolution of the role of academic learning in judicial education within Australia, along with practical examples of how, in Victoria, we are using academic collaboration to enrich and enhance judicial education.

Australia, the judiciary and the academy

In Australia, there is typically a strong division between practising lawyers and the academy, as judicial officers are almost always drawn from the ranks of practicing lawyers. There are exceptions, but they remain just that – exceptions.² As a result, there has been, at times, a reluctance to use doctrinal academics for judicial education on substantive law, as they add little to what a well-read judge can deliver on the same topic. Where academics are used, the focus is on equipping judges with information on the state of the black-letter law, so that judges can correctly apply that law in the courtroom.

In contrast, academic involvement in skills development education is more common, and focussed on providing background, context and framework for teaching by a judicial faculty. This takes place in areas such as judgment writing, using internationally recognised academics such as Professor James Raymond, or fields such as management of self-represented litigants, delivery of oral decisions and communication with jurors.

Finally, within the social context dimension of judicial education, academics have proved invaluable through their mastery of disciplines such as forensic medicine and psychology. Judges benefit from information which helps them better contextualise matters they are likely to encounter in the courtroom, such as responses to trauma, the impact of mental illness on decision making, impact of delay on memory, the nature and effects of acquired brain injury, the process of and limits of DNA evidence and the evaluation of witnesses. The common element of both

* Director, Research and Publications, Judicial College of Victoria, Australia. This paper was delivered at the IOJT Conference in 2015. The views expressed in this paper are the author's opinion and do not necessarily reflect the views of the Judicial College of Victoria. The author wishes to acknowledge the assistance of Margaret Blackburn in developing this paper.

¹ National Judicial Institute of Canada (NJI), *Twenty Principles of Judicial Education*, 2006.

² Examples include The Hon Marcia Neave AO, appointed to the Victorian Court of Appeal in 2006, after working as a legal academic for 40 years; The Hon Justice Mark Leeming, who straddled the world of practice and academia and worked as a barrister and academic at the University of NSW until he was appointed to the Supreme Court of NSW in 2013; The Hon Mark Weinberg, who worked as an academic and ultimately Dean of the University of Melbourne Law School before returning to practice in 1986 until he was appointed to the Federal Court of Australia in 1998 and the Supreme Court of Victoria in 2008.

legal academics providing education on substantive law and cross-disciplinary training on skills development and social context matters is that the expert acts as a repository of knowledge. The academic functions as a teacher to an already highly educated classroom. However, academic work is more than just teaching — academics also develop theories, analyse information and test hypotheses. It is this analytic function which has often been eschewed in judicial education, for good reason. Judges must deal with the law as it stands. Within a busy court list, there is typically neither the time nor the need to develop overarching theories of principle. Even within intermediate or final appellate courts, the cases where such theories could inform or influence the outcome are rare. More often, cases are decided on the correct operation of principles of statutory interpretation and an understanding of precedent.

Transactional and transformative education

Transformative learning, first developed in the work of Mezirow³ and refined by Cranton⁴ and others, refers to learning that leads to more significant change and development than other kinds of learning. In transactional learning, the focus is on what is learned. In the transformative model, learning is a powerful tool through which the learner constructs new personal meaning, which results in a paradigm shift and shapes future perceptions of experiences, both intellectual and affective. Key tools for transformative learning are critical reflection and engagement in rational exchange of ideas. They are the means by which learners identify and evaluate the assumptions and prior values that they bring to the learning process.

There is a temptation in judicial education to focus on transactional learning designed to assist judges with the most visible and admittedly important part of the judicial role, that of resolving cases according to law. In this paper, I argue that robust collaboration between judges, educators and academics provides four avenues to pursue, with the potential to unlock a transformative approach to professional change and development:

1. court-oriented research
2. informing judicial education
3. stimulating judicial engagement
4. fostering judicial contributions to academic publications.

Court oriented research — Judicial wellbeing project

In Victoria we have a judge-led court administration system, Court Services Victoria.⁵ This system was established in 2014 to safeguard judicial independence and ensure courts could exercise control over their administrative structures. One of the promised outcomes of the reform was that:

Court Services Victoria will allow the judiciary and their senior executives to develop efficient, innovative, whole-of-system approaches to court administration.⁶

³ J Mezirow, *Transformative dimensions of adult learning*, Jossey-Bass, 1991.

⁴ P Cranton, *Understanding and promoting transformative learning: a guide for educators of adults*, Jossey-Bass, 1994.

⁵ Established by the *Court Services Victoria Act 2014* (Vic), and overseen by a Courts Council consisting of the head of each Victorian jurisdiction and two appointed members.

⁶ Hansard, Parliamentary Debates, Legislative Assembly, Wednesday 30 October 2013, Court Services Victoria Bill 2013, Second Reading, Mr Clark (Attorney-General), 3663.

The development of such new approaches to court administration requires a range of skills outside the traditional, transactional focus for judicial education, including principles of governance, leadership and management education and organisational theory. These are all matters that the Judicial College of Victoria is exploring, with an eye to incorporating into judicial education programs in future years.

Another limb of courts' innovation takes place when courts recognise that external review and analysis can inform new approaches and make themselves open to change. Many of you will be familiar with the use of management consulting groups who are periodically hired to evaluate court practices, recommend efficiencies or support efforts to persuade government to fund new courts' initiatives. However, other disciplines have much to offer independent and autonomous court systems. As a result, the College, in partnership with Court Services Victoria, is working to establish a "Judicial Research Hub" to streamline and support the conduct of court-oriented research.

This approach outsources the conduct of research to a traditional research body — the academy — rather than internalising the function as occurs where judiciary-based applied research centres are established.⁷ Judiciary-based applied research centres are the gold standard in court oriented research. However, for those jurisdictions where this is not a realistic possibility either for cultural or budgetary reasons, it is suggested that collaborative partnerships with the academy provide an alternative which can secure some of the same outcomes as an in-house research capacity and may provide a foundation which can grow into a fully-fledged applied research centre.

The first project being conducted as part of the Victorian "Judicial Research Hub" is a study of judicial wellbeing. This has been conducted in collaboration with a lawyer and PhD candidate from the School of Psychology at University of Melbourne, Ms Carly Schrever. Her research project involves examining current court systems for managing judicial stress and vicarious trauma and recommending new systems to address those hidden dangers in judicial work.

Within Australia, the issue of mental illness in the legal profession has received significant attention, especially with the creation of the Tristan Jepson Memorial Foundation in 2005 which aims to decrease "work related psychological ill-health in the legal community and to promote workplace psychological health and safety".⁸ While the focus started on law firms before being extended to barristers,⁹ the Supreme Court of Victoria recently announced that it would soon become a signatory to the Foundation's Best Practice Guidelines for the Legal Profession,¹⁰ which are designed to promote a "psychologically healthy workplace".¹¹

⁷ B Rothstein and I Archie, "Judiciary-Based Applied Research Centres: Enhancing the Administration of Justice While Strengthening Judicial Independence and Improving Judicial Training" (2014) 2 *Judicial Education and Training* 20; Y Mersel and K Weinshall-Margel, "Establishing a Judiciary-based Research Centre — The Israeli Experience" (2014) 2 *Judicial Education and Training* 35.

⁸ www.tjmf.org.au/about-us/, accessed 12 December 2016.

⁹ www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/2013-Media-Releases/Lawyers--new-foundation-targets-mental-health, accessed 12 October 2015.

¹⁰ Associate Justice Mary-Jane Ierodiaconou, Annual Tristan Jepson Memorial Foundation lecture, 12 December 2016, <http://assets.justice.vic.gov.au/supreme/resources/c4c15b4a-d8ff-4cf5-b802-70e55384012c/annual+tristan+jepson+memorial+foundation+lecture.pdf>. This would make the Supreme Court of Victoria the first court signatory to the guidelines.

¹¹ www.tjmf.org.au/raise-the-standard/the-guidelines-at-a-glance/, accessed 12 December 2016.

This study into judicial well-being is, as far as we know, the first of its kind in Australia to examine the issue of “work related psychological ill-health” among the judiciary. Judges have a very public role, and the question of mental health and the judiciary is one which must be handled sensitively. As in all walks of life, mental health and mental illness must not be stigmatised. Confidentiality must be preserved. Researchers must grapple with the challenges of maintaining anonymity when reporting on a small group. All of these require a high degree of trust between the judiciary and the research team. Effective learning in this sensitive area requires the creation of a safe environment where participants can experience vulnerability which provides the fertile soil for personal growth. Seen in that light, the parallels between effective judicial education and research into topics of sensitivity are obvious. It is for this reason that it was natural and important that Ms Schrever, a former employee of the Judicial College, approached us for assistance in facilitating access to the courts for the conduct of her research. Through its reputation for confidentiality and sensitivity, the College has been well placed to act as a research broker, lending its institutional support to the research and providing reassurance to the courts.

The aim of court-oriented research is to engage the court as both a study participant and beneficiary of the research. Judges and judicial educators encounter numerous problems within the justice system for which there are no simple solutions. Through collaboration with universities, these judges and educators can encourage academics in disciplines such as law, economics or social sciences to research a problem relevant to courts. Rather than treating the court as a data source, with information on case volumes, sentencing trends, self-represented litigant prevalence data and all manner of topics which may be interesting to others, but not likely to produce recommendations that the court can act on, court-oriented research is designed to benefit both the public and the court.

The court is engaged at an early stage in developing the parameters of the study and has the chance to influence the questions which the researcher seeks to answer. Academics can then leverage the support of the courts in seeking funding for the research, either directly from the courts or from external funding bodies. Then, the academics conduct the research and identify opportunities for improvement. Courts can then use that research to either review and improve their own internal processes, as the basis for either identifying a need for new judicial education or for a law reform proposal which the courts can deliver to government. This process of courts being both participant and beneficiary in the research takes advantage of the academic process to provide neutral and independent inputs.

Informing judicial education

The second avenue of value for partnerships between judges, judicial educators and the academy is to inform judicial education. I have already referred to the classic use of academic input to judicial education as content experts. Here though, I am referring to the role the academy can play in two different areas:

- identifying new topics for judicial education
- using court-oriented research for learning.

Academic input into need analysis

As judicial educators, we draw on a diverse range of sources to inform our design of educational curricula. Foremost in that is the role that judicial officers themselves play in identifying areas of demand and need, through their lived experience and through the collegiate dialogue that

takes place within courts. Good judicial educators also play an important role in identifying over-the-horizon trends or opportunities and will incorporate these into educational curriculum to prepare judges before the need becomes emergent. This predictive function of professional judicial educators is one which can and should be shared with the academy. From their vantage at the cutting edge of legal developments and the conduct of empirical research, some academics are ideally placed to help judicial educators identify new developments and new opportunities. Especially when supported by the latest empirical research, this can provide the robust evidence base to convince judicial steering committees of the value of education on that topic, even before the need is recognised.¹²

Academics can have a planning role for judicial education on two levels. First, in the broad design of education curricula and second, in the specific design of content for individual parts of the program. That is, as educators, it is important that we consult with the academy both in deciding what to run and also determining how to run it. This is why, for the last three years, we have run an annual judicial education program in collaboration with the University of Melbourne Law School, with a faculty comprising both judicial officers and University of Melbourne academics.¹³ This process has drawn on the rich mixture of academic and practical knowledge to identify sessions for each program that are relevant to judicial officers.

Using court-oriented research for learning

As discussed previously in the context of court oriented research, judicial engagement with the academy provides an opportunity to influence the design of research projects and to stimulate projects which will produce outcomes relevant to the court. Such outcomes can feed into the judicial education system and facilitate transformational learning.

Ms Schrever's research on judicial wellbeing is an example of the transformational capability of court oriented research even before the research is complete. In August this year, the College conducted a two day seminar on judicial well-being, with speakers from prominent organisations dedicated to fostering improved mental health, experienced lawyers and judges, and facilitated by an experienced organisational psychologist. The planning and organisation of this seminar was conducted by Ms Schrever, in collaboration with a judicial steering committee and another member of staff who also works part time as a clinical psychologist, Dr Ros Lethbridge. This provided the opportunity to design an education program aligned with Kolb's experiential learning cycle.¹⁴ Judicial officers attending the program would all have differing experiences with vicarious trauma, burnout and occupational stress. The program then provided the opportunity for both reflection and conceptualisation through a combination of group discussions and formal presentations, before participants return to their courts to engage in active experimentation through future experiences with stress and trauma.

Stimulating judicial engagement

As mentioned earlier, most judicial education, as a matter of priorities and necessity, is transactional in nature: focussed on the conduct of hearings and determination of disputes.

¹² See also Y Mersel and K Weinshall-Margel, "Establishing a Judiciary-based Research Centre — The Israeli Experience" above, n 7 at 40.

¹³ The Age of Statutes: Principles of Statutory Interpretation, 15 May 2015; Judicial Discretion in Private Law, 14 March 2014; Constitutional Role of the Judge, 15 March 2013.

¹⁴ DA Kolb, *Experiential learning: Experience as the source of learning and development* (Vol 1), Prentice-Hall, 1984.

However, as adult learners at the top of their professional career, judicial officers often seek more from education than improved conduct of transactional processes. One element of judicial education which is easily overlooked is the value of stepping back from the coal-face and looking at legal principles, which provides frames of reference to guide enhanced judicial decision making. This chance to connect or re-connect with fundamental principles on topics such as the relationship between courts and government, the development of concepts such as natural justice or procedural fairness, the development and operation of the principle of legality, or examining judicial independence and the role of the judge within a constitutional framework is, for many judges, intellectually stimulating and satisfying.

The National Judicial College, in the United States of America, provides, perhaps, the pinnacle in using collaboration between the academy and judicial education to stimulate interest in fundamental propositions through its Masters and PhD programs for judicial officers.

Coming from an Australian tradition, the idea of serving judges going back to university for further study is novel. Our Victorian approach has, instead, been to bring the university to the judiciary, through a series of seminars which focus on the academic side of questions relevant to judicial education. Feedback from participants indicates that engaging in such programs can reinvigorate their interest in life on the bench. Especially when targeted at appellate level judges, such programs can also invite them to reflect critically on their role in developing the common law and their approach to judgment writing. Such a questioning and curious attitude will encourage openness to new arguments or approaches, improve the likelihood of judges being aware of competing theories or tensions within a branch of the law and ultimately contribute to a higher quality of justice for litigants before an appellate court through better reasoned and considered judgments and reduced dependence on the quality of a party's legal representation.

Fostering judicial contributions to academic publications

Within the Anglo-Australian legal tradition, extra-curial speaking is a well-recognised occurrence. Less common, however, is for those speeches to make their way into academic literature. As judicial educators, we facilitate hundreds of hours of discourse on a range of legal issues to and among judicial officers across our various court hierarchies. However, while the papers from this conference will be collated and some published, how many of the speeches to our judges receive that circulation and opportunity for critical evaluation and reflection?

In Victoria, select speeches by Supreme Court and Federal Court judges are placed on publicly accessible courts websites,¹⁵ and all presentations delivered at Judicial College of Victoria programs are placed on a secure intranet accessible only by judicial officers and their support staff. The College also highlights select extra-curial speeches from around the world through a regularly updated news and events feed on the judicial intranet.

Within the last two years, the Judicial College has also started publishing a journal¹⁶ containing select papers from College events to provide a way of disseminating learning from

¹⁵ See www.supremecourt.vic.gov.au/home/contact+us/speeches/, accessed 18 November 2016 and www.fedcourt.gov.au/publications/judges-speeches, accessed 18 November 2016.

¹⁶ Judicial College of Victoria Online Journal, at www.judicialcollege.vic.edu.au/publications/jcv-journal, accessed 12 December 2016.

judicial education events to the outside world, especially the academic community. This journal has been well-received by both the judiciary and legal academics and papers from the journal have already been cited in significant appellate decisions¹⁷ and law reform reports.¹⁸

The purpose of producing such a journal is two-fold. First, it provides visibility and transparency to judicial education activities. As judicial educators, we know, and most of our judicial officers know, that judicial education demonstrates a healthy, intellectually curious and engaged judiciary and is not a sign of deficiency. However, there is a public perception dimension and we must always manage the risk that judicial education will be mistakenly perceived or misrepresented as an indication of inadequacies in the justice system, or worse, as useless when it fails to cure all ills. By releasing select papers, which are of high quality, intellectually rigorous and academically oriented, it is possible to provide a measure of transparency while managing the perception risks.

Second, it provides an opportunity for the process of judicial education to engage with and stimulate debate within the wider academic community. Material on topics of ongoing interest within the academy, such as the application of principles of statutory interpretation, the continuing growth, formulation and application of principles of equity and the practical content of principles of judicial independence all benefit from a uniquely judicial perspective.

It is obvious that not all presentations to judicial education events are suitable for wider publication. Skills development resources and substantive law updates may either be wholly unsuited for, or of limited interest to, a wider audience. Similarly, depending on presentation design, the application of adult learning principles may mean the majority of the educational content arises from participant interaction and debate rather than from the session facilitator.¹⁹ Despite this, events designed to stimulate judicial engagement will tend to produce a fertile crop of papers for reproduction in an academically minded journal.

Building partnerships and links between institutions — Practicalities and managing risk

Having discussed four ways in which courts and judicial educators can collaborate with the academy, it is time to turn to some practical considerations — how do you go about it and what are the risks which must be managed?

Practicalities

Pursuit of collaborative partnerships between judges, judicial educators and the academy requires a clear vision of what is sought and what can be achieved. This paper has outlined four means by which academic engagement in judicial education can deliver improved outcomes. Depending on where a judicial education body is in its life-cycle, one or more of these may be worth pursuing. What follows are general observations about how to build this collaboration, though the detail will vary (and some parts may be omitted) depending on which outcomes are being pursued.

¹⁷ *Bare v IBAC* [2015] VSCA 197 at footnotes 233, 330, 485, 509, 597.

¹⁸ M Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* at fn 90, 103, 160, 161, 281, 332 at <http://assets.justice.vic.gov.au/justice/resources/>, accessed 18 November 2016.

¹⁹ For example, where a judicial education seminar is taught using the Socratic method.

Part 1 — Building institutional links between judges and judicial educators and universities

Every judicial education body has different levels of linkages with universities. Some may be situated within a university and function as a university department, while others maintain loose professional ties based on the education body needing to call on university academics as presenters from time to time. In Australia, our judicial education bodies have tended to be loosely linked. While the National Judicial College of Australia is housed at the Australian National University, it is autonomous and not part of the university structure. The other two Australian judicial educators, the Judicial College of Victoria and the Judicial Commission of New South Wales, are fully independent and autonomous bodies with only professional links to universities. This lack of formal ties to a university environment poses initially higher barriers to building links, but provides an opportunity to build diverse links with a range of academic bodies, rather than only a host organisation.

These links can take a wide variety of forms, including co-branded judicial education events which recognise the special contribution from a university to a particular program or series of programs; internships between the university and the judicial education body; guest speaking roles for judges and judicial educators at the universities; and partnerships between universities and judicial educators to facilitate stakeholder forums with judicial officers for academics researching a particular area of law.

All of these contribute to improved relationships between the different organisations and pave the way for drawing on academic expertise in the conceptualising and delivery of judicial education.

Part 2 — Setting up systems for court-oriented research

For those bodies which are pursuing the court-oriented research angle, there is a separate line of work which must be pursued. Research work with the judiciary will often require approval from a human research ethics committee. In building and improving collaborative partnerships, judicial educators have a brokering role here, ensuring that the ethics approval process is rigorous, appropriate and adapted to the particular issues which arise in the courts' environment while minimising any duplication of effort researchers face.

Educators can also act as facilitators, bringing together judicial officers from different courts to encourage a systemic approach to proposed research, rather than researchers needing to approach each court individually and each court deciding completely independently. While the question of participation must ultimately be a decision for each court, the system benefits from sharing of information and concerns about research questions and ensuring that researchers do not confront a fragmented and siloed system.

A cross-courts research governance committee also acts as an ideas incubator, providing an opportunity to feed research ideas back to universities as possibilities for exploration. This allows universities to propose the ideas generated by the courts to PhD students and others looking for worthwhile problems to investigate and hopefully solve.

Managing risk

When seeking to build collaborative partnerships between judges, judicial educators and the academy, there are three major areas of risk to consider:

1. change management, including managing cultural change
2. managing expectations
3. managing confidentiality.

Change management

The first and potentially most significant barrier to be addressed is the question of cultural resistance to change. Different judicial systems will have different attitudes to the issue of collaboration with the academy. However, as change agents,²⁰ judicial educators are well-placed to challenge outdated approaches, to identify opportunities and manage risks. As in most change management processes, improving collaboration often requires identifying “champions” whose support for academic collaboration can shift opinion within the court. Judges who have previously worked as academics, or who maintain ties to universities, or who have retired and returned to universities to teach are all potential champions for driving a culture of engagement between the judiciary and the academy. In Victoria, we have had the good fortune that our Chief Justice, Marilyn Warren AC, has led the charge, identifying opportunities and pushing for adding an academic dimension to judicial education.

Anxieties associated with these collaborative partnerships may include concern about:

- diminution in the practicality and quality of judicial education
- public perceptions and confidentiality of data
- the utility of such partnerships and the value of the partnerships for the time it will take.

It will be important for those seeking to build the partnerships to identify the specific anxieties affecting your system and to adopt strategies to address them, based on the goals you are seeking to achieve.

Managing expectations

Expectation management is, in some ways, the opposite extreme to change management. Whereas change management involves persuading a system to accept a shift from the status quo, expectation management requires persuading parts of the system to recognise that the shift may not be as great as they might hope for. This is especially important when working with change champions, whose enthusiasm is a vital ingredient for successful delivery of the change project while also challenging the scope of the project. For this reason, it is vital to have a clear vision of what collaborative partnerships are designed to achieve, along with an incremental plan which can be revisited once the foundations are established. This methodical approach to delivery provides a bulwark against scope creep (that is, uncontrolled changes or continuous growth in a project’s scope) along with a system to harness and contain the expectations and enthusiasm of champions.

²⁰ M Conner, “Judicial Educator: Change Leader” (2015) 3 *Judicial Education and Training* 6.

Managing confidentiality

As educators, we are well aware of the need to provide confidentiality within the learning environment. However, the process of building collaborative partnerships with the academy provides the opportunity to expand the traditional learning environment while posing fresh challenges to confidentiality. The wider array of participants, the process of transformational learning and the use of participant knowledge and experiences as the basis for research must all be considered with a confidentiality lens.

In the development of the judicial wellbeing project discussed earlier, one of the issues the project encountered was the question of how to identify the study cohort and participants. Consistent with the conduct of similar studies in the United States, the project will not identify the jurisdiction or court where participants are from, and comparisons will be limited to non-identifying groups such as “summary v higher courts”, “criminal v civil” and “recent appointees v longer serving judicial officers”.

Conclusion

In 2014, Professors Hughes and Bryden²¹ spoke of the utility, from the perspective of academics, of partnering with judicial educators to identify research topics of interest to the judiciary. They identified three benefits for the academic community forming stronger linkages with judicial education: expanded thinking through the incorporation of a judicial perspective in scholarly work; capacity for the judicial environment to influence the scholarly research agenda; and increased opportunity for conducting empirical research involving judges. A collaborative partnership between judges, judicial educators and academics provides the chance to capture these benefits and answers their call for:

a dialogical model of research where judges provide information about the constraints and challenges of the work of judging to researchers, articulate conceptual and pragmatic hurdles to implementing researcher reform proposals, and where the research is responsive to judicial input.²²

Incorporating uniquely academic insight and approaches to judicial education challenges traditional thinking about judicial education which often focuses on transactional skills. However, the process provides rich fruit for improving the quality of judicial education and the opportunity to use judicial education to stimulate systemic improvements within court systems. It has also, in our experience, helped reverse the decline in judicial education attendance numbers which our Chief Justice spoke of at this conference in 2013. Especially in jurisdictions where courts are administratively self-governing or committed to continuous improvements,²³ using education from disciplines such as leadership and management, organisational theory and psychology can transform courts and support judges to perform those parts of their role which exist outside the core judicial role of resolving disputes according to law.

²¹ J Hughes and P Bryden, “Judicial Education as a Forum for Identifying and Meeting Research Needs”, (2015) 3 *Judicial Education and Training* 95.

²² *ibid* at 109.

²³ *The International Framework for Court Excellence*, 2nd edn, 2013, recognises that court excellence requires a continuous improvement methodology (at p 13). See www.courtexcellence.com/resources/the-framework.aspx, accessed 18 November 2016.

Continuing education for judges

Richard Reaves*

Introduction

At the recent IOJT biennial conference in Pernambuco, Brazil, prior to addressing the mainstream experience of judicial education in the USA, as reflected in the IOJT presentational support paper, I related the following three conclusions. This departure from the script amounted to an exercise of speaker-writer hubris, derived from several decades of experience with judicial education among a variety of states in the USA.

First, the most important topics for judicial education in the USA focus upon the tone, demeanor, and engagement styles that judges bring to resolution of disputes. The parties and their lawyers, if any, already bring law, opinions about case resolution, and plenty of conflict, so diffusing its presence by the manner in which the court treats these individuals is key. Professional competence with these skills is at least equal to, yet probably more important than, legal correctness of result or dispositional efficiency. Nevertheless, seldom is the focus on tone, demeanor, and engagement styles, a highly sought after topic among judges themselves when triaging time and financial resources in planning for continuing judicial education.

Second, due to a customary absence of effective performance measures for courts in the USA, coupled with an organizational climate that fiercely values the independence of judges, anecdotal evidence of flawed practice combines with force of personality among training leaders to determine the key directions to pursue in judicial educational product design and delivery. Consequently, a close working relationship between the judicial disciplinary authority and the judicial education agency must be maintained, in order to assure that salient elements of judicial professionalism are timely addressed through continuing judicial education.

Third, in the USA it is independent courts that furnish the primary bulwark to counter overreach by the government, be it national, state, or local, against the liberty interests belonging to each individual in this contemporary democratic state. Judges must guard against becoming too comfortable with government and their place in it, especially when pursuing resources or circumscribing court powers.

Judicial education must never shy away from reminding judges of their unique societal responsibility to preserve individual liberty. It must always aid courts by nurturing knowledge, skills, and attitudes that enable judges to stand against other branches of government, public media, political ideologies, domains of religious expression, and centers of economic power, which otherwise would operate to dominate the lives of individual members of society.

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Methods or platforms for instruction and learning in judicial education

Formal academic education leading to practice of law

In the absence of employing the European-Latin American model for educating judges, which often includes:

- (i) selecting judicial service as a career pathway during post-secondary education studies in law school
- (ii) coupled with formal academic examinations for judicial career placement
- (iii) followed by actual vocational service through assignment in forums of ascending adjudicatory complexity
- (iv) judicial education in the United States of America engages judges quite differently, both in relation to methods or platforms for instruction and learning as well as with regard to phases of judicial career.

Standard, four-year, college education is followed by three-year, graduate school study of law. This seven years of post-secondary education typically is understood as the initial formal learning platform experienced by most trial and appellate judges. While it may encompass familiarization with law, it lacks significantly informed focus on either judicial decision making or effectively operating courts.

Such a track of formal legal education routinely leads to study for and passage of one or more bar examinations, which focus generally on substantive law and litigation procedures across a wide range of legal subject matters, regularly covering more topics than actually will be encountered during an attorney's subsequent professional practice. This regimen of academic preparation is followed by the practise of law for an undetermined period of time, until the individual attorney pursues selection for a judicial position.

Life experience and pragmatic orientation

For other US-American judges, non-lawyers who typically serve in initial criminal proceeding forums issuing warrants and conducting pre-trial release determinations, or in civil small claims courts, a formal law school education or even a college degree often is not a prerequisite. Also, these judges may be pursuers of other non-legal vocations either prior to or simultaneously with serving as a judge.

Nevertheless, it is in the crucible of dealing day-to-day with social and vocational relationships involving business, law enforcement, family, and community affairs that interpersonal skill development, along with accreting the wisdom of common sense, becomes esteemed as the primary learning platform for such judges. Whether named justices of the peace, magistrates, small claims judges, town and village justices, or tribal judges, these non-lawyer judicial officers number in the thousands, and in the locales where they serve (largely in rural areas) face little danger of being replaced by law-degree holding adjudicators.

Correspondingly, the practising lawyer's engagement with complex personalities and diverse business matters, law enforcement transactions, governmental agency policies, and civic organization activities is frequently advocated as a necessary precursor to becoming a good judge. Lawyers generally see their role in society as wizards of pragmatism, as problem-solvers, even when adversarial litigation becomes the method for resolving disputes.

In reality, a miniscule percentage of civic, civil, and even criminal conflicts are settled through litigation, while the overwhelming majority are resolved through negotiations. Again, it is this aspect of life experience in resolving differences gained from dealing with people and organizations, causes and compromises, which is deemed so vital to acquiring the mature perspective that is essential to a judge's exercise of sound judgment and informed discretion.

Whether lawyer or non-lawyer (and whether merely legal fiction or self-deluding folklore in the USA), the best judges are understood to have matured through varied life experiences while practicing different or prior legal vocations, in order subsequently to carry to the judicial bench both a pragmatism and a wisdom capable of being conscientiously applied in their exercise of legal judgment and court power. Thus, wide experience in civic and personal life is no less important than formal education as a preparatory platform leading to competent judging, though it also honors the academic legal correctness and pragmatic dispositional effectiveness of the judge's decisions.

Conferences and seminars: state and national

In-residence, or face-to-face, conferences and seminars operate as standard methods for continuing education in most professions in the USA, whether in the legal world targeting lawyers and judges, or elsewhere. Conferences routinely involve large groups of attendees, contemplate substantive plenary sessions led by lecturers or panelists, and frequently gain enrichment from multi-tracked, simultaneous, mini-presentations through which the larger group is divided into smaller and more manageable units.

Seminars regularly target attendee groups of limited or fixed size and focus as specialty courses on concentrated subject-matter areas, and frequently are strengthened by use of preparatory readings or related personal investigatory tasks directed to those choosing to take part. Certification credit may be earned through completion of designated courses or from hours of participation, whichever criteria of measurement is employed by the requirement-imposing, educational certification authority. State-based and nationally-based providers of judicial education in the USA employ both in- residence, or face-to-face, conferences and seminars as vehicles to serve their constituencies.

Products and services of state and national providers complement rather than duplicate each other. State-based providers work ever-mindful that their precious judicial education resources of:

- (i) programming money
- (ii) attendee time
- (iii) intellectual capital for leadership, and
- (iv) organizational good will,

must be allotted sufficiently each year to satisfy mandates experienced by a vast array of eligible participants.

Nationally-based program sponsors respect the privilege of focusing upon topically-centered professional practice areas, which allow them to:

- (i) employ longer allocations of instructional time
- (ii) more complex or layered learning and speaker delivery strategies (for achieving in-depth examination of germane subject matter issues)

- (iii) nationally-based courses involving methods of instruction
- (iv) targeting groups no larger than 50-60 people, and
- (v) activities that facilitate small group interaction and personal learning, even within these limited plenary audiences.

If a minimum pre-registrant level is not attained, a nationally-based provider may feel the necessity to cancel or postpone delivery of an activity. When cutting-edge innovation is occurring across the country in various court systems (eg testing new techniques for serving self-representing litigants, developing strategies for implementing accountability courts), or where national-level legal authorities or uniform state law trends emerge in a common direction (eg constitutional criminal procedure due process requirements, more efficient child-support enforcement techniques, effective dispositions for sexual abusers of children and youths), nationally-based continuing judicial education can provide both repetitively dedicated and highly-skilled leadership resources to expedite judges' appreciation for such new realities.

Correspondingly, and in a symbiotic fashion, state-based judicial education aims to connect its participants with mastery of:

- (i) timely, precedential, and directly-applicable legal authorities (ie cases and statutes)
- (ii) insight into practicalities for effectively working with court-serving state and local government departments (ie their formally-promulgated regulations as well as routine organizational policies and practices),
- (iii) lawyering customs and law enforcement practices that constitute the local legal culture, and
- (iv) the normative state-of-the-art environment of court administration for vertically engaging with other courts, not to mention other legal system stakeholders (ie sheriffs, record keeping clerks, court reporters, language interpreters) as well as more customary courts users (ie litigants, witnesses, jurors, media).

Equipping judges to navigate successfully through such nuances of locale is a unique state-based provider responsibility, on par with the more visionary perspectives offered by nationally-based judicial education organizations.

Remote learning resources

Contemporary advocacy is emerging for judicial education to adopt greater reliance upon computer-delivered self-study using either fixed or dynamic lesson plans, many involving supplemental readings, completion of problem exercises, and even chat room interactions among the on-line participants. Various forms of knowledge testing as well as critical monitoring of attendee involvement in queries and responses can enable a relatively high level of quality control assessment and accountability for participation in such computer-based self-study. Generally absent in this advocacy urging more remote learning, however, is a corresponding commitment to adequately fund design and delivery of good quality products.

There is a common misconception that resort to such educational methods is more economical. There is also a common misconception that virtually any court professional is readily able to utilize this new self-study technology, and that the purveyors of it are skilled and adept at making it user-friendly rather than off-putting. Equally troubling is the fact that it is easier for a registrant to make a last minute decision to cancel participation in a

self-study activity, without appreciating the adverse impacts on productivity suffered by the course provider, than to cancel involvement at a seminar or conference for which the registrant must set aside significant time for travel and attendance.

Self-study and reference materials

Judicial education in the USA is frequently called upon to provide judges not only with these traditional and modern platforms for courses of instruction, but with self-study and reference materials, including:

- (i) bench books
- (ii) bench guides
- (iii) bench cards
- (iv) pattern jury instructions
- (v) process jury instructions
- (vi) uniform rules of court procedure
- (vii) model orders and normative letters of correspondence
- (viii) standard forms of practice as well as sample dialogues and interrogatories (increasingly in multiple languages such as Spanish as well as English)
- (ix) performance assessment tools
- (x) standard operating procedures for accountability courts etc.

Whether in the form of hard copy books, as electronic publications, or as dedicated websites, the development and integration of these reference tools into course delivery furnishes an increasingly important learning method for modern judicial education.

Phases of judicial career influences on judicial education

Once designated for judicial service, whether selected by appointment or election, judges typically are accorded a very short period of time for adjustment to workload and are expected to be, though not perfect, immediately productive. Nevertheless, judicial education in the USA rather commonly recognizes at least three phases of judicial career evolution, which embody both personal and vocational growth. They are new judge orientation, survey update certification and recertification, and mid-career personal and professional development.

Basic / new judge orientation courses

Formal courses of basic orientation address the essential preparation of new judges. Pre-service orientation following selection can be logistically difficult to implement, but increasingly it is becoming a value that judicial education organizations are striving to embrace. Among the regular new judge orientation course, topics, should include the pragmatically effective handling of day-to-day court operations in relation to:

- (i) understanding and duly exercising class-of-court subject matter jurisdiction
- (ii) frequently confronted evidentiary questions and due process issues, typically pertaining to specific stages of court proceedings
- (iii) key strategies and successful tactics for accessing support from court-serving governmental agencies, both local and state

- (iv) workload management techniques and procedural rules to direct case flow, whether involving lawyers or self-representing litigants, and
- (v) ethical practices that govern interactions with members of the local bar, the public, and the media.

In a USA state such as Georgia, where there are six independently functioning classes-of-trial courts, noticeable nuances of difference will be discerned in the contents of new judge orientation courses for judges in each of these respective courts. Nevertheless, integrated with the aforementioned basic new judge orientation topics should be highlighted emphases on fundamental concepts and essential standards that every judge needs to know and apply professionally, such as:

- (i) basic principles of due process
- (ii) key aspects of judicial ethics
- (iii) essential rules of evidence, and
- (iv) preserving integrity of the judiciary while interfacing with court-serving agencies from other governmental branches.

The nationally-based providers of judicial education have proven capable of delivering new judge orientation directed in these areas of judicial practice.

Mentor-coaching

Mentor-coaching of new judges, by a duly trained and more experienced judge, is an increasingly conducted, in-depth and inter-personal, state-based avenue for recently selected judges to gain new knowledge, discover how to develop new skills, as well as observe and exemplify new attitudes. It is especially geared to identifying skills in need of refinement as well as affording practice opportunities for their development.

Thoroughly designed mentor-coaching relationships typically encompass:

- (i) mentor and mentoree dialogues and consultations
- (ii) mentoree self-study of recommended resources, existing in print, video, and internet websites
- (iii) topically directed inquiries and conversations with other judges
- (iv) site visits with mentor hosting, mentoree hosting, as well as neutral site observations
- (v) guided consultations with court support officials, and court support service agencies, and
- (vi) expert referrals of the mentoree by the mentor to other experienced lawyers, court administrators, and organizational leaders.

Periodic survey update professional certification and recertification

Update education is the most commonly understood and embraced reason for judicial education in the USA. It is something lay persons can grasp about the work of judges, which provides some justification for providing continuing judicial education. In most states, this understanding is sufficiently credible to furnish a basis for mandating a minimum requirement or level of involvement, usually declared by statute or court rule, whether based on participation yearly in specific courses or for a designated number of hours.

Attendance in nationally-based courses is routinely accredited toward satisfying these required hours for certification. A few states even direct attendance in specific courses offered by nationally-based sponsors. The survey aspect of this update focus derives from a perceived

need for alerting judges to recent changes or new developments in all of the jurisdictional components of their responsibilities, rather than concentrating on a certain phase of proceedings or a designated type of case.

Among the subject matters covered in these survey update course offerings are the following:

1. Update on the most recent case law from the intermediate State Appellate Court, State Supreme Court, United States Supreme Court, and US Circuit Court of Appeals.
2. Update on the most recent statute law from the State legislature, and United States Congress; in particular for new laws addressing statutory codes of: evidence, criminal behavior, criminal procedures, guardianship of persons and conservatorship of assets, mental illness and substance abuse treatment, behavioral assessment and developmental disabilities, marital dissolution, child custody and visitation, local and state taxation, voting rights and requirements.
3. Update on the most recent procedural rules of court, and new uniform court forms.
4. Update on judicial ethics and professionalism from the most recent state disciplinary cases and official advisory opinions, including principles of access to courts and court services, reporting and intervention for strengthening professionalism, procedural practices of disciplinary agencies involving both judges and lawyers.
5. Update on new judicial chambers business practices, addressing technology and software, personnel policies as well as productive supervisory practices, and decisional workload management.
6. Update on new state agency policies and operations, arising from departments that deal with issues such as:
 - Family and Children’s Services
 - Child Support Enforcement Services
 - Foster Care Placement and Adoption Services
 - Community Mental Health Assessment and Treatment Services
 - Aging and Elder Care Support Services
 - Developmental Disability Support Services
 - Corrective Institutional Confinement Services
 - Probation, Re-Entry Supervision, and Parole Services
 - Driver and Boater Licensing Services
 - Environmental Regulation Enforcement Services
 - Wildlife Management Services
 - Workers Compensation Board Adjudication and Rehabilitation Services
 - State Administrative Agency Hearings Services
 - Public Defender Standards and Legal Representation Services
 - Indigent Civil Claims Support Services
 - Election Law and Policy Implementation Services.

In all of these subject matter areas, attentiveness for judicial educational focus is given to their specific, and frequently unique, engagement with the different stages of case flow from initiation and pre-trial, to trial and decision with final judgment, and then to subsequent disposition as well as on to appeal.

Specialty courses, at both the state and national level, are created to enrich these survey update courses by focusing on judicial handling of particular case types. For example, in-depth and in-breadth study may occur about conducting capital felony proceedings, coping with domestic violence allegations, responding to human trafficking initiatives, affording equitable relief posed by pandemic disease and other public disaster circumstances.

Particular situational patterns presented to courts also may provide a basis for treatment via these specialty courses, such as professionally handling self-representing litigants, according non-citizens relevant due process rights, engaging court security obligations on behalf of the public and court staff while also assuring individual rights, better understanding the use of various forms of scientific evidence for proximate cause and legal effect, enabling immersions into judging and humanities studies that introduce both classical and culturally diverse philosophies on operating courts and implementing justice. Participation in specialty course offerings also may play a significant role in the third cognizable career phase, mid-career personal and professional development.

Mid-career personal and professional development

Movement from the ranks of trial court judicial service to an appellate judge's position presents a career option available only to an exceedingly small percentage of the trial bench's experienced, intelligent, talented, energetic, and dedicated mid-career judges. Such an ascension in judicial status comes about through either of two recognized political events. One involves public exposure and determination via an electoral campaign, accompanied by the varying levels of transparency that go with such judicial elections. The second employs the more hidden politics of executive or legislative appointment to the appellate courts, which is exercised by political party elites.

Advanced courses, certificate, and degree programs, which have been fledgling for several decades in judicial education in the USA, may provide an answer to the question frequently faced by experienced judges, many of whom after two terms or so (8 to 12 years) on the bench ask:

- (i) whether they have already accomplished everything they could hope to achieve as judges, and
- (ii) whether they should seek-out different career options or changes in their professional lives, or alternatively
- (iii) if there are better ways they can apply their experience to strengthen the judiciary.

For a few of them, return to the practice of law presents a viable option. But for most, the loss of years for building and maintaining client associations while judging makes a return to law practice impractical. The next most viable option is to commit to work in the activities of a judicial professional association, which largely involve on-the-task learning, while moving from one committee assignment to another and also continuing to attend to routine judicial responsibilities. The degree of successful involvement with these activities is largely determined by force of personality and interpersonal organizational politics, rather than dedicated interests or highly informed competencies.

Consequently, judicial education today is being challenged to furnish specialized and advanced educational opportunities for:

- (i) recognizing and retaining the judicial practice expertise accrued by mid-career judges, and
- (ii) re-engaging their personal and professional development, ultimately to benefit the court system as well as these individuals.

This education and training could spark or revive these persons' interests in deepening their judicial knowledge and skills. It could equip them to take on new challenges outside their own courtrooms that would substantially aid the court system as well as advance the legal profession. With appropriate training, they could serve the legal system effectively in new and invaluable roles, including mentoring new judges, teaching in law school and college classrooms, advocating on behalf of the judicial branch, and serving generally as agents for innovation and modernization in the court system.

For example, they might even organize cutting-edge learning events focusing on non-legal but law-connected topics, such as: engineering and physics, neurology and psychiatry, economics and financial spreadsheet accounting as well as small business bookkeeping, pharmacology/biology and substance abuse treatment, journalism and media relations, criminal justice and forensic scientific methods, organizational development and social psychology, personnel policies and better practices in administrative governance, child development and family relations, chemistry and electronics, principles and methods of physical scientific research, etc. Nevertheless, endorsing the personal pursuit of greater educational involvement represents only a first step.

Harnessing the talents and experience of these mid-career judges to benefit the courts and the legal system requires not just random advanced educational involvements but greater intentional connection to various extra-adjudicatory roles that these judges become asked or expected to fulfill. Completing the administrative collaboration that applies sought-after learning experiences across the court system is key to transforming attendance at advanced courses from personal interest pursuits to legal system enrichment assets. The current culture of judicial administration would need to become accepting of mid-career judges employing further education in order to apply their vocational interests in:

- (i) mentoring new judges
- (ii) coaching/teaching judicial support staff
- (iii) drafting and publishing:
 - (A) judicial bench books
 - (B) bench guides
 - (C) bench cards
 - (D) uniform court rules of procedure
 - (E) pattern jury instructions
 - (F) court operating manuals
 - (G) alerts and admonitions for self-representing litigants
 - (H) guidelines to the public for service on juries, and
 - (I) other similar electronic publications.

- (iv) techniques for representing the judiciary to members of the executive and legislative branches
- (v) techniques for representing the judiciary to members of the commercial media and the general public
- (vi) discerning and explaining multi-cultural methods of judicial philosophy and decision-making
- (vii) explaining Federal and State constitutional law, their complementarities, differences, and potential conflicts; and
- (viii) physical science, social science, economics, and political topics likely to present various impacts on court proceedings.

Again, striving for a balance between use of state- and nationally-based judicial education resources could more quickly result in successfully addressing the needs and interests of mid-career judges, along with facilitating potential contributions for improving the public service rendered by their respective courts. Engagement with nationally-based speakers and materials frequently evokes positive feelings of status and contributes to ideas of success about fulfilling the more complex, visionary, mature aspirations and expectations of mid-career judges.

Nevertheless, state-based and nationally-based judicial education though complementary, in actuality, may not always operate interchangeably. Because state-based judicial education defaults heavily into mastering, in the local court context, the application of specific federal and state law as well as procedural rule requirements, coupled with concern for building better administrative relationships to both state and local governmental agencies, not to mention engaging positively with the unique legal cultures of bar associations as well as law enforcement, it is perceived as inherently more pedantic and uninspiring. Nevertheless, adroitly enabled, it too may serve as a useful source of specialty courses.

Judicial education in the USA needs to develop sources of funding for taking part in nationally based programs that gives equal financial access to mid-career judges, along with new judges, especially when they are willing to commit to new roles of service and leadership, in order subsequently to strengthen the judicial branch as well as to lead instruction at the state level on similar subject matters for judicial peers and court support personnel. Development of advanced courses of study requires identification of research scholars and speakers, perhaps from state and regional law schools and universities, on topics to be offered.

Some of the practical administrative courses, for example: mentoring of new judges, coaching judicial support staff, and inter-branch operational relations, may lend themselves to design and delivery in partnership with the offices of court administrators, or individual judicial professional associations. In order to be effective in addressing court systems as a whole, participation in these mid-career opportunities should be available, generally, to judges from all classes-of-courts, and recertification accreditation should be adapted to accommodate the variety of new roles that these individuals would inevitably live out.

Conclusion

The presence of these realities found in contemporary judicial education:

- (i) formal academic education leading to practice of law
- (ii) life experience and pragmatic orientation

- (iii) conferences and seminars, both state and national
- (iv) remote learning resources
- (v) self-study and reference materials
- (vi) basic new judge orientation courses
- (vii) mentor-coaching
- (viii) periodic survey update professional certification and recertification, and
- (ix) mid-career personal and professional development.

These realities also summarize the actions of continuing judicial education in the USA, which are aimed at providing opportunity to develop professional skills, fulfilling qualifying conditions or routine requirements, and that lead to ensuring ascension in judicial career.

Current models of judicial training: an updated review of initial and continuous training models across Western democratic jurisdictions

Diana Richards*

Introduction

This review of the existing judicial training models was conducted in early 2016. It constitutes an update of a major review of judicial training conducted by Professor Cheryl Thomas for the English judiciary in 2006.¹ The current review is part of a larger empirical project conducted in collaboration with the Romanian National Institute of Magistracy on the perceptions and attitudes of 510 Romanian judges and prosecutors on the initial, induction and continuous training practices.² For this reason, unlike Thomas' review, it also includes Romania and England and Wales as reviewed jurisdictions. Its chief aim is to provide an up-to-date comparative overview of judicial training practices around the world, and to pinpoint some of the general trends. This shall hopefully be of use to judicial trainers, policymakers and academics.

With regards to initial training, scholars and judicial trainers³ typically seem to distinguish between two major models, corresponding to the distinction between common law judiciaries and civil law (or career) judiciaries. While this is an oversimplification⁴ — as it shall become apparent soon — for didactic reasons it is useful because it makes two major points. First, it shows that in all jurisdictions there is a tight relationship between the judicial appointment methods and the characteristics of the initial judicial training offered. This is because the selection conditions correspond to implicit assumptions about the level of practical experience

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¹ C Thomas, *Review of Judicial Training and Education in Other Jurisdictions*, report prepared for the Judicial Studies Board, May 2006, at www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf, accessed 18 November 2016.

² A selection of the findings of the project can be found in D Richards, "Learning to Sentence: An Empirical Study of Judicial Attitudes towards Judicial Training" (2015) 7 *International Journal for Court Administration* 68.

³ M Kirby, "Modes of Appointment and Training of Judges — A Common Law Perspective" [1999] *Journal of the Indian Law Institute*; Thomas, n 1; G Radu and O Pacurari, "Vocational and Continuous Training of Judges and Prosecutors: A Comparative Analysis" in D Piana and P Langbroek (eds), *Legal education and judicial training in Europe: the menu for justice project report*, Eleven International Pub, 2013; O Pacurari, J Hirvonen and R Hornung, "Current Developments in Judicial Training Methodology in Europe — Looking for Good Practices" (2015) 3 *Judicial Education and Training* 68.

⁴ This is, in a sense, the role of models — to offer rough generalisations to help classify instances, even if that means they, by definition, are not able to catch all the specificities.

of the appointee, and the learning needs that the appointee has in order to fulfil his judicial role. Second, it shows that despite their historical peculiarities, many justice systems do have many common characteristics in virtue of their structure and underlying fundamental philosophies.

In the common law model, the majority of new appointees already have significant practical experience in advocacy. For that reason, there is no lengthy and comprehensive “initial” training. But often there is a much shorter, hands-on “induction” training, meant to focus on the practical aspects of being a judge as opposed to being an advocate. New appointees in this model often have full adjudicative powers from the moment they are appointed, and they begin their judicial activity almost immediately.

In contrast, in the civil law or “career judiciary” model, the majority of new appointees have no legal practice experience upon appointment, and the initial training is designed to address this. The initial training is designed to also be part of the evaluation of the candidate, where successful entry into the judiciary is dependent not just upon the entry exam, but also on the successful completion of the initial training programme.

In reality, the variety of judicial training models is significantly wider. Thomas illustrated this variety in her 2006 study where she tabulated and compared judicial training in 12 Western democratic countries.⁵ She first summarised the various approaches to continuing education for judges across five⁶ of the nine dimensions she identified as essential for describing training:

1. presence or absence of initial training for new appointees
2. presence or absence of continuous training for fully appointed judges
3. mandatory, optional or recommended character of the training⁷
4. type of organisational structure that delivers judicial training⁸
5. mix of participants in judicial training⁹
6. methods used to assess the training needs¹⁰ and impact of training¹¹
7. types of content available¹²
8. delivery of content (centralised, decentralised)
9. presence or absence of appraisal/performance assessment during or at the end of the training.

Additionally, Thomas tabulated and compared the initial training requirements in civil law jurisdictions, reporting on five additional dimensions.¹³

⁵ Thomas, n 1.

⁶ Dimensions included in the table: type of organization delivering training, the training body, the mix of participants, the mandatory/optional character and the amount of entitled/mandatory training per judge (Thomas, n 1 at 19, Table 1).

⁷ Thomas, n 1 at 18–24.

⁸ Be it state judicial schools, justice ministry departments, committees of judicial self-governing bodies or multiple organisations, including university-affiliated bodies, *ibid* 27–32.

⁹ In some countries, judges are trained separately, while in others, they are trained together with other court staff, with prosecutors, or with lay magistrates, *ibid* 33.

¹⁰ Thomas, n 1 at 36–8.

¹¹ *ibid* at 40–7.

¹² *ibid* at 56–87.

¹³ *ibid* at 22, Table 2.

This tabulated, comparative approach is very helpful in displaying the existing models of judicial training because it displays several dimensions at once, allowing the reader to notice the common patterns and dissimilarities. However, 10 years have passed since Thomas's study. For this reason, the tables presented below have been adapted and updated to reflect the most recent practices and figures. They now also include Romania and England and Wales (the latter not being included in the 2006 work as it was specifically designed to examine jurisdictions other than England and Wales).¹⁴

This update involved desk-research of publicly available web-based or printed resources. For each country, the most recent national data and regulatory framework were consulted, in English or in one of the eight foreign languages, from websites of judicial training institutions, judicial bodies, local ministries of justice, national statistics and research agencies, as well as a few scholarly articles summarising local judicial appointment and training practices. Of particular assistance were several international comparative surveys conducted in the past few years, such as the 2011 European Parliament's "Judicial Training in the European Union Member States"¹⁵ and Radu and Pacurari's 2013 chapter on "Vocational and Continuous Training of Judges and Prosecutors: A Comparative Analysis" which was part of the European "Menu for Justice" project report.¹⁶ The author is grateful for any feedback or corrections from readers.

Models and trends in initial and induction training

Table 1 below includes one new column from the 2006 original — the number of initial trainees per year. The aim of this new information was to highlight the similarities and differences in judicial training cohort sizes between the countries analysed. The information marked (*) has been modified and updated compared to the initial table. Information with (**) marks a change towards mandatory training and/or an increase of initial training period compared to 2006. Information with (***) marks a decrease of stringency of initial training compared to 2006.

The first pattern that can be observed in Table 1 is that today all 10 European jurisdictions in the comparison have mandatory initial or induction training for new judicial appointees. This is also true for a common law country such as England and Wales. Secondly, all jurisdictions require a law degree for their professional judges, although some countries (Denmark, Finland, Italy) seem to have further increased their requirement in the past decade, now requiring appointees to hold a postgraduate law degree.¹⁷

¹⁴ This effort serves two purposes. Firstly, in order to see where Romania best fits among country models on judicial training, it made most sense to compare today's Romania with today's world practices on judicial training. Secondly, it was interesting to note any evolutions and changes across world judiciaries in the way they provide judicial training as opposed to how they were providing it a decade ago. A few such emerging patterns will be discussed shortly.

¹⁵ European Parliament — Directorate General for Internal Policies, "Judicial Training in the European Union Member States — Annex I" (2011) at [www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET\(2011\)453198_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf), accessed 18 November 2016.

¹⁶ G Radu and O Pacurari, n 3.

¹⁷ One potential explanation for this increase in requirements might be the implementation of the Bologna Process. With the implementation of the three-year cycle for undergraduate degrees across Europe, law seems to have remained one of the few disciplines where a four-year cycle is deemed required for a fundamental knowledge of law. For a more extensive discussion see, for example, D Cavallini, "The 'Bologna Model' and the Italian Reform of Laurea Magistrale" in D Piana and P Langbroek (eds), *Legal education and judicial training in Europe: the menu for justice project report*, Eleven International Pub, 2013.

Table 1: Initial and Induction Training of Newly-appointed Judges (adapted from Thomas 2006)

	Qualification	Mandatory Training	Training Period	Elements of Training	Training Evaluation	Number of Trainees
Austria	Law degree and exam*	Yes	5 months leading to position of Candidate Judge***	5 months court practice Trainee courses	Yes, feedback from supervising judge and training head	185 (2010)
	Appointment as Candidate Judge	Yes	3.5 years (4 years including the 5 months court practice)**	Min 1 year court practice + practice in other legal offices Training courses at court level	Yes, written and oral examination	
Denmark	Postgraduate law degree and appointment as deputy judge*	Yes	3 years	Court practice 10 courses, 2-4 days each in substantive law	Yes, annually by supervising judge (examination and interview)	100 (2010)
	Section head in ministry then appointment as temporary judge	Yes	9 months			
Finland	Master's degree in law	Required	1 year**	Court practice (1 year district court, or 6 months district + 6 months appellate/admin court)**	No	
	Professional competence demonstrated in court "or elsewhere"***					
France	Professionals with no legal practical experience*	Yes	2 years + 7 months	33 weeks internship in non-judicial settings (law firm, prosecutor's office, prison)* 34 weeks coursework* 50 weeks court practice*	Yes, 9 exams: • 3 theoretical exams • 3 judicial craft exams • 3 final exams (incl interview)	263 (2015)
	Professionals younger than 50 with at least 15 years of experience*	Yes	8.5 months**	1 month theoretical training* 5 months probationary practical training* 2.5 months pre-allocation training*		
Germany	4-year legal degree*	Only for some Laender	Various	Sitting on panels with more senior judges in ordinary courts* 2-8 weeks shadowing judge in specialist courts Mandatory seminars in judicial skills training**	No	1,129 new judges and prosecutors (2010)
	1st state exam (theoretical)*					
	2-year "preparatory service" (incl. 5-8 months court)*					
	2nd state exam*					

	Qualification	Mandatory Training	Training Period	Elements of Training	Training Evaluation	Number of Trainees
Italy	Postgraduate law degree and exam*	Yes	18 months	6 months centralised training at the Judicial School*	Yes, from directors of Judicial School and from supervising courts	253 new entrants (2010)
	Legal professionals, JPs, public officers 5+ years experience and exam*	No		12 months decentralised training (10 court practice + 2 prosecutor office practice)*		
Netherlands	Law professors and lawyers with 15+ years experience, no exam*	No				
	Law degree, at least 7 years professional experience (can include training) and admission as a trainee judge*	Yes	1.4 to 4 years depending on competence***	Combination of practical work in court (work-training environment) and reflective learner discussions (work-team environment)*	Yes, 2 portfolio assessments after 6 months and at the end Interviews every 3 months	
Romania	Law degree and examination (no legal experience)*	Yes*	2 years*	1 year theoretical modules*	Yes, individual course examination and final exam at end of year 2	100 (2014)*
	Law degree, at least 5 years of legal experience and examination*		6 months*	1 year court practice + practice in prosecutor's office and law firms* 4 weeks court induction* 8 weeks theoretical training* 12 weeks supervised court practice*	Yes, evaluation from court supervisor	73 (2014)*
Spain	Law degree and examination (no legal experience)*	Yes	21 months**	12 months theoretical training** 9 months practical training**	Yes (but no failures)	325 (2010)
	Law degree and examination (at least 10 years of experience)*	Yes*	4 months*	1 month training* 3 months court practice*		
England and Wales	Legal qualification and a minimum number of years of experience depending on the position applied for*	Yes*		National seminars*	No	646 (2010)*

Thirdly, for all countries, the training consists of a combination of theoretical and hands-on training, although the more specific content and methods are highly variable. Fourthly, with the exception of Finland, Germany and England and Wales, all countries now include an evaluative element as part of the training. Denmark, France and the Netherlands have moved in the past 10 years to include training evaluation for all their newly-appointed judges.

Apart from the general patterns, two major clusters can be observed. The most obvious cluster is comprised of civil law countries with a strong Napoleonic/Roman influence — France, Italy, Romania and Spain. Each of these countries has two main judicial appointment routes. The first appointment route recruits judges from law graduates who are not required to have any practical legal experience.¹⁸ For these graduates, the initial training period is very significant (ranging from 1.5 years to 2.5 years) and typically includes at least six months of theoretical training, followed by or intermingled with at least nine months court practice. Romania seems to be most similar to France in that the first route judicial trainees undergo an extensive exam period that conditions their inclusion in the judiciary.¹⁹ The second appointment route recruits judges from among experienced professionals. The legal requirement varies across civil law countries, with France and Italy requiring at least 15 years of experience, Spain requiring at least 10 and Romania requiring at least five years. For second route judges, the induction training remains quite significant (between 4 and 8.5 months), although appreciably shorter than for judges from the first route. The theoretical component of the training is considerably shortened (on average, one month, so less than 25 per cent of the entire training), and most of the training is focused on hands-on judicial craft training and supervised court practice. While there does not seem to be any general pattern in the evaluation of second route trainees, Romania again seems to resemble France most, in that it requires second route trainees to undergo the same examination as its first route trainees.²⁰

In contrast to civil law countries of Roman influence, the second cluster includes Nordic countries, countries of Germanic influence and England and Wales. What seems to be common to all these countries is a “learning by doing” philosophy, which has two major repercussions in the way judicial training is organised. First, in these countries there is considerably less emphasis on theoretical training, with most courses lasting only a few days. Second, most of the judicial training actually consists of court practice, in most cases supervised (with the exception of England and Wales). Where the training is evaluated, it consists in an evaluation of the court practice by the supervising judge. At one end of the continuum, Austria and Netherlands are closely similar to civil law systems of Roman influence because the required training period

¹⁸ Although the situation is a bit complex in France, as the judicial candidates who undergo initial ENM training come from four different types of demographics: 1) law graduates younger than 31 (1er concours); 2) public officers younger than 48 with 4+ years experience (2eme); 3) private sector professionals younger than 40 with 8+ years experience (3eme); 4) law graduates between 31 and 40 with LLM/PhD in law and with at least 4 years of experience (art 18.1): Ecole Nationale de Magistrature (ENM), “Devenir Magistrat: Je Suis En Reconversion” (2015) at www.enm-justice.fr/devenir-magistrat/je-suis-en-reconversion.php, accessed 21 November 2015.

¹⁹ Although other countries such as Austria and Netherlands also have extensive initial trainee appraisal, as the table shows.

²⁰ The difference is that, while France subjects all route trainees to the same graduation exam, Romania subjects all route trainees to the same admission exam.

can amount to four years (but that training is mostly court practice). At the other end of the spectrum, in England and Wales new appointees are required to attend induction training,²¹ but their activity in court is not supervised and the training does not contain any appraisal.²²

The first table highlights two major trends in initial/induction training. The first trend is that most Western democratic jurisdictions (whether civil or common law) now make some initial or induction training mandatory for all judges, irrespective of their prior experience or mode of appointment. This reflects the increasing importance and acknowledgement of the importance of judicial training. Although the table only covers European countries, a similar trend is reflected in other jurisdictions as well.²³

The second trend is that the appointment and initial/induction training practices in Western democracies have become more hybridised throughout the decades. This means that the gap between civil and common law systems has shrunk, as each system adopted elements from the opposite model:

1. Latin judiciaries do not only recruit young, inexperienced judges, but also recruit, through alternative routes, judges with comparable levels of practical experience of common law, Germanic or Nordic appointees
2. common law countries have lowered their requirements regarding the needed level of practical experience of candidates,

for instance, England and Wales now has a much lower statutory threshold of age of appointment that it traditionally had (5 to 7 years),²⁴ which means, at least in principle, that it has to take into account the lower level of experience of newer appointees when designing its induction seminars.

Netherlands is a fascinating case study on this point of hybridization, as it has implemented a highly versatile initial judicial programme, which ranges from 1.4 to 4 years based on the experience of the appointee, assessed on a case-by-case basis. This theme of hybridization will be treated at length at the end of this section.

Models and trends in continuous training

Table 2 below has also adapted and updated Thomas's other comparison of how 14 different jurisdictions approach continuous (or in-service) judicial training. It too includes Romania and England and Wales, and helps to place Romanian continuous training in the wider Western democratic context.

²¹ "All newly appointed and newly authorised judicial office holders will receive proportionate induction training", Judicial College, Judicial College Strategy 2015-2017 2015 para 11.

²² Critics can rightly point out that the UK system does not actually fit in this cluster because the newly-appointed judges' practice in court is not formally acknowledged as part of the judicial training offered by the Judicial College.

²³ See current trends in the USA, Canada and Australia: D Benton and JAL Sheldon-Sherman, "What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education" (2015) *Journal of Dispute Resolution* 3; L Armytage, *Educating Judges: Towards Improving Justice. A Survey of Global Practice*, Brill | Nijhoff, 2015; B Dawson, "Judicial Education: Pedagogy for a Change" (2015) *Journal of Dispute Resolution* 174.

²⁴ "There is a "statutory requirement of at least five or seven years' post-qualification experience (PQE)" depending on the post." Judicial Appointments Commission, "Eligibility" (2015), at <https://jac.judiciary.gov.uk/eligibility>, accessed 7 December 2015.

Table 2: In Service Training of Fully-appointed Judges (adapted from Thomas 2006)

	Type of organisation delivering training	Name of training body	Participants	Voluntary or compulsory	Training entitlement / requirement*	Avg. trainees per year
Austria	Justice ministry department	Advisory Board for Continuous Training*	Judges and prosecutors	Voluntary but requirement to develop skills	Judges 3-4 days per year	1,707 (2009)
Canada	Multi-organisations and universities	National Judicial Institute (and others)	Judges only	Voluntary	New judges objective: 10-15 days per year for 4 years	
Denmark	Judicial self-governing committee	Danish Court Administration*	Judges and clerks	Voluntary		560
Finland	Justice ministry department	The Training Unit, Department of Judicial Administration*	Judges, prosecutors, court staff**	Voluntary Compulsory in major law amendments**		2,005 (2010)
France	State judicial school	Ecole Nationale de la Magistrature (ENM)	Judges and prosecutors	Compulsory**	All judges required to 5 days per year minimum**	6,482 (2010)
Germany	State judicial school	Deutsche Richterakademie	Judges and prosecutors	Compulsory only in some states and in specific circumstances (eg change of function)**		4,663 at federal level 24,539 at Land level (2010)
Italy	State judicial school*	Superior School of the Judiciary*	Judges and prosecutors	Compulsory**	At least one training every 4 years**	
Netherlands	State judicial school	Stuudiecentrum Rechtspleging (SSR)	Judges and prosecutors	Voluntary		15,939 (2010)
Portugal	State judicial school	Centro do Estudos Judiciarios	Judges only	Voluntary		
Romania*	State judicial school*	Institutul National al Magistraturii (INM)*	Judges and prosecutors*	Compulsory*	At least one training every 3 years*	4,822 (2014)*
Spain	State judicial school	Escuela Judicial del Consejo General del Poder Judicial	Judges only*	Compulsory when changing jurisdiction or speciality		3,202 (2010)
England and Wales*	State judicial school*	Judicial College*	Judges only*	Compulsory**	At least once every year (salaried), less often (fee-paid)**	5,092 (2010)
United States	Multi-organisations and universities	National Judicial College Federal Judicial Center National Center for State Courts	Judges and court staff	Voluntary (federal) Compulsory (state)	Requirements vary by state: avg. 7-15 hrs./year	2,344 federal (2014)
Australia	Multi-organisations and universities	National Judicial College of Australia & others	Judges and magistrates	Voluntary	Developing entitlement statement	

As before, data marked (*) represents new/updated data, while the updated data marked (**) points to a generalised trend towards making continuous training mandatory.

The first pattern that is immediately visible from the table is that almost all civil law countries (apart from Austria and Finland) tend to adopt a judicial training model whereby the organisation delivering training is an independent state judicial school, while in common law countries the typical practice is a coordination between several country-wide organisations and universities in delivering training. England and Wales is a notable exception to the latter model, by having created the Judicial Studies Board in 1979.

The state judicial school model has been adopted by more Western jurisdictions in the decade that has passed since Thomas's original comparison. In that period, Italy has created a Superior School of the Judiciary and England and Wales has renamed its judicial training body the Judicial College, although there is no physical "college" or standing faculty. Two countries in the comparison, Austria and Finland, continue to conduct training through a less formalised model, where judicial training is run by a department within the Ministry of Justice.

The predominant model (in 10 of the 14 countries) is to train judges together with other court-related professionals, most often with prosecutors (7 countries) but also with court clerks (3 countries) or lay magistrates (Australia only). Romania fits the predominant model, training judges together with prosecutors. England and Wales, Spain, Portugal and Canada are the only jurisdictions where judicial continuous training is dedicated to judges only. Since 2006, Finland has moved from a judges-only model to a mixed model.

Perhaps the most interesting trend since 2006 has been a shift from continuous training as an optional entitlement to a mandatory requirement for all judges. In 2006, almost all countries reviewed had a voluntary entitlement for continuous training,²⁵ but 10 years later half of the countries included in the review have at least some mandatory requirement for judicial continuous training. The degree of the shift is variable,²⁶ but the trend is unmistakable. This suggests that the importance and necessity of judicial training in general, not just for newly-appointed judges, has gained acceptance not just amongst judges but also amongst judicial policy-makers who are likely to be funding training.

This updated comparison of 14 Western jurisdictions suggests that the initial resistance to judicial training in the 1960s and 1970s has now not just weakened with regards to initial training, but with continuous training as well. There is no indication that this trend is likely to be reversed in the near future, and the next section explores the reasons why judicial training has continued to gain acceptance and to expand.

²⁵ With the exception of some state level judicial training in the US and some promotion-related training in France.

²⁶ Romanic-influence civil law jurisdictions (France, Italy, Romania) imposed the widest restrictions, obliging all judges to undergo a minimum number of days/sessions of continuous training at least every few years. Other countries such as Austria, Finland, Germany, and Spain impose mandatory continuous training only in certain circumstances (for managerial positions, when changing jurisdictions, or when major law amendments take place). In view of this trend, it is encouraging to see that the Judicial College has now included minimal mandatory training for both salaried and fee-paid judges in its most recent training prospectus: Judicial College, "Judicial College Prospectus, April 2014 — March 2015" 10 www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf, accessed 7 December 2015.

New developments that further increase and shape the role of judicial training

During the past few decades, a host of factors have increased the importance of judicial training.²⁷ Increased caseloads and greater emphasis on litigation costs mean that judges need to gain case management and conflict resolution skills, and judicial training needs to cover these new areas of competence.²⁸ There has also been an enhanced interest in the management of the judicial image, an extra-legal extension of the principle that “not only must Justice be done; it must also be seen to be done”.²⁹ The Consultative Council of European Judges has stated that “training is a prerequisite if the judiciary is to be respected and worthy of respect”.³⁰ For this reason, judicial training now often includes courses teaching judges how to manage their image and that of the institution they represent in public.³¹ Thirdly, unlike previous eras, technological advances are now making their way into courts and the legal profession,³² thus prompting the need for additional training on new technologies in court.³³

Carrying out judicial training is not a goal in itself. An increasing workload; numerous legal reforms with an ever-shorter half-life period; the naissance of technically and socially complex new phenomena, such as the Internet and social media; the shift away from judges and prosecutors as mere law appliers towards judges and prosecutors as managers within their organizations; and, last but not least, increasing expectations of civil society towards a performing judiciary, make a comprehensive concept of “life-long learning” indispensable for judges and prosecutors.³⁴

An interesting development that further increases the need for judicial training involves judicial recruitment. There has been an increasing demand that the composition of the judiciary reflects the wider demographical profile of a population or, in a softer sense, that a wider diversity of backgrounds of judges is desirable.³⁵ This has led to significant efforts both in Europe³⁶ and around the world³⁷ to enlarge the candidate pool to include those from non-traditional backgrounds — be it on considerations of gender, race, socio-economic status or educational and professional experience. In some instances this means recruiting those with less traditional court advocacy experience, and as a consequence, judiciaries cannot no longer assume that new appointees have been sufficiently exposed to judicial skills, which gives rise to the need to train new appointees in areas such as judicial craft.

²⁷ Pacurari, Hirvonen and Hornung, above n 3 at 73.

²⁸ Thomas, above n 1.

²⁹ *R v Sussex Justices, ex p McCarthy* [1924] KB 1 256.

³⁰ Consultative Council of European Judges (CCJE), “Opinion No 4 (2003) on Appropriate Initial and In-Service Training for Judges at National and European Levels”, [5].

³¹ Thomas, above n 1 at 57.

³² R and D Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, Oxford University Press, 2015.

³³ Thomas, above n 1 at 98-99.

³⁴ Pacurari, Hirvonen and Hornung, above n 3 at 73.

³⁵ C Thomas, “Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices”, The Commission for Judicial Appointments 2005, at www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Diversity.pdf, accessed 10 June 2013; PH Russell and K Malleon, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, University of Toronto Press, 2006; R Hunter, “More than Just a Different Face? Judicial Diversity and Decision-Making” [2015] *Current Legal Problems* at <http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001>, accessed 2 January 2016.

³⁶ “The EU Justice Scoreboard: Towards More Effective Justice Systems in the EU”, 9 March 2015, at http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm accessed 13 April 2015.

³⁷ C Thomas, “Understanding Judicial Diversity”, Advisory Panel on Judicial Diversity, 2009.

A second aspect of changes to judicial recruitment that can impact on the need for training concerns the types of routes available to candidates to enter the judiciary. If it was easier in the past to distinguish between different models of judicial recruitment and training, these distinctions have become increasingly blurred in the past couple of decades, perhaps partly due to the effects of globalization and intense intellectual exchanges between judicial experts across international networks.³⁸

The hybridization of judicial training models and the relevance of the Romanian example

The story of institutionalised judicial training is a rather short but optimistic one. Two major things happened in the past six decades to make it so. First, judicial training has become a generally accepted and desirable phenomenon. This is reflected not just in the adoption of judicial training models around the world, but also in the decreasing resistance against imposition of judicial training — be it initial or mandatory continuous training.

Second, the judicial appointment and training models have become more hybridized over time. While, historically, civil law and common law jurisdictions had significantly different appointment and promotion practices,³⁹ which also resulted in different approaches to and models of judicial training, those differences have been shrinking in the past few decades.

One major cause for this hybridization has been a shift in appointment practices. These have been discussed earlier — how civil law countries now appoint almost half of their appointees very much similarly to common law countries, from a more experienced pool of candidates, while common law countries at the same time decrease their experience requirements so as to accommodate a more diverse variety of judicial candidates. Thomas explains this hybridization:

Many if not most European judiciaries now appoint at least some experienced professionals to the judiciary later in their careers, and their initial training needs are therefore similar to new appointees in common law systems. In addition, common law judiciaries are increasingly becoming “career” judiciaries in which more appointments are being made from among younger, less experienced lawyers and where progress to higher judicial posts is not just possible but encouraged.⁴⁰

This hybridization has not just been caused by a change in appointment practices, but also by judicial evaluation and appraisal practices. Historically, civil law countries have developed a comprehensive appraisal framework, while common law countries resisted on grounds of interference with judicial independence, just like they had resisted judicial training. This resistance is changing, for instance, in England and Wales, which is currently piloting new appraisal and evaluation frameworks.⁴¹

³⁸ Pacurari, Hirvonen and Hornung, above n 3 at 68.

³⁹ “There are great differences among European countries with respect to the initial and in-service training of judges. These differences can in part be related to particular features of the different judicial systems, but in some respects do not seem to be inevitable or necessary”, CCJE, above n 30 at 6.

⁴⁰ Thomas, above n 1 at 12–3.

⁴¹ “Only civil law jurisdictions covered in this report have judicial evaluation and appraisal systems and competence frameworks for the judiciary. There is little to no formal judicial appraisal in the common law countries covered in this report, where appraisal and competence frameworks are seen as incompatible with judicial independence (p 114). In this respect the recent development of judicial appraisal schemes and competence frameworks for some judges

A third major cause for the hybridization of judicial training practices is due to the influence of globalization and the homogenizing influence of international structures. A flurry of transnational organisations, networks,⁴² exchanges, research projects dedicated to judicial training, as well as international documents providing guidance for the design and implementation of judicial training⁴³ have enabled judicial educators to exchange information on and “bring home” best practices on judicial training. One of these recent European studies conducted by the European Judicial Training Network (EJTN) in 2014 concludes:

The second conclusion relates to transferability, which includes in particular the transfer of practices between civil and common-law jurisdictions. The study has found little basis for the oft-held assumption that these systems are sufficiently different for there to be little to share between one another in the field of training. Its findings suggest the opposite.⁴⁴

The view that judicial training frameworks are nowadays highly comparable is widely shared by judicial trainers and specialists.⁴⁵ This is important for the study conducted on the Romanian judiciary,⁴⁶ as it helps to reinforce the idea that the lessons one can draw from a one-country study can be relevant to other jurisdictions. The two judicial training tables — comparing the latest initial and continuous judicial training practices across 14 Western democratic countries — illustrate a trend towards hybridization and homogenisation of judicial training practices.

in England and Wales highlights a greater compatibility with civil law rather than with common law systems”, *ibid* at 12. Also see “Judges Face Performance Appraisals” [2013] BBC News at www.bbc.co.uk/news/uk-25550587, accessed 7 January 2016.

⁴² The European Judicial Training Network (EJTN), the International Organization for Judicial Training (IOJT), and the Menu for Justice (JustMen) project being just a few.

⁴³ J Cooper, “EC Study of the Best Practices in the Training of Judges and Prosecutors in EU Member States” (2015) 3 *Judicial Education and Training* 47; EJTN Sub-Working Group “Training the Trainers” and European Judicial Training Network (EJTN), *Handbook on Judicial Training Methodology in Europe*, European Judicial Training Network (EJTN) 2014 at www.ejtn.eu/PageFiles/6343/EJTN_TT_Handbook_Final.pdf, accessed 4 January 2015; Menu for Justice, “Menu for Justice: Training Needs Assessment Tool”, 2012, at www.academic-projects.eu/menuforjustice/Lists/Deliverables/DispForm.aspx?ID=30, accessed 12 December 2016.

⁴⁴ European Judicial Training Network (EJTN), “Lot 1 ‘Study on Best Practices in Training of Judges and Prosecutors’”, European Commission 2014, 113.

⁴⁵ “Despite all these different institutional and organizational approaches, and despite important divergences in the respective legal concepts that subsist in spite of the unifying tendencies of European Union law, the relevant stakeholders in judicial training throughout Europe share the view that the strategic and methodological challenges in all their countries are very comparable.” (Pacurari, Hirvonen and Hornung, above n 3 at 69.)

⁴⁶ Richards, above n 2 at 68.

Triumphs and trials of judicial education in a small jurisdiction — the Judicial Education Institute of Trinidad & Tobago story

The Honourable Mr Justice Peter Jamadar JA* and Mr Kent Jardine**

Introduction

Trinidad and Tobago is a twin-island republic located in the southern Caribbean, in close proximity to the Bolivarian Republic of Venezuela. After being what VS Naipaul called “a colonial slum”¹ within the Spanish Empire for nearly 300 years, Trinidad became a British colony during the French Revolutionary Wars in 1797. Near the end of the 19th century, after the collapse of the economy in Tobago, the two islands became a unitary state. In the mid-20th century, Trinidad and Tobago became, in quick succession, part of the short-lived West Indies Federation in 1958, an independent country under the British Crown in 1962 and a Republic, within the British Commonwealth, in 1976.²

Trinidad and Tobago’s economy has, since the early 1960s, shifted from the production of primary agricultural products such as sugar, cocoa and coconuts to oil and (since the 1980s) natural gas. This has allowed the country to achieve relatively high levels of economic development but with the inevitable “boom and bust” cycle, the “Dutch disease” of dependence on the one economic activity and the present-day impending economic collapse due to falling oil and gas prices and rapidly depleting reserves.³

Although the country remains relatively stable politically, with changes in government occurring peaceably (including just a few months ago), the society illustrates the model of plural society with the majority of the population divided almost equally between the descendants of African slaves and the descendants of indentured farm labourers from India, while the rest of the population is made up of various small groups of other ethnicities.⁴ The country has a total population of just over 1.3 million.⁵

Operating within a modified Westminster system, Trinidad and Tobago is a constitutional democracy within the common law family which retains the Judicial Committee of the Privy

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¹ VS Naipaul, *The Loss of El Dorado*, Andre Deutsch, 1969.

² The Commonwealth, “Trinidad and Tobago: History”, at <http://thecommonwealth.org/our-member-countries/trinidad-and-tobago/history>, accessed 4 November 2016.

³ Government of the Republic of Trinidad and Tobago, “PM Persad-Bissessar’s address on the state of the economy”, 9 January 2015, at www.news.gov.tt/content/pm-persad-bissessars-address-state-economy, accessed 4 November 2016.

⁴ MG Smith, *The Plural Society in the British West Indies*, University of California Press, 1965.

⁵ Government of the Republic of Trinidad and Tobago, Ministry of Tourism, “Quick Facts”, at www.tourism.gov.tt/Profile/Welcome-to-Trinidad-and-Tobago/Quick-Facts, accessed 4 November 2016.

Council of Great Britain as the final court of appeal, although its government agreed in 2001 to the establishment of the Caribbean Court of Justice and that court actually sits in Port of Spain, the capital of Trinidad and Tobago.⁶ The judicial establishment of Trinidad and Tobago comprises 11 judges of the Court of Appeal (including the Chief Justice as President of the Appeal Court), 31 High Court judges, 3 Masters, 55 Magistrates and 14 Registrars. There are 15 administrative units in the Court's administration and roughly 2000 persons on staff.⁷

The beginning of judicial education (1996–2000)

Judicial education in Trinidad and Tobago in the modern sense had its beginnings on 31 May 1995 when a new Chief Justice of the Republic of Trinidad and Tobago took office — Michael Anthony de la Bastide TC, PC, QC. He was appointed directly from the private bar, after 34 years of a distinguished career as a barrister-at-law. It may be that it was his early academic background — Open National Scholarship, Languages, St Mary's College (1955), First Class Honours, Law, Oxford (1959)⁸ — or maybe it was just a mixture of his legal experience and intuition, but from the very beginning of his tenure, Chief Justice de la Bastide (as evidenced in his 1998 and 2000 annual Law Term addresses to the Nation⁹) heralded the importance of the need for a structured continuing education policy for all judges and judicial officers.

In his 1998 address de la Bastide stated:

I am anxious to see established in Trinidad and Tobago a Judicial Training Institute ... What I have in mind is an institute that will provide training not only for judges but also for magistrates and court staff.

In furtherance of this objective, de la Bastide met with Judge Sandra Oxner, then working with the World Bank Judicial Reform Unit, who offered World Bank funding for a judicial education programme designed in part by the late Justice Telford Georges, a director of the Commonwealth Judicial Education Institute.¹⁰ De la Bastide sent a judge and magistrate to attend the intensive training course for judicial educators held by the CJEI in Halifax, Nova Scotia, Canada that very year. Not that his initiative was to await that training; in 1996, the year after he assumed office, de la Bastide had already hosted his and Trinidad and Tobago's first dedicated two-day Continuing Education Seminar (CES) for judges of the Supreme Court. This practice continued every year thereafter, soon becoming an annual residential event.¹¹

Such was his commitment to continuing judicial education, that de la Bastide's 2000 annual address he was able to report:

The establishment and maintenance of an on-going programme of judicial education which includes Magistrates as well as Judges, is a high priority in the Judiciary's programme. The nucleus of a judicial education committee has in fact been formed and has started functioning.

⁶ The Caribbean Court of Justice, "The CCJ: From Concept to Reality", at www.caribbeancourtofjustice.org/about-the-cj/ccj-concept-to-reality, accessed 4 November 2016.

⁷ Judiciary of the Republic of Trinidad & Tobago, *Annual Report*, 2013-2014 p 14, at <http://www.tflawcourts.org/images/annualreports/Annual-Report-2013-2014/#/16>, accessed 4 November 2016.

⁸ The Caribbean Court of Justice, "Judges of the Caribbean Court of Justice", at www.caribbeancourtofjustice.org/judges_pages/delabastide.html, accessed 4 November 2016.

⁹ Judiciary of the Republic of Trinidad & Tobago, "Law Term Opening Speeches", at www.tflawcourts.org/index.php/law-library/special-collections/cj-law-term-speeches, accessed 4 November 2016.

¹⁰ Comment by Judge Sandra Oxner, 9 November 2015.

¹¹ The Trinidad and Tobago Judicial Education Institute — A History, 2012, p 2.

It consists of two Judges and a senior Magistrate who have all attended the Commonwealth Judicial Education Institute's intensive training course for judicial educators in Canada, and the Court Executive Administrator whose training at the National Centre for State Courts in the United States, has equipped her to train non-judicial officers in court administration and case management.¹²

As can be seen from the above, not only were decisions and commitments made, but an initial human resource investment in training judicial officers to be judicial educators was also undertaken. This latter choice has proven to be invaluable and the policy of investing in the training and development of leaders in judicial education has continued.

The initial form that judicial education took in Trinidad and Tobago was via "Judicial Retreats". These were conceptualized by de la Bastide as "weekend retreats" (held on Saturday and Sunday), intended to bring all judges (from 1995) and all magistrates (from 2001) together in one place for two days for the purpose of continuing judicial education. Typically, these early judicial retreats had two core objectives — substantive judicial education (on areas of law and procedure) and the building and strengthening of relationships among judicial officers. Both aims were considered of equal importance. The former was intended to keep judicial officers up to date on the current law and to facilitate discussion on challenging and problematic areas in the local context. The latter was intended to build camaraderie — "mutual trust and friendship among judicial officers" — which de la Bastide valued greatly (and hence the terminology "Judges/Magistrates' Retreat"). By identifying a social and relational purpose for judicial education as explicitly desirable, a core ideal of judicial education in Trinidad and Tobago was birthed.

The insight to make the development of trust and friendship a core value of judicial education in the twin-island state of Trinidad and Tobago has borne dividends. First of all, judges and magistrates, prior to these weekend retreats, had few structured opportunities to meet and spend extended time together in the context of exploring work-related issues or of engaging in adult judicial education. Not only was this experience new, but it was also refreshing, inspiring and mutually beneficial. Learning together as adults, in a safe and peer-directed context, developed new and strengthened old relationships while at the same time refreshing knowledge about substantive law and improving critical judicial skills. However, one most significant (though maybe unexpected) development that was brought about by the focus on judicial camaraderie, was a shift in how judicial officers worked.

This shift can best be conceptualized as the movement from individual to collaborative problem solving. Trinidad and Tobago, as a common law jurisdiction, values the independence of the judiciary. This independence is not only regarded as independence among other state agencies (the separation of powers among the main arms of the state), but also the independence of each judicial officer in relation to all others. Prior to the introduction of "Judges'/Magistrates' Retreats", the typical judicial officer was highly individualistic and jealously guarded his/her independence *inter se*, exemplified by an almost nomadic exclusivity in relation to hearing, analysing and deciding cases. This is not to say that judges and magistrates did not speak among themselves about cases they were hearing, but it was limited, *ad hoc* and even somewhat secretive.

¹² See at www.ttlawcourts.org/index.php/law-library/special-collections/cj-law-term-speeches, accessed 13 December 2016.

What has happened in Trinidad and Tobago as a consequence of the introduction of the educational retreat (bringing together all judges/magistrates), is a much more openly collaborative approach to the hearing and determination of court matters — without any accompanying experience of an erosion of judicial independence. Judges and magistrates now quite regularly collaborate and consult one another on issues of law and practice (and other matters) that confront them for determination. Furthermore, this collaborative model has at the present time expanded to include the promotion of the model of judges and judicial officers as team leaders and participants, working with court administrators and staff in case management and the administration of the court system. The use of the Appreciative Inquiry model as the foundation for the way we do business has begun to create a profound change in the perception of the role of judges and judicial officers within the organisation. People have begun to move out of their silos, seeing the system for the first time in a holistic way, appreciating the talents and contributions of all staff members.

The Judicial Education Committee (2000–2002)

Within three years of its conception, judicial education in Trinidad and Tobago was being led and implemented by a multi-disciplinary ad hoc committee made up of both judicial and non-judicial staff of the judiciary. This Judicial Education Committee was formally constituted with an entirely voluntary membership in September 2000. The Committee was led by a judge of the Supreme Court with the first Chairperson being the late Justice Wendell Kangaloo JA. The Committee was mandated to:

- identify training needs throughout the judiciary
- identify training opportunities for all categories of staff
- organise and coordinate training activities
- plan training and development programs (seminars, workshops, retreats)
- evaluate training outcomes, and
- establish a Judicial Education Institute to replace the Committee.¹³

The model that was deployed initially drew heavily from the principles learned at the judicial educators program offered by the CJEI. Thus training was focused on the following four key areas: the role of the judge, substantive and procedural law and practice, judge craft and social context sensitivity.¹⁴ Over time, other groups of judicial officers and staff were included and we would add another key area — the wellness of participants. More recently, we are including explicit socio-historical awareness in order to address the colonial history and impact on law and society in Trinidad and Tobago. The aim was to develop judges and judicial officers who were impartial, competent, effective and efficient, and in so doing, to increase public trust and confidence in the administration of justice in Trinidad and Tobago. Programmes

¹³ Sir S Ramphal, QC, OCC, “Creating a Regional Jurisprudence”, lecture presented at the Judicial Education Institute of Trinidad and Tobago (JEITT), Distinguished Jurist Lecture 2011, Paria, pp 54-55; at www.ttlawcourts.org/images/JEI/DLS/speeches/Distinguished-Jurist-Lecture-2011.pdf, accessed 4 November 2016.

¹⁴ Commonwealth Judicial Education Institute, Intensive Study Programme for Judicial Educators, Halifax; C, Thomas, “Review of Judicial Training and Education in Other Jurisdictions”, report prepared for the Judicial Studies Board, May 2006, p 58 at https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf, accessed 4 November 2016.

were selected and developed on the basis of the experiential learning circle model (beginning with some form of needs analysis) and delivered in accordance with the best practices of adult education, in particular bearing in mind the variety of learning styles/types. Throughout the changes in administrative structures, the principle that judicial education programmes in Trinidad and Tobago would be participant-focused, participant-led and participant-driven has remained fixed.

These formative years in the story of the development of judicial education in Trinidad and Tobago were characterized by management through the voluntary committee appointed by the Chief Justice with both judicial and non-judicial staff. Furthermore, without any formal institutional structure or budget, judicial education and training was implemented by volunteers from within the judiciary, with assistance from other international judicial education institutes. In addition, we experienced a clear preference for foreign external facilitators and a muted disdain for locals. While we continue to work with international judicial education and management institutes such as the CJEI in Halifax, Canada, the US National Centre for State Courts, the Weatherhead School of Management from Cleveland and University College London (UCL) Judicial Institute in London, an increasing priority for us has been the formation of a local faculty from the ranks of the local judiciary and judiciary staff. If the Judicial Education Institute of Trinidad and Tobago (JEITT) is to assume a leadership role in the organisation and promote the development of judges, judicial officers and staff as leaders within our national community, it is important for us to guide and direct our education efforts ourselves. While it is true that this has the potential to lead to a narrow, inward-looking organisation cut off from innovation and global trends, this is a dynamic with which we of necessity must struggle. Post colonial people like ourselves, particularly those of us from small jurisdictions, sometimes lack the initiative, drive and confidence to assume responsibility for the direction of our lives; this “unresponsibility”¹⁵, in the words of Lloyd Best, is a facet of Caribbean life that judicial education must address.

The development of a modern, vibrant Caribbean jurisprudence encounters its greatest challenge perhaps in the instinctive resistance of colonised persons against any attempts to move beyond established traditions and new dominant principles. This resistance is heightened in small organisations which have been socialised into a narrative of helplessness and dependency, a narrative sharpened in our contemporary globalised environment. In judicial organisations, particularly in jurisdictionally small, common-law traditions, regard for precedent and a sustained conservatism make the paradigm shift away from resistance to indigenous change problematic.

The JEITT has, with some success, overcome this resistance through three core trajectories:

1. the development of a robust and contextually relevant and competent local faculty who will work both independently and with foreign facilitators;
2. the use of local professional educators to supervise the design and implementation of all educational offerings;
3. investment in research based and designed interventions, as opposed to the typical generic importation of foreign ideas and programmes.

¹⁵ K Meighoo, “Organic Theorising in Inorganic Societies, or the need for Epistemic Sovereignty beyond radicalism and rebellion” in *Caribbean Reasonings: The Thought of New World — The Quest for Decolonisation*, B Meeks & N Girvan (eds), Ian Randle Publishers, Kingston, Jamaica/Miami 2010.

In total, we seek to develop a locally driven, collaborative model. What we see emerging is not a complete abandonment of the old or a wholesale enthusiastic embrace of the new but, rather, a hybrid creation incorporating both in dynamic, often unique ways.

Initially the most basic infrastructure was used and expenses were limited to internal travel, meals and rental of accommodation. Where foreign facilitators were used, the cost of their transportation and accommodation was covered. Programmes were selected after some analysis of needs but often with what was readily available and easily accessible in mind. Funding was essentially derived from the Chief Justice's vote and occasionally from external funding agencies. At this time, there were no dedicated staff and people from the library, information and protocol units were used in the facilitation of judicial education events.

It is fair to say that during the formative stages of establishing a culture of continuing judicial education in Trinidad and Tobago, there was significant buy-in to the idea. However this was not unanimous. There were some judges and judicial officers who saw no value in continuing judicial education and simply did not participate in what was being offered. They would often turn up to training but be disengaged. Over time we have learned to accept that once continuing judicial education is voluntary and there are no explicit sanctions or career benefits to participation, there will always be a percentage of judges and judicial officers who see no value in or benefit from judicial education.

In Trinidad and Tobago we can therefore say that the emergence of the JEITT is an example of initiative, commitment and courage by a small jurisdiction taking the risk in following our belief that this was the right path to follow. It was a consequence of the vision and will of judicial leadership to simply make continuing judicial education happen — where there is the will (and some minimum resources) there is a way. In truth, the resolute, innovative and inspiring leadership of Chief Justice de la Bastide and Chairperson Kangaloo paved the way for the acceptance and entrenchment of continuing judicial education in Trinidad and Tobago. This factor is of considerable importance in a society such as ours, where the personality cult of the individual (especially where charismatic leaders are almost “deified”) quite often trumps institutional structure. At the same time, while it is important to note that it was the singular vision of Chief Justice de la Bastide, and his determination to make that vision a reality, which succeeded in laying the foundation for the Judicial Education Institute, it must also be said that this development was occurring in jurisdictions all over the world, notably in Canada and Australia.¹⁶ Therefore, while in small jurisdictions such as Trinidad and Tobago, singular individuals such as de la Bastide have an outsized influence in creating momentum, it is also true that they are themselves, sometimes without being aware of it, the creation of the times in which they live.

In Trinidad and Tobago, we believe that the story of judicial education has its origins in decisive and determined leadership, aided by charismatic personalities and an emerging global movement towards continuing judicial education. In a small jurisdiction such as ours, getting judicial education started and up and running required genuine and committed leadership, as well as a cadre of willing and enthusiastic volunteers led by trained judicial educators.

The Pilot Project (2002–2011)

The period that follows the formative stage in the emergence of the JEITT can be described as the period of consolidation and institutionalisation. It coincides with the tenure of the next Chief

¹⁶ J Clifford Wallace, “Globalisation of Judicial Education” (2003) 28 *Yale J Intl L* 355.

Justice of Trinidad and Tobago, the Honourable Mr Justice Satnarine Sharma TC, CMT, and with Cabinet approval for the creation of a formal judicial education institute as a pilot project. The impetus towards institutionalisation was the consequence of both the original vision of de la Bastide which had translated into one of the mandates of the Judicial Education Committee, as well as the sheer momentum created by the number of seminars, training sessions and lectures that were being held.

During this period the institutional structure of the Institute began to emerge and with the advantage of the appointment of a small but permanent support staff, the work of the Institute began to expand.¹⁷ Significantly, with Cabinet recognition came funding, as the Institute was now a legitimate line item for budgetary purposes. It is worth emphasizing this, because executive recognition was not a priori, but ex post facto the proven usefulness of continuing judicial education for the delivery of effective, efficient and impartial justice in Trinidad and Tobago. In small developing societies such as Trinidad and Tobago, consciously working towards State recognition of the value of continuing judicial education is often necessary for the entrenchment and expansion of judicial education institutes that desire a measure of independence from the agendas characteristically associated with funding from international aid agencies. This is not to say that State funding does not have its own complications.

The move to formal institutionalisation with State funding was a carefully thought out and negotiated process. Again, at the forefront was decisive and resolute leadership. The most obvious concern was an erosion of judicial independence. However, this was avoided by a clear and firm insistence that the United Nations Basic Principles on the Independence of the Judiciary (1985), the Latimer House Guidelines (1998) and the Bangalore Principles for Judicial Conduct (2002), are only guaranteed in the context of a truly independent Judiciary; and that such an independent Judiciary is a pre-requisite to the upholding of the rule of law and fundamental to a functioning democracy that values freedom and equality and that respects the dignity of all persons (as enshrined in the Republican Constitution of Trinidad and Tobago). In short, what was insisted upon was the creation of an institute that was under the control of the Chief Justice and judge-led and administered (subject to accountability for financial expenditure). Essentially the nascent Judicial Education Institute of Trinidad and Tobago was formed as an autonomous educational institute existing within the context and in service of the wider Judiciary.

These objectives were all recognised and honoured by the Executive, as can be seen by the fact that Cabinet gave its approval with explicit recognition of the following considerations:

1. A comprehensive strategy of judicial education provides an essential and viable means to strengthen the Judiciary's capacity to dispense justice and meet its responsibilities for judicial governance.
2. The unique nature of judicial and court administration requires special training and skills tailored to meet what is needed to strengthen institutional capacity and administer judicial services.
3. Judicial education must be led by judicial officers and function under judicial control, so as to ensure not only that the independence and impartiality of the Judiciary is preserved, but also that members of the Judiciary are accepting of the relevance and values of programs.

¹⁷ The Trinidad and Tobago Judicial Education Institute — A History, 2012, p 4.

4. The Judiciary must be committed to being a learning organisation, able to respond to change, embrace new ideas, encourage learning, growth, development and innovation, facilitate excellence, value all members and encourage communication and sharing, if it is to discharge its responsibilities to the society.¹⁸

Thus, the Judicial Education Institute was formally established on the 31st July 2002 to operate with a Board of Directors led by the Chief Justice as President and a judge of the Supreme Court as Chairperson. Justice Wendell Kangaloo JA, who had been instrumental in bringing the Institute to this point, was appointed to this latter position. He was succeeded by Justice Ivor Archie JA in 2005 and when Justice Archie became the Honourable Chief Justice three years later, Justice Paula Mae Weekes JA took the Chair. She was eventually followed by Justice Peter Jamadar JA in 2009 who remains Chairperson at the present time.¹⁹

One small but significant undertaking by the new JEITT, was the conscious decision to “brand” itself as unique and valuable within the judiciary. To this end it undertook and invested in a collaborative branding exercise, culminating in the choice and use of a distinctive logo. What this initiative achieved was a sense of identity and meaning for the JEITT both among board members and within the larger judiciary. Another aspect of this “branding” and institutional consolidation was the exploration and discovery of an apt mission statement for the JEITT. The mission statement that emerged after hours of discussion and consultation aptly describes the institute’s purpose, which is “to promote excellence in the Administration of Justice in the Republic of Trinidad and Tobago through continuous training and development of judges, other judicial officers and non-judicial staff attached to the Judiciary”. This mission statement has provided a touchstone and focus for the work of the JEITT and kept it “on track” as it has continued to develop institutionally and expanded its deliverables.

During the period 2002 to 2011, the JEITT firmly established itself within the administrative structure of the judiciary as an invaluable part of the entire organisation and was recognized as integral to the development and sustainability of the judiciary as a whole. As such the JEITT provided high quality service to the judiciary, conducting seminars, workshops, panel discussions, and residential and educational training programs for judges, judicial officers, court administrators, judiciary support staff and other stakeholders. In collaboration with the Hugh Wooding Law School, the Institute has provided a course of paralegal training to all judiciary and public service staff as a three-level offering: an orientation program followed by basic and advanced levels. This programme is delivered in large part by judicial officers and senior staff of the judiciary. On completion, successful candidates are awarded certificates and promotion within the ranks of the court administration is contingent on the possession of these certificates.

In addition, during this period, the JEITT embarked on a publication initiative and published the following: *A General Guide to the Civil Proceedings Rules*, 1998; JEITT Monographs of papers presented at its continuing education seminars (2009, 2010, 2011); a JEITT Sentencing Handbook; and *Tools for Professional Writers — A Summary of the Essentials for Writing Effective Judgments*. This focus on publication meets another need — the desire for published research on issues pertinent to, and produced in, the individual jurisdiction. At the same time, the Institute maintained its relationship with judicial institutes around the world including

¹⁸ *ibid* at p 4.

¹⁹ Sir S Ramphal, QC, OCC, “Creating a Regional Jurisprudence”, lecture presented at the Judicial Education Institute of Trinidad and Tobago (JEITT), Distinguished Jurist Lecture 2011, Paria, pp 70-72; see at www.ttlawcourts.org/images/JEI/DLS/speeches/Distinguished-Jurist-Lecture-2011.pdf, accessed 4 November 2016.

the International Organization for Judicial Training, the National Judicial Institute in Canada and the National Association of State Judicial Educators in the US. These relationships were fostered not only by facilitators from these organisations coming to the Caribbean to conduct lectures, seminars and workshops but also from the attendance and participation of Trinbagonian judicial officers at the annual conferences of these groups.²⁰

The Judicial Education Institute of Trinidad & Tobago (2011 to the Present)

In 2011 Cabinet gave its approval for the expansion and restructuring of the JEITT. Cabinet also agreed to make the JEITT a permanent part of the organisational structure of the judiciary. The pilot project had proven its worth. The JEITT had demonstrated its capacity to play a vital role in the ongoing transformation, development and sustainability of the judiciary. What had begun as an idea, had taken root and grown and blossomed into a full and fruitful enterprise.

The place of the newly constituted JEITT within the organisational structure of the judiciary is significant. Like the judges and masters and the Chief Justice's Administrative Secretary, the institute lies directly under the authority of the Chief Justice alone. It does not form part of the administrative machinery of the courts but retains its independence and, therefore, its capacity to exercise leadership within the organisation.²¹ In his 2015 Address to the Nation at the opening of the Law Term 2015–2016, Chief Justice Archie ORTT stated "The JEI continues to be central to our developmental strategy."²² Furthermore, the JEITT's financial independence has been preserved with the annual budget forming a separate line item vote.

The new organisational structure, agreed to by Cabinet, retained the Board of Directors as the governing body, presided over by the Chief Justice and a Chairperson, but added several key positions. These included a Programme Director, Judicial Educator, Research and Publications Specialist and an Information Technology Specialist. The Cabinet-approved organisational chart included 13 persons but after three years, the Board has come to the conclusion that the activities of the Institute have increased to such a degree that this should be expanded to 17. The most significant inclusions here are a Judicial Research Assistant and a Judicial Research Officer who have come to be required because of the growth of the research component of the Institute's work.

The appointment of qualified staff remains a challenge for the Institute. At the management level, it has proven difficult to recruit and retain competent management staff especially in the area of Information Technology. A Programme Director, Retired Court of Appeal Judge Roger Hamel-Smith was only appointed last year around the same time as the Publications Specialist and the Judicial Research Officer. The first contract of the Judicial Educator came to an end in December 2015; Trinidad and Tobago is one of only a handful of jurisdictions which has placed judicial education in the hands of someone with professional education competence but

²⁰ *ibid*, pp 59–63.

²¹ Judiciary of the Republic of Trinidad & Tobago, "Structure", at www.ttlawcourts.org/index.php/about-the-judiciary-1/structure, accessed 4 November 2016.

²² Judiciary of the Republic of Trinidad & Tobago, "Address of the Honourable the Chief Justice Mr Justice Ivor Archie, Opening of the 2015/2016 Law Term", at www.ttlawcourts.org/index.php/newsroom-69/news/5752-address-of-the-honourable-the-chief-justice-mr-justice-ivor-archie-opening-of-the-2015-2016-law-term, accessed 4 November 2016.

no legal background or experience. At the lower levels, staff continue to be snapped up and promoted by other units within the Judiciary since their experience in the JEITT qualifies them to perform effectively at a high standard.

The new Board includes the leadership of the judiciary (the Chief Justice, the Chief Magistrate, the Registrar and the Court Executive Administrator) as well as representatives from each group of judicial officers and the management of the Institute. The judges and judicial officers on the Board have the responsibility to act as liaisons between the JEITT and their colleagues. They are also responsible for organising each term half-day training sessions for their particular group. These groups include the Court of Appeal, the Criminal Bench, the Civil Bench, the Family Court, the Registrars, the Magistrates and the Court Administrative Unit. Board meetings also occur once a term and feature a lively exchange of ideas and suggestions. This democratic approach to judicial education is deliberate and is seen as a way to model the system change necessary to move the judiciary forward. It is a recognition that positive change will come when the responsibility for effecting that change is accepted by everyone in the organisation. It is also a recognition that we cannot continue to depend on the “great man” to move the levers of history — in the words of Barack Obama — “we are the change we are looking for.”

At the same time, we would be remiss if we were not to mention that the work of the Institute could not have advanced to its present position without the active support and encouragement of the former Chairperson, now Chief Justice and President of the Institute, the Honourable Mr Justice Ivor Archie ORTT. By making judicial education a priority in his administration, by his faithful attendance and active participation in Board meetings and training sessions (a phenomenon often remarked on with awe by foreign facilitators) and his willingness to clear the path for new and sometimes challenging initiatives to move forward in the face of doubt and sometimes open opposition, have all contributed significantly to the success of the JEITT.

The residential weekend seminars which began in 1996 continue to occupy a large part of the attention of the Institute since it remains true that judges and judicial officers are under no obligation to attend. It is therefore incumbent on the Institute to ensure that everyone is encouraged to participate by the relevance of the topic chosen, the innovative teaching practices and lively discussions and the efforts to generate a greater spirit of camaraderie among participants. The CESs are all held in the island of Tobago allowing the majority of the participants the opportunity to distance themselves both physically and psychologically from their daily preoccupations. Every effort is made to ensure that participants are comfortable and their needs are being met. The weekend programme is designed to end at midday on Sunday giving participants the opportunity to spend at least part of the weekend with their family. There are ongoing discussions about the feasibility and desirability of including families on residential weekends.

Already decided is the intention to invite judicial officers from neighbouring jurisdictions, a move which has existed since the days of the Kangaloo Committee. Small jurisdictions often exist in regional groupings for example in the Caribbean, the Pacific nations, and the Indian Ocean, and the movement towards an indigenous jurisprudence is often a joint enterprise with others making a similar journey, though not always by making the same steps.²³ The JEITT appreciates the tendency to become what we most fear and works to avoid becoming a new colonial power in the Caribbean region while sharing its facilities, resources and expertise. To

²³ J Clifford Wallace, “Judicial Education and Training in Asia and the Pacific” (2000) *21 Mich J Intl L* 849.

this end, apart from invitations to participate in annual CESs, the JEITT has hosted delegations from the OECS, Barbados, Guyana and imminently, the Dutch Antilles on study visits. In addition, most of Distinguished Jurist lecturers have come from neighbouring jurisdictions. This is all evidence of a conscious policy of regional inclusivity in judicial education in recognition of the need for wider regional initiatives. In this area, the greatest challenges are resource-based and a legacy of insularity and competitiveness in the region.

In addition to facilitating programmes which are designed for specific groups within the Judiciary (eg judges and senior management), the Institute utilises ‘cross-training’ where applicable. This inter- and intra- group targeted training applies a) across sections of judges and judicial officers as well as b) between groups of judges, judicial and non-judicial officers. Cross-training has practical and ideological benefits. Practically speaking, this type of training allows us to take advantage of our small target audience and to maximise our limited resources. By creating larger, mixed groups, the Institute can be efficient and economical, because we limit the expense incurred in hiring facilitators. Additionally, cross-training encourages the cross-fertilisation of ideas, experiences and insights around common topics. From an ideological standpoint, cross-training builds overall institutional strength and purpose. When different groups work and learn together, this builds mutual trust and respect which enhances learning and improvement. Past examples of judges, judicial and non-judicial officers’ programmes include the Judiciary Strategic Summit which was a whole system roll out of the Appreciative Inquiry model, Weatherhead School of Management leadership training and the UCL Judicial Institute led Train the Trainers programme (discussed below). With regard to judges and judicial officers, cross-training occurs fairly regularly. In June 2016 we brought together all judges, masters, registrars and magistrates to explore the topic of unconscious bias at our largest ever CES.

In 2014, the JEITT opened its Training Centre on the ground floor of the building it now occupies. This centre is a fully equipped multimedia facility containing the latest in education technology. It can comfortably hold 40 persons and is designed to be divided easily into five break-out rooms. It has its own library, kitchen and copy centre and participants have wireless access to the Internet. The existence of this facility has created considerable interest throughout the judiciary and it is almost continuously in use. This has resulted in increasing collaboration between the JEITT and the training department of Human Resources, bringing to the fore once again the old debate about the mandate of JEITT. The Institute now includes among its annual CESs a residential weekend for senior administrative management of the judiciary and various groups such as staff at the Family Court and Case Management Officers have received training facilitated by JEI. Training for the Appreciative Inquiry process, faculty training and training in team-building have all included both judicial and non-judicial staff. At the same time, there remains considerable resistance among the ranks of judges about the JEITT extending its role to the entire organisation. It has to be said that among the rest of the staff, the issue appears already settled in favour of a wider reach.

All levels of judges and judicial officers are canvassed throughout the year about possible topics for inclusion at the CES. The increased judicial workload as a result of high crime rates and a growing litigious attitude in the society has resulted in an increase in recent years in workshops on judicial skills such as judgment writing, case management and eliminating bias. The introduction of new laws eg the recent establishment of the Children’s Authority in Trinidad and Tobago, has required some study of legislation and the forging of agreements on the way forward. Looking to the future, the rapidly changing nature of Trinbagonian society under the onslaught of technology, globalisation and crime has made it necessary for judges to

become more aware of the historical socioeconomic reality of the Caribbean. It is envisaged that persons from academia, the financial world, medical professionals, and persons working with disadvantaged groups will be called upon to meet with judicial officers to share their experiences and recommendations for the judicial system.

At half-day sessions, of necessity local facilitators are the norm, though occasionally advantage is taken of visits by distinguished jurists or experts. On weekend seminars, when foreign facilitators are sometimes used, every effort is made to include local personnel as group leaders or panellists, for example. Court staff are often employed as actors when role plays are used as a teaching device and this has had the positive impact of creating good relations between judicial and non-judicial staff. The JEITT has also made a conscious effort to develop a local faculty from among judges, judicial officers and senior management of the Judiciary. Apart from their aforementioned use as lecturers in the Paralegal courses, through an ongoing involvement with the CJEI and, more recently, with UCL Judicial Institute, a cadre of about two dozen trained local facilitators has been created and will be deployed to give specialist courses to their colleagues and to staff. It is also hoped to make the availability of these persons known to other jurisdictions within the region. This development is important in establishing our bona fides as an educational institute, developing truly indigenous and contextually relevant judicial education and training and is the foundation stone for an eventual move towards academic accreditation.

The emergence of a group of judicial officials and staff willing to lead as facilitators in judicial and staff training is not the only area in which the JEITT is creating a culture of innovative leadership within the judiciary. From the latter half of 2011, the leadership of the organisation attended appreciative inquiry training at the Weatherhead School of Management in Cleveland. This eventually culminated in the Judiciary Strategic Summit of November 2013 attended by 200 members of staff, democratically elected by their peers of every section, unit and court in the system. While not all of the hopes and dreams of the Summit have come to fruition, those three days remain a tangible beacon of what is possible.²⁴ This relationship with Weatherhead has resulted in further leadership training for selected groups of judges, judicial officers and senior staff. This training includes sessions on appreciative leadership, emotional intelligence, mindfulness and creativity, all designed to foster a new culture within the organisation through the development of leaders who challenge the prevailing norms of the society by accentuating the positive and seeking innovative and creative solutions to problems. The JEITT is thus leading a whole system cultural and behavioral change that is intended to transform the way the Justice system in Trinidad and Tobago is experienced and operated. In fact, this initiative is one of the several innovative interventions that the President of the JEITT has mandated.

Apart from training sessions for judicial officers and staff, since 2011 the JEITT has hosted the annual Distinguished Jurist Lecture and Panel Discussion for the general public. The lecturers have been, since 2011, Sir Shridath Ramphal, former Commonwealth Secretary-General, Justice Adrian Saunders of the Caribbean Court of Justice, Sir Marston Gibson, Chief Justice of Barbados, Dr Leighton Jackson, Deputy Dean in the Faculty of Law at the Mona campus of the University of the West Indies and Dame Linda Dobbs of the United Kingdom. These lectures and the discussions which follow have invariably generated national

²⁴ Judiciary of the Republic of Trinidad & Tobago, *Annual Report, 2013-2014* p 14, at www.ttlawcourts.org/images/annualreports/Annual-Report-2013-2014/#/16, accessed 4 November 2016.

debate: in 2012, for example, Justice Saunders initiated discussion on Trinidad and Tobago adopting the Caribbean Court of Justice as its final court of appeal and in 2013 when Sir Marston Gibson, Chief Justice of Barbados, outlined the arguments for and against the retention of the jury system. The JEITT sees these lectures as an opportunity to engage the general public in discussion on relevant and at times controversial topics which are usually reserved to the legal profession and yet have enormous impact on the daily lives of ordinary citizens who, in the words of Justice Smellie of the Cayman Islands, have “a sense that the court house . . . is inhabited by judges who have little understanding of or empathy for the circumstances of the ordinary person.”²⁵ The JEITT makes an effort to ensure that the panels are multidisciplinary; members have included journalists, religious ministers and lecturers in anthropology, sociology and criminology. Indeed, these distinguished jurist lectures are broadcast on the television and radio and published in the main daily newspapers, to ensure that the public has access to them and to facilitate widespread discussion about the topics. Breaking down these artificial barriers allows the judiciary to assume its leadership position in society as an upholder of justice and the rights of citizens. The JEITT is thus playing a significant role in this leadership task.

This important outreach to the general public is also manifested in the JEITT’s website and publications. In the past, texts produced by the Institute were accessed only by legal practitioners and scholars. Through the use of digital technology, most JEITT publications will now be available as e-books on the judiciary website, available for free download by the general public. This includes the four Distinguished Jurist Lectures, the recently completed Criminal Bench Book and in the near future, the Civil Proceedings Rules. In fact the decision to publish the Criminal Bench Book in electronic form and make it available to the public free of charge is in furtherance of a commitment to greater transparency and accountability and to expand access to justice in Trinidad and Tobago.²⁶

In recent times, the JEITT has also produced a *Handbook on Award of Damages for False Imprisonment and Malicious Prosecution* and a handsome volume on the history of the Court of Appeal, which was published to commemorate the 50th anniversary of Trinidad and Tobago’s independence.²⁷ 2015 has also seen the completion of a local Bench Book, the work of a committee of local Criminal Judges, “a signal accomplishment (that) once more affirms the Judicial Education Institute as a premier institution of its kind in the region.”²⁸ Small jurisdictions are notorious for their aversion to producing research and printed work. It is often too easy to “piggy-back” on the work of others while for many, the question of a lack of financial resources is a determining factor. The JEITT’s fortunate ability to access some finance from State resources has made it possible for the Institute to produce a few printed texts each year,

²⁵ The Honourable Justice A Smellie, “The Need for Continuing Judicial Education and Training —The Caribbean Perspective”, Keynote address at the Second Biennial Meeting of Commonwealth Judicial Educators, Commonwealth Judicial Education Institute, 30 November 2003, St Lucia, at <http://cjei.org/publications/JusticeSmellie.pdf>, accessed 4 November 2016.

²⁶ Judicial Education Institute of Trinidad & Tobago, *Criminal Bench Book*, 2015, at www.ttlawcourts.org/jeibooks/bookdetails.php?1, accessed 4 November 2016.

²⁷ Celebrating 50 Years of an Independent Court of Appeal of Trinidad and Tobago 1962–2012, Paria, 2015, at www.ttlawcourts.org/jeibooks/bookdetails.php?8, accessed 4 November 2016.

²⁸ Judiciary of the Republic of Trinidad & Tobago, “Address of the Honourable the Chief Justice Mr Justice Ivor Archie, Opening of the 2015/2016 Law Term”, at www.ttlawcourts.org/index.php/newsroom-69/news/5752-address-of-the-honourable-the-chief-justice-mr-justice-ivor-archie-opening-of-the-2015-2016-law-term, accessed 4 November 2016.

welcome additions to the legal and historical record. The enormous benefits gained through the availability of these texts to a wide audience through the Internet makes the very difficult production work immensely rewarding.

The dearth of original research and of persons willing and able to engage with such research and the allocation of sometimes scarce resources to research remains a challenge. The JEITT has begun to expand its research from being solely topic-based for training sessions and lectures to gathering empirical data as a foundation for training and education. The topic of procedural fairness has become a main focus for this new law term and we are using research to gather information as a needs assessment (through the use of surveys and court observation) as well as to inform the training on the topic. Data is being collected on the experience of court users — do they see the system as fair? Do they believe that their voice is heard? Research is also being carried out by a team of behavioural analysts investigating interactions among members of judges and magistrates teams. The empirical data collected and analysis will be used to determine what, if any, intervention is necessary to increase the effectiveness of the team in assisting the judge to dispense justice in a timely, impartial and effective manner. We are convinced that an indispensable element of indigenous judicial education is relevant, rigorous local research and analysis. We would like to suggest that small jurisdictions, even those with limited resources, should make the investment in local research and analysis, as counter-intuitive as this may appear at first glance.

It would be tempting for other small jurisdictions to look at the work of the Institute and its ready access to ample State funds as an indication that such activity is beyond their own reach. While the benefit of an expansive budget is not to be denied, it should be pointed out that this has been a feature only of the last three years. Previously, the Institute existed in much the same situation as the judicial education efforts of other small jurisdictions worldwide. We put together what we could from the Chief Justice's funds and depended on the willingness of volunteers in both participating in training sessions but also in designing and facilitating training programmes. This, along with the generosity of global organisations, has been central to the success of the JEITT. Although that situation for us is now in the past, it still exists for our neighbours, the Eastern Caribbean Supreme Court (ECSC). Smaller than Trinidad and Tobago and with a physical infrastructure and political system spread over more than a dozen different territories, the Judicial Education Institute of the ECSC under the effective leadership of first, Sir Dennis Byron and later, Justice Adrian Saunders has since 1998 been achieving miracles with a minimum of resources but with a stern adherence to best practices and a commitment to excellence. The example of the ECSC suggests that access to ample financial resources, while wholly welcome, are not a requirement for modern, effective judicial education.²⁹

The mention of Sir Dennis Byron and earlier Chief Justice Ivor Archie would seem to bring us full circle again to the question of the role of individuals in the promotion of judicial leadership through education. It would appear almost as a “condicio sine qua non” — the need for an effective committed leader to drive the process of sustained judicial education. We however remain convinced that the leader requires those willing to be led; the Caribbean commitment to education and learning means that there is a ready audience for such initiatives. For small jurisdictions, therefore, the need is not for the “great man” to appear but for the audience

²⁹ Sir D Byron and M Dakolias, “The Regional Court Systems in the Organization of Eastern Caribbean States and the Caribbean” in *Small States, Smart Solutions — Improving Connectivity and Increasing the Effectiveness of Public Services*, The World Bank, 2008.

to be receptive and to be willing to move forward, collectively. There is also the need to move beyond the culture of dependency often nurtured in small places. While we continue to work, within the framework of an increasingly globalised judicial education environment,³⁰ with “outsiders” (persons and institutions from larger places) who have the expertise, the resources and the experience which we do not possess, it is our responsibility to retain control, to tailor what we receive to meet our needs, to question, to challenge, to interrogate, to invite these others to join with us in moving forward.

To this end we believe that judicial educational institutes need to have a clear, motivating and mobilizing “vision-statement”, not just in the classical management sense, but in the sense of an “iconic word image”. In furtherance of this, the JEITT has adopted the motto “Transformation through Education”. Thus, we see our underpinning and overarching role as one of transformation and our vehicle for achieving it as education.

There is a saying in Caribbean society: “Small axe does cut down big tree”. Although Bob Marley in his 1973 recording posited an oppositional relationship between the small axe and the big tree, the original meaning of the saying was that the axe, though small, has the potential to do great things. That is the meaning we want to adopt here. Small jurisdictions face a multitude of difficulties, many of them appearing insurmountable. The temptation is to allow others to be the axe for us and many are generous enough to be willing to assist with what needs to be done. But, we need to do our work. We need to lead our people to greatness; that is a responsibility we cannot abdicate. We are, however, not alone in this. There are others alongside us struggling with the same task. Let us then be the small axe, let us together cut down big trees.

³⁰ G Oberoi, “Globalisation of the judicial education discourse”, *Commonwealth Law Bulletin*, Vol 38, No 3, September 2012, pp 393–421.

Judicial education on “gender awareness” in Australia

The Honourable Justice John Basten*

Introduction

As demonstrated by the book of papers published recently by Ulrike Schultz and Gisela Shaw, *Gender and judging*,¹ there is a wealth of research being conducted on gender awareness in the judiciary in many countries in Asia, South America, Africa, Europe, North America and Australasia. This conference reflects part of that global process, specifically work undertaken in Japan by Professor Kayo Minamino and her colleagues.²

An important preliminary lesson from this research is that, broadly speaking, lack of gender awareness is a problem across different cultures and across different legal systems, but is revealed in different forms; it follows that solutions which will work in one country may fail or be inappropriate in another. That is exactly as one should expect. The lesson applies to me too; I can describe my perceptions of our Anglo/Australian experience, but I cannot (and should not) extrapolate to Japanese legal culture. That is for you to do.

There is a fundamental reason why all countries which operate under the political principle of the rule of law share the problem. The reason is that laws must be applied, in the words of our judicial oath, without fear or favour, affection or ill will. Partiality, that is, preferring one party over another for reasons not permitted by law, is prohibited. Judges must be impartial at all times and in all cases: at least, that is the ideal. Sometimes we fall short; and in particular we may fall short because we carry unexamined “baggage”.³ Part of the baggage, and I emphasise *part*, especially for male judges, is an omission, a lack of appreciation of the experiences of, and values which are commonly held by, women. There are other points of blindness, but this one is particularly important because it potentially affects half the population.

There are a number of assumptions underlying the concept of judicial education with respect to gender awareness. Any proposal directed to this topic must first identify and address those assumptions. One assumption is that differences in gender can affect the way judges administer justice and decide cases. No doubt that is true, but how it works, and why this issue deserves special attention, require consideration.

* Judge of Appeal, New South Wales Court of Appeal, based in Sydney, Australia. Revised version of a paper presented at the Kyoto International Conference on Judicial Training for Gender Awareness in the Courts, April 2014, Kyoto. Valuable research assistance was provided by my clerk, Steven Gardiner. This article was first published in *The Judicial Review* (2014) 12(1) *TJR* 45. It was subsequently published in (2015) 22 *International Journal of the Legal Profession* 151.

¹ U Schultz and G Shaw, “Introduction: Gender and judging: overview and synthesis”, in U Schultz and G Shaw (eds), *Gender and judging*, Hart Publishing, Oxford, 2013, p 3.

² K Minamino, “Gender and judicial education in Japan” in Schultz and Shaw, *ibid*, Ch 7.2, p 543.

³ S Elias, “Justice for one half of the human race? Responding to Mary Wollstonecraft’s challenge” (2010) 10(4) *TJR* 399 at 402; *Liteky v US* 510 US 540 at 551–552 (Scalia J); *R v S (RD)* [1997] 3 SCR 484 at [35], L’Heureux-Dubé and McLachlin JJ quoting the Canadian Judicial Council, *Commentaries on judicial conduct*, Les Éditions Yvon Blais Inc, Québec, 1991, p 12, and B Cardozo, *The nature of the judicial process*, Yale University Press, New Haven, 1921, pp 12–13 and 167.

Having said that culture and the legal system are significant variables in understanding and addressing this issue, let me say a little about our Australian context.

The Australian context

Australian courts (like those in the English tradition elsewhere) are largely constituted by judicial officers who are not trained as such, but are lawyers with many years experience in practice, whether private, public or self-employed. Whilst, in the past, magistrates were part of the public service and obtained experience as clerks of the relevant courts, that is no longer the case. Like judges in higher courts, they are chosen from the ranks of practising lawyers, operate independently of government and are appointed to a statutory retirement age (usually 70).⁴

Once appointed, a judge can be removed only by the Parliament, and not by the executive government alone, and then only for misbehaviour or incapacity.⁵ Generally, judges are not promoted and expect no preferment. Once appointed, most will remain in that position until retirement. They will acquire seniority and respect based on performance, but they expect that from peers and not from the government.

Our laws may best be described as a mixture of judge-made law and statutes enacted by Parliament. There is room for interpretation and for discretionary judgment in their application. Trial judges (as everywhere) must apply their skills and experience in assessing the evidence, particularly in relation to witnesses giving oral accounts of what they have seen or done, or what has happened to them.

Finally, a special feature of our system of administering justice, probably known to you from American television, should be noted. Trials of serious criminal charges are conducted before a judge and jury of 12 drawn from the community. The jury are solely responsible for fact-finding — applying legal principles explained to them by the presiding judge, but assessing the witnesses based on their diverse experiences. Juries contain roughly equal proportions of men and women. The jury has an important constitutional function in the administration of justice. They are not specifically instructed in how to avoid prejudice and stereotyping in relation to gender.

Identifying the issues

Gender supplies an important consideration for judges in four respects. First, there are gender-based values which infuse substantive legal principles. Much academic writing has focused on this aspect.⁶ It is one of which judicial officers should be conscious, but which

⁴ In NSW and Tas, the retirement age is 72: *Judicial Officers Act 1986* (NSW), ss 44(1) and (3); *Supreme Court Act 1887* (Tas) s 6A(1); *Magistrates Court Act 1987* (Tas), s 9(4)(a). For all others (except magistrates in WA and ACT) it is 70: *Constitution* (Cth), s 72; *Federal Circuit Court of Australia Act 1999* (Cth), ss 9 and Sch 1, Pt 1, cl 1(4); *Supreme Court of Queensland Act 1991* (Qld), s 21(1); *District Court of Queensland Act 1967* (Qld), s 14(1); *Magistrates Act 1991* (Qld), s 42(d); *Supreme Court Act 1935* (SA), s 13A(1); *District Court Act 1991* (SA), s 16(1); *Magistrates Act 1983* (SA), s 9(1)(c); *Constitution Act 1975* (Vic), s 77(3); *County Court Act 1958* (Vic), ss 8(3), 14(1)(b), (c); *Magistrates' Court Act 1989* (Vic), s 12(a); *Judges' Retirement Act 1937* (WA), s 3; *District Court of Western Australia Act 1969* (WA), s 16; *Supreme Court Act 1993* (ACT), s 4(3); *Supreme Court Act* (NT), s 38; *Magistrates Act* (NT), s 7(1). For magistrates in WA and ACT the age is 65: *Magistrates Court Act 2004* (WA), s 5 and Sch 1, cl 11(1)(a); *Magistrates Court Act 1930* (ACT), s 7D(1).

⁵ *Constitution* (Cth), s 72(ii); *Constitution Act 1902* (NSW), s 53; *Constitution of Queensland 2001* (Qld), s 61; *Constitution Act 1975* (Vic), s 87AAB; *Judicial Commissions Act 1994* (ACT), s 5(1); *Supreme Court Act* (NT), s 40(1). SA, Tas and WA do not prescribe a ground of removal: *Constitution Act 1934* (SA), s 75; *Supreme Court (Judges' Independence) Act 1857* (Tas), s 1; *Supreme Court Act 1935* (WA), s 9.

⁶ R Graycar and J Morgan, *The hidden gender of law*, 2nd edn, The Federation Press, Leichhardt, 2002.

they have little opportunity to change. Secondly, there are areas for evaluative judgment where consciousness of gender-based values may be significant. Assessment of damages in tort and sentencing for crimes may provide examples. Thirdly, gender may be relevant to our expectations of how people behave in particular circumstances. In this sense, our understanding of typical responses (what people in fact do, rather than how they should be treated) will affect our assessment of credibility. Fourthly, the last issue arises with respect to how juries assess credibility and thus the directions to be given by the judge. The jury should be warned about problems of which they may not be aware (for example, unreliability of identification evidence), but to warn of inappropriate gender stereotyping may be to intrude on the core function of the jury. It is the second and third aspects which engage the core issue for present purposes.

There is no doubt that in many respects men and women share the same experiences and skills. However, there are areas in which experience and (some would say) skills and methods of reasoning differ. Based on personal experience, culture and upbringing, people acquire different values and assess the world differently. On the other hand, as judges, there is much which is likely to unite us in our common training as lawyers.⁷

The fact that judges bring their own values and experience of the world to the function of judging (possibly in varying degrees) has been the subject of concern over the decades and, indeed, through much of the 20th century. The early modern expressions were found in the area of industrial law.⁸ The assumption was that by background and upbringing, judges were more likely to be understanding of the values and goals of employers than those of labourers and unionists. A similar concern arose in relation to race. The civil rights movement in the United States, for example, had its own analysis of the composition and operation of courts.

Recognition of gender as a point of difference appears, broadly, to have arisen later than class and ethnicity, and has been followed by concerns expressed by various social minorities, including gay men and lesbians.⁹

To place gender concerns in a list is not to diminish their validity, but to seek to understand the role which gender awareness may properly play in educational programs. Much advocacy for oppressed groups relies on an assumption that a judge’s membership of a particular group, at least where that group is not part of the dominant class in society, is a condition of full understanding and hence of providing justice. The move for recognition of the special needs of oppressed or excluded groups thus tends to be expressed not as a demand for judicial education, but for representation.

Diversity — the composition of courts

“Representation” may be appropriate in a legislature, but the executive and the judiciary should *reflect*, rather than represent, the diversity of the society they serve. Diversity is an important value in the administration of justice. Whilst the rule of law may depend on the availability of mechanisms for enforcement (such as an effective and uncorrupted police force, and sheriff’s

⁷ K Mack and S Roach Anleu, “Skills for judicial work: comparing women judges and women magistrates” in Schultz and Shaw, above n 1, Ch 2.5, p 211, reporting recent empirical research on how female judicial officers in Australia view their roles.

⁸ And not only in complaints from workers — see T E Scrutton, “The work of the commercial courts” (1921) 1(1) *CLJ* 6 at 8.

⁹ The late recognition of the need to address gender in judicial decision-making is referred to in K E Mahoney, “Gender bias in judicial decisions” (1993) 1(3) *TJR* 197 at 199.

officers to enforce civil judgments), it will also depend upon a high measure of acceptance, across all social groupings, of the functioning of courts. Thus, in a civil society based upon notions of individual equality, the apparent exclusion of a large and highly visible group from the judiciary will tend to diminish respect for the law and undermine the rule of law as a political institution. The presence of women on courts in significant numbers is a necessary element of a healthy democracy.

There is a wealth of anecdotal evidence that women appearing as advocates feel uncomfortable and perceive themselves to be outsiders in courtrooms routinely presided over by male judges. To describe the feeling as a “perception” is not to imply that it is unjustified. The feelings of exclusion may extend to female judges, at least when few in number.¹⁰

In Australia, approximately 33 per cent of judicial officers are women and that percentage applies across almost all jurisdictions (State and federal) and at all levels in the judicial hierarchy, although it tends to be lower in the higher courts.¹¹ (That achievement has occurred entirely within my adult life: when I graduated from university, there was only one female judge in the superior courts in Australia.)¹²

However, the importance of maintaining a reasonable proportion of women in the judiciary is not limited to democratic inclusivity. Although not the primary justification for maintaining a diverse judiciary, women may have an educative function for the judiciary as a whole. That effect will operate differently in different jurisdictions. Thus, our Court of Appeal, excluding the Chief Justice whose sitting time is limited, and excluding the Chief Judges of the trial divisions who also rarely sit on appeals, has a President (who is a woman) and nine other full-time Judges of Appeal, of whom two are female. We sit in Benches of three, so that the chances of a male judge sitting with a female colleague is high. To the extent that a woman’s view of a matter were to be significantly different from that of her male colleagues, she is able to express that view, not merely in a judgment, but in discussions that occur both in court and out of court. Of course, that involvement is not available in trial courts, where judges sit alone. The two trial divisions of our Supreme Court comprise approximately 36 full-time judges, of whom six are women. One division hears serious crime and civil negligence cases, while the other deals with much of the commercial work of the court (and has a female Chief Judge). Although the numbers are perhaps lower than one might wish, there is still a group of female judges whose views will be expressed to their colleagues from time to time, including in the course of informal discussions about their respective cases and during regular lunches.

I derive two propositions from the experience of our court. The first is that the need for judicial education regarding gender awareness is likely to be reduced in circumstances where women constitute a significant proportion of a court. Secondly, and perhaps ironically, judicial education with respect to gender awareness is likely to be taken more seriously, and thus likely to be more effective, where there is a significant number of women on the court.

¹⁰ P Darbyshire, *Sitting in judgment: the working lives of judges*, Hart Publishing, Oxford, 2011, p 423, in relation to the atmosphere in the dining room at court.

¹¹ Australian Institute of Judicial Administration, Statistics, updated 12 March 2014, <www.aija.org.au/JudgesMagistrates2014.pdf>, accessed 2 April 2014; and see, generally, R McColl, “Celebrating women in the judiciary 2014”, address to the Women Lawyers Association of NSW, 27 February 2014, Sydney, at <www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m6700011771022/mccoll_270214.pdf>, accessed 2 April 2014.

¹² Dame Roma Mitchell was appointed to the Supreme Court of SA in 1965: see <http://en.wikipedia.org/wiki/Roma_Mitchell>, accessed 2 April 2014.

However, there appears to be a “critical mass”, below which women judges are likely to feel themselves to be outsiders and uncomfortable.¹³ (That is not to say that achievement of such an outcome is a sufficient response to the need for diversity; nor that it is possible to define that level — either in numerical terms, or across courts.)

The importance of a gender-neutral court

The literature assumes that gender awareness, as an element in judicial education, is intended to address the needs of male judges for insights as to female values and experiences. As a broad proposition, and in the present social context, that focus should be accepted. The introduction of sex discrimination laws in Australia was accompanied by a debate as to whether they should apply both to discrimination against women and discrimination against men. The principle of formal equality suggested that they should apply to both; the goal of substantive equality suggested that men do not need protective laws of that kind, because they generally have enjoyed a position of superiority, rather than inferiority, in the public life of the country.

Sexual assault is often identified as a situation where many men and many women could (and undoubtedly do) have different perspectives. But the courtroom brings its own set of values. Assuming a male accused and a female complainant (the most usual case), it would undermine the rule of law if the outcome were thought to depend on whether the judge was male or female. And race can add another dimension.¹⁴ Diversity may, by raising such questions, highlight the complacency of assumed impartiality in another age. The only appropriate response is to ensure that it does not matter who the judge is. The principle of impartiality does not assume a mind free of personal opinions and values, but rather an ability to recognise, question and consciously allow for the attitudes and sympathies which are held, when deciding a particular case.¹⁵ To that end, judges must be able to discuss, identify and explore assumptions, attitudes and values. To provide a forum for that to happen is an important function of judicial education.

The way in which judges behave in court can be critical to the perception of equal treatment according to law. Any person involved in court proceedings who is treated dismissively is likely to believe they have not been accorded “a fair go”. Comments by male judges revealing misogynist or stereotyping views have no place in any courtroom. Although it is not part of this topic, there should be scope for complaints to an independent panel which can review judicial conduct.¹⁶

One would like to think that such concerns are relics of bygone days, but they clearly are not, or at least not everywhere. On the other hand, most male judges on our court have grown up in an era when it was not unusual to appear with or against female advocates, to be briefed by female solicitors and to appear (at least on occasion) before female judges. Further, many of us live with professionals. In the last decade the number of partners of judges on our court who have held (and often continue to hold) positions in business, government or as self-employed professionals, has increased dramatically.

Expectations and understanding will be affected by such changes in demography. Several factors work together; however, the most important factor in terms of avoiding social ostracism

¹³ P Darbyshire, above n 10, p 423.

¹⁴ See *R v S (RD)* [1997] 3 SCR 484.

¹⁵ *ibid* at [35] (*L’Heureux-Dubé and McLachlin JJ*) and [119] (*Cory J*).

¹⁶ In NSW, this is one function of the Judicial Commission of NSW, which has a complaint handling role (the Conduct Division) quite separate from its role in providing judicial education: see *Judicial Officers Act 1986* (NSW), Pts 5, 6.

is probably the sheer weight of numbers. Once women exceed a figure around 20–25 per cent of the court's membership, appearing before a female judge is likely to be seen as “normal”. Through various processes, the atmosphere in the courtroom is likely to change from the earlier days when a male ethos dominated.

Attitudes can be held subliminally and may be retained despite such changes. These may require conscious exposure, but when exposed may readily be addressed.

Gender and decision-making

The processes of decision-making and judgment writing may be distinguished from issues relating to conduct in court and the atmosphere of the courtroom. Whether women judges decide cases and write judgments differently from men is controversial,¹⁷ as is the proposition that there should be education to teach men these skills, implying that they are a preferred form of judging. Of course, if gender is (or should be) reflected in decision-making, it must be discussed in judicial education.

In the English speaking world, the issue was clearly articulated in a paper by Justice Bertha Wilson, the first woman appointed to the Supreme Court of Canada (in 1982). Prior to attaining that high office, she had been a judge on the Ontario Court of Appeal since 1975. In 1990, with some 15 years' experience on superior courts, she wrote a paper entitled “Will women judges really make a difference?”¹⁸

Over the 24 years since Justice Wilson published this paper, the intensity of interest in the question she identified has grown exponentially, at least if measured by academic research and publications.¹⁹ The answers to this question may be important in determining the scope and content of judicial education in the current era.

At one level, the question may readily be answered, “yes”. A critical mass of women judges will make a difference in the ways already identified. By reflecting one of the most obvious elements of diversity in every society, their presence will help to overcome the sense of disenfranchisement which inevitably results from the absence of women from any of the three arms of government. By the same token, their presence will lend credibility to the administration of justice. There will be consequential effects, including the reduction (and hopefully the removal) of feelings of alienation felt by women working within the legal profession and the courts. The importance of these consequences should not be underestimated; they are likely to build on themselves.

There is another sense in which the inclusion of women in the judiciary may well affect the outcomes in some cases. For the reasons already explained, all of us bring certain values to the administration of justice, which will be based to a significant extent on our life experiences. Arguably, maturity and a range of life experience should be criteria for judicial selection. Further, the desirability of a range of experience across the membership of a court is also

¹⁷ See E Rackley, “The Neuberger experiment” (2013) 163 (7573) *New LJ* 13, reporting an exercise stimulated by Lord Neuberger, President of the UK Supreme Court, enquiring whether a detectable difference could be found between the judgments authored by women and those authored by men. The answer was largely negative: the exercise appears to have identified more by way of stereotyping assumptions on the part of the readers as to how women judges would write.

¹⁸ (1990) 28(3) *Osgoode Hall Law Journal* 507.

¹⁹ Schultz and Shaw, above n 1.

a relevant consideration. (Some differences in experience may diminish as women become familiar in the corridors of power, whether political, governmental or commercial. Biological roles will not change, but aspects of oppression may diminish.)

Justice Wilson’s question, however, was primarily directed at a different level. It was intended to focus on whether cases will be decided differently when the judiciary contains a significant female membership. At that level, the question itself is fraught, for a number of reasons. First, it must not be allowed to influence the identified need for diversity in the composition of the courts. By analogy, democratic government requires that women have the vote. Although psephologists treat gender as an important factor in studying voting patterns, women should have the vote whether that would affect the outcome of elections or have no influence at all on the outcome of any election or all elections. By parity of reasoning, a conclusion that women judges will not affect the way in which cases are decided does not mean that increasing the numbers of women in the judiciary is not an important goal, or even that it is a goal having a lower priority than it otherwise might.

The question is reflected in feminist literature which seeks to locate specifically feminist sets of values which, to form a social goal, must be both different from and superior to the values presently in place. Justice Wilson drew on the work of Professor Gilligan in search of such values.²⁰ Justice Wilson noted:

“Gilligan’s work on conceptions of morality among adults suggests that women’s ethical sense is significantly different from men’s. Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other; the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women’s ethical sense, is not seen in terms of winning or losing but, rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.”²¹ [Citation omitted.]

Other work has focused on women’s superior skills in listening, empathising and communicating.²²

There are risks of unintended consequences attending this line of argument. Supposing empirical research provided support for the psychological theory, the response would surely be to ask where people with these specialist capabilities are best deployed. The answer is likely to be the trial courts and particularly the magistrates’ courts and tribunals with the greatest contact with members of the public. Indeed, there might be a tendency to have women focus on alternative dispute resolution, thus creating a new pressure for women to work outside the mainstream courts. Once established, such a mindset would operate adversely to the interests of the many women in the profession who specialise in constitutional law, commercial law, intellectual property, taxation and land law.²³

²⁰ Wilson, above n 18, at 519–520, referring, at n 37, to C Gilligan, *In a different voice: psychological theory and women’s development*, Harvard University Press, Cambridge, Massachusetts, 1982.

²¹ *ibid* at 520.

²² *ibid* at 521, referring to PA Cain, “Good and bad bias: a comment on feminist theory and judging” (1988) 61 *Southern California Law Review* 1945 at 1954.

²³ These concerns as to unintended consequences echo the analysis of Professor Rosalind Dixon (now at the University of NSW) in an assessment of female appointees to the US Supreme Court: R Dixon, “Female justices, feminism, and the politics of judicial appointment: a re-examination” (2010) 21(2) *Yale Journal of Law and Feminism* 297.

Further, the argument that experience affects outcomes justifies inquiry into the judge's experiences, with the purpose of seeking recusal for apprehended bias if the information gleaned warrants such an application. Public confidence in the judiciary is likely to be diminished, rather than enhanced, by such inquiries and applications. Our system depends on judges identifying potential conflicts and either not sitting, or advising the parties of the issue and seeing if objection is taken. However, recusal is usual only in cases of specific connection, such as knowing a witness or a party, or involvement in related litigation when credibility of a person was assessed, or having acted for a party before appointment to the Bench.

Otherwise, judges are expected to put personal views on matters other than relevant legal principles to one side, so as to reach a decision on the evidence and according to law. Judicial education is devoted to the realisation of the ideal that the identity of the judge should not affect the outcome. As between the parties, he or she should strive for neutrality, although the outcome will not be neutral.

If the established legal principles do not fairly reflect values of gender equality, the proper way to promote those values is to identify them and seek to adapt the system by legislation. Indeed that has happened in one of the areas identified by Justice Wilson, namely the "complex system of exclusionary evidential rules"²⁴ which she equated with an adversarial system reflecting male values. Whether or not that characterisation is correct, there have been major reforms of the rules of evidence since 1990 (at least in Australia) which appear to have had nothing to do with the appointment of more women to the Bench, as opposed to broader political pressure on legislatures. Some of the exclusionary rules are designed to protect criminal defendants from juries convicting on the basis of prejudice and stereotyping, rather than by focusing (as they should) strictly on evidence directed to the charge laid by the prosecution. There have been changes in recent years in Australia with respect to aspects of criminal procedure designed to reduce the need for complainants in sexual assault cases to relive the experience in a very public forum and before an alleged attacker. They have not been uniformly welcomed, but they have resulted from a public debate and legislative response.

This brief review of concerns raised about the role of women in the judiciary (or more accurately their absence) reveals two matters of importance for judicial education, one involving removal of a negative element, the other a positive benefit. First, while attitudes are changing, there are still too many examples in our country of male judges with unconscious stereotypical attitudes about the role of women in society. Those attitudes, it may be noted, do not necessarily relate to the role of women as judges or lawyers, or as professionals more generally. Thus, a judge who is genuinely and consistently respectful of the views of female colleagues may yet make inappropriate assumptions about women involved in sexual assault cases or women seeking a greater share of a testator's estate. It is desirable for all of us to examine our unconscious thought patterns. By providing structured assistance in this regard, judicial education may be seen as an attempt to counter negative influences.

See also S Cooney, "Gender and judicial selection: should there be more women on the courts?" (1993) 19 *MULR* 20 at 25–26, citing AC Scales, "The emergence of feminist jurisprudence: an essay" (1986) 95 *Yale Law Journal* 1373 at 1383.

²⁴ Wilson, above n 18, at 520.

The second matter is that women’s different life experiences and consequential values, if incorporated into judicial decision-making, may complement a judge’s frame of reference. Education directed to that end may be seen as promoting a positive benefit, as well as removing a taint on impartiality.²⁵

Judicial education in Australia

This discussion appears to raise a paradox: addressing partiality in the form of unconscious prejudices requires some form of judicial education — a process which has the capacity to intrude on judicial independence. This apparent paradox can be resolved. To explain how, it is necessary to look at some history and context.

For a long period, there was resistance to “judicial education” as a legitimate activity. That attitude was based on a concern that any kind of “education” diminished the independence of the judiciary. That was an unsophisticated view from a simpler age. It is now necessary to acknowledge the growing complexity of law and society, which calls for continuing professional education.

Nevertheless, there are limits as to what is acceptable. Discussing how kinds of cases should be addressed is acceptable; direction as to how particular cases should be decided is not. Identifying the skill sets required for judging is acceptable; criticism of individual judges (except of course through appellate judgments) is likely to raise resistance. Anything which carries the hint of political direction will be greeted with deep suspicion.

Yet feminism is a set of political values. Most judges will understand it to be a reflection of the principle of equality and thus in conformity with the rule of law. But as an ideology it has no direct application in legal reasoning, nor is it a requirement for judicial education.²⁶ A pragmatic approach to gender awareness is to locate it firmly in the broader concept of unconscious partiality. It is then an acceptable (and essential) element of judicial education.

It is somewhat artificial to look for a defining commencement date for moves to introduce gender awareness into judicial education in Australia. That is for two reasons. The first is that whatever date one chooses, it was preceded by laws relating to sex discrimination generally and many other public activities devoted to promoting equality for women.

The literature suggests that the topic of gender awareness was stimulated in Australia by the writings and speeches of various Canadian lawyers, including Professor Kathleen Mahoney, a distinguished Canadian academic.

In 1990 Chief Justice David Malcolm, from Western Australia, attended an international conference in Edinburgh entitled, “Equality and the administration of justice: gender, race and class”.²⁷ Stimulated by the presentations at that conference, including from Professor Mahoney,

²⁵ The distinction is no doubt one of emphasis rather than a comparison of absolutes. Nevertheless, that may be important in how programs for judges are presented.

²⁶ That view is unlikely to be diminished by such undoubtedly stimulating publications, as R Hunter, C McGlynn and E Rackley (eds), *Feminist judgments: from theory to practice*, Hart Publishing, Oxford, 2010, which stimulated a similar venture in Australia at the University of Queensland Law School, see <www.law.uq.edu.au/the-australian-feministjudgments-project>, accessed 7 April 2014.

²⁷ D Malcolm, “Gender bias in the administration of justice” (1993) 1(3) *TJR* 191 at 194. A similar positive response to such experience was noted by North J in the Federal Court in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 135.

he organised a seminar on the topic, “Gender bias in the administration of justice” held at the Supreme Court of Western Australia on 14 August 1992. He also established a committee to consider the question of gender bias, which reported in 1994.²⁸

In the same period, the Senate in the Commonwealth Parliament asked the Standing Committee on Legal and Constitutional Affairs, to inquire into “gender bias” and the judiciary, which resulted in a report dated May 1994.²⁹

Much has changed over the last 20 years. Now, three specific propositions should be borne in mind. One is that judges value high quality judicial education but tend to be impatient with, and dismissive of, that which does not live up to their expectations. That proposition flows from two somewhat conflicting factors. On the one hand, when appointed, our judges tend to be highly experienced lawyers, senior in their profession, both in terms of professional status and age. On the other hand, most of us will readily acknowledge that the function of a judge is not something that we have experience of, and will concede the need for assistance.

A second and related point is that many judges will come from a specialist background of legal practice, as to which they are truly expert, but will be required as judges to function across a far broader range of cases. The need to become familiar with new areas of law and procedure and write authoritative judgments about them is a demanding exercise.

The third point is that many lawyers who become judges will have skills drawn from professional and personal experience. They will probably have spent much time in their professional careers assessing the truthfulness and reliability of witnesses (and clients) and forming judgments about how others will view them as witnesses in court. However, the more senior one is professionally, the more likely one is to resist the suggestion that one has unconscious prejudices, unarticulated and unexamined values and limited understanding of how one reaches one’s own decisions and makes one’s own judgments. Yet this is the area into which judicial education must delve if there is to be any serious attempt to improve levels of gender awareness.

In NSW, the most focused attempts to raise gender sensitivity are to be found in the *Equality before the Law Bench Book*, produced and regularly updated by the Judicial Commission of NSW with the assistance of a panel of judicial officers.³⁰

The Bench Book, which is provided to all NSW judicial officers, identifies sources of inequality, stating:

Women tend to fare worse than men in relation to their employment status, income level, the amount of unpaid household work and childcare activities they engage in, the type and nature of violence committed against them, and in relation to some legal proceedings.³¹

Troublingly, the Bench Book notes:

It is also the experience of the Judicial Commission of NSW and other complaint bodies than many more women than men complain of gender bias in relation to the legal system and legal proceedings.

²⁸ *Report of the Chief Justice’s Taskforce on gender bias*, June 1994, especially Ch 3.

²⁹ Parliament (Cth), Senate, Standing Committee on Legal and Constitutional Affairs, *Gender bias in the judiciary*, Report, May 1994.

³⁰ Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Ch 7, “Women”.

³¹ *ibid* at [7.2.1].

It is true that not all women fare badly in comparison to men, or feel discriminated against in comparison with men. However, the general existence of gender inequality or bias in our society means that, for many women, unless appropriate account is taken of the examples of gender bias listed ... below, a woman may:

- feel uncomfortable, resentful or offended by what occurs in court
- feel that an injustice has occurred
- in some cases be treated unfairly and/or unjustly.³²

The Bench Book then lists and addresses a number of situations where gender bias could occur, or be perceived to occur:

- using language and terminology carelessly and/or inappropriately — that is, using language, statements or comments that create, or could create, a perception of gender bias
- assessing a woman against how a man would have acted or felt in that situation
- assessing a woman against how a “normal” woman ought to behave
- showing a lack of understanding of the nature of domestic violence or sexual assault, and/or of the impact of domestic violence or sexual assault on women
- showing a lack of understanding of the value of household work and childcare activities
- implying that a woman makes a less credible witness than a man.

³³ Many of the examples are culturally quite specific; others are almost simplistic. For example, we advise judges not to address women by their given names if they address men using a title and a family name.

Further, in major criminal trials, a judge presides, but fact-finding is undertaken by a 12-person jury. Other matters dealt with in the Bench Book concern directions to be given to jurors in considering the evidence. While the use of lay jurors in criminal trials is derived from long-established British tradition and provides many in the community with a direct role in administering criminal justice, jurors will bring to their task both everyday experience and everyday prejudices. Possible prejudices may need to be addressed by directions from the judge.

Beyond the circulation to all judicial officers of the Equality before the Law Bench Book, the topic of gender awareness is dealt with incidentally in seminars organised by the Judicial Commission for the courts and at annual court conferences.³⁴ In our court, we are focusing on understanding the psychology of decision-making and how unconscious biases can (and in some circumstances undoubtedly will) affect the way we make decisions and thus administer justice.

Conclusions

Most judges have a limited role in leading social change; our primary function is to administer the law, rather than make it. However, administering the law frequently involves evaluation

³² *ibid.*

³³ *ibid* at [7.2.2].

³⁴ For a further discussion about how the Judicial Commission addresses gender bias in its educational programs and publications, see K Lumley, “Without fear or favour, affection or ill will: addressing gender bias in NSW judicial education” (2014) 12(1) *TJR* 63 at 72.

and choices, and judicial education can at least help to prevent judges from preserving or reinforcing factors which diminish the equal treatment of women in society. There is an increasing insistence that partiality is more than conscious bias. A truly impartial judge must be able to identify and counter unconscious prejudices, stereotyping and predilections. However, the line between sound judgment and prejudice is porous and contestable. It is an important function of judicial education to raise awareness of such issues, of which gender difference is an important part.

The dangers of unconscious prejudice for true impartiality were recognised long before the concept of “judicial education” became acceptable in common law countries. The appropriate solution was then seen to be self-examination, itself a desirable (if not an essential) skill for a good judge.³⁵ However, the place of continuing legal education within the legal profession is now well established (and is a requirement for annual recertification). Thus, our judges, who were practitioners prior to appointment, are amenable to the idea of continuing legal education once appointed to a court.

The important protection against any intrusion on judicial independence is to ensure that control of judicial education lies with the judges themselves. Thus, our court has a committee of judges which organises educational programs, with the help of a Judicial Commission, which is itself governed by a Board comprising the heads of all jurisdictions.

The Australian Council of Chief Justices has approved a goal that judges participate in 5 days of continuing education a year.³⁶ Attendance is entirely voluntary, but, at least in NSW, it is well-attended and appreciated.

The issues in civil law jurisdictions with a career-judiciary are beyond the scope of this paper and beyond my competence to discuss. The principle of impartiality will not seem foreign to you, but questions of independence will operate differently.

³⁵ See quotations from Frankfurter J and Lord MacMillan in Wilson, above n 18, at 508–509, and see F Frankfurter, “The appointment of a justice” in P B Kurland (ed), *Felix Frankfurter on the Supreme Court: extrajudicial essays on the court and the Constitution*, Belknap Press, Cambridge, Massachusetts, 1970, pp 211, 216–217.

³⁶ National Judicial College of Australia (prepared by Dr C Roper AM), *A national standard for professional development for Australian judicial officers*, 28 April 2006, p 29, at <<http://njca.com.au/wp-content/uploads/2013/01/A-National-Standard-for-ProfessionalDevelopment.pdf>>, accessed 15 July 2014; see also *Review of the national standard for professional development for Australian judicial officers*, Report, December 2010, at <<http://njca.com.au/wp-content/uploads/2013/01/Review-of-the-National-Standard-forProfessional-Development-for-Australian-Judicial-Officer-Report-2010.pdf>>, accessed 20 April 2014.