

# Judicial Education and Training

Journal of the International Organization for Judicial Training

Issue 2  
2014



# JUDICIAL EDUCATION AND TRAINING

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National Center for State Courts  
300 Newport Avenue  
Williamsburg, VA 23185-4147  
Web site: [www.ncsc.org](http://www.ncsc.org)  
ISBN: 978-0-89656-290-5

# JUDICIAL EDUCATION AND TRAINING

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## CONTENTS

Introduction <i>Livingston Armytage</i>	1
Judicial Training in a Globalised World <i>Wayne Martin</i>	8
Globalisation of Judicial Education <i>J. Clifford Wallace</i>	13
Judiciary-Based Applied Research Centres: Enhancing the Administration of Justice While Strengthening Judicial Independence and Improving Judicial Training <i>Barbara Rothstein and Ivor Archie</i>	20
Establishing a Judiciary-Based Research Centre: The Israeli Experience <i>Yigal Mersel and Keren Weinshall-Margel</i>	35
Assessing the Quality of Justice <i>John Stacey</i>	45
Restoring Image and Trust Through Judicial Training on Communication <i>Susan Glazebrook</i>	50
Judiciary School—The Spanish Approach <i>Felix V. Azon Vilas</i>	69
How Should UN Standards Guide International Judicial Training in Post-Conflict Situations?: Personal Reflections 20 Years After the Rwandan Genocide <i>Lyal S. Sunga</i>	79
Judicial Training in an Interdependent World: Guidelines for Best Practice in the Use of Comparative Law <i>Karen Eltis</i>	88
World Bank Support for Judicial Systems Serving Good Governance <i>Anne-Marie Leroy</i>	92
Technical Expertise for Judicial Training and Judicial Reform: Challenges and Opportunities <i>Gilles Blanchi</i>	99

# INTRODUCTION

BY LIVINGSTON ARMYTAGE\*

Judicial education is a new discipline, which is set on a continuing journey towards professionalization. Almost 20 years ago, I wrote a book titled *Educating Judges*, which opened with these words:

Continuing judicial education is new to the common law tradition of judging. It was first introduced in the United States in 1963 as a means to assist judges to enhance performance. This was followed in Canada, Britain, Australia and New Zealand over the next three decades.<sup>1</sup>

My purpose in writing that book was to survey the formative experience of judicial education. The book researched the need for continuing judicial development—which at that time many senior judges found unnecessary, and some even insulting. I argued that judicial education should adapt the principles of adult and professional learning to develop a distinctive approach that addressed the needs of judges as self-directed learners. I proposed a program delivery model that provided a framework for policy making and emphasized the role of continuous reflective evaluation. Most important, I framed the challenge for professionalization, calling on educators to assist judges in building a methodology to promote professional development and contribute to improving justice in due course. The book closed with these words:

How the judiciary and educators collaborate to embrace this challenge, and what useful lessons may be found within the experience of the civil law tradition of judging remain to be seen.

Much has, of course, happened in the intervening two decades. To highlight two developments in particular: globalisation has changed the world of jurists, as much as economists and consumers, with the ever-increasing exchange of experience. And information technology has transformed the way judges work, research the law, and manage cases. In step with these changes, judicial education has now spread across the juristic world. Ten years ago, the International Organization for Judicial Training (IOJT) was established to promote the rule of law by supporting the work of judicial education institutions around the world. Last year, in 2013, the launch of IOJT's journal, *Judicial Education and Training*, embodies these developments by providing a showcase to exchange experience. It also provides a means for us to reflect on progress.

As this issue demonstrates, it is now pleasing to observe that making the case for the need for judicial education is no longer controversial. The breadth of contributions

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<sup>1</sup> L. Armytage, *Educating Judges: Towards a New Model of Judicial Learning* (Boston: Brill/Kluwer, 1996).

shows that an interdisciplinary partnership between jurists and educators is now well established. Additionally, we are now exchanging experience between the civil- and common-law traditions. These are substantial achievements, which enable judicial educators to address the many new challenges explored in this issue.

Yet it is timely to observe that some of the fundamental challenges of judicial education posed 20 years ago persist: the overarching pursuit of pedagogic effectiveness remains core to the quest for professionalization. As the learned authors of our third and fourth articles stress, we still do not know as much as we should about how to promote the learning of judges, nor do we fully understand the relationships between judicial development and improving the quality of justice. These remain the key challenges for judicial educators; much serious work still remains to be done. The current imperative for robust methodical research to build a knowledge-based understanding of what works in the expanding practice of judicial education remains under-addressed to date. It is hoped that the contributions in this and future issues of the journal will address this challenge.

## CONTRIBUTIONS

The 11 articles presented in this second issue of the journal consolidate the selection of papers presented at IOJT's 5th Biennial Conference, Bordeaux. These contributions are ordered to address four themes: (a) *the impact of globalisation on judicial education*, (b) *addressing the need to continually improve our knowledge through research*, (c) *developing general and specialized curricula*, and (d) *the provision of technical assistance as a means to build and share experience*.

Addressing the first theme, **Chief Justice Wayne Martin** of Western Australia considers what he describes as the “irresistible” impact of globalisation on the role of judicial education and, notably, the willingness of judicial-training organizations to share their knowledge and experience. He notes that the issues we share in common, as judicial educators, are greater and more significant than the issues that separate us. Within this context, he argues that judicial training plays an important role in building public confidence in the legitimacy of courts. This legitimacy rests on qualities such as independence, integrity, accountability, transparency, impartiality, accessibility, and responsiveness. Public confidence reflects the community's perception of these qualities in the manner in which the judiciary administers the law. Hence, he argues, judicial training helps build confidence not only in the judiciary but, more importantly, the rule of law. To perform this function, Chief Justice Martin emphasizes “the science, principles and techniques of adult learning,” which must be applied if judicial training is to be effective.

In the second article, **Chief Judge Emeritus J. Clifford Wallace**, of the U.S. 9th Circuit Court of Appeals, writes about the emerging recognition among judicial leaders that education is now a vital part of improving the judiciary. Building on his extensive experience working in many parts of the world, he describes the common nature

of many of the needs to be addressed to pose the rhetorical question: why reinvent the wheel? While explaining that judicial education varies from country to country, he observes that there are more similarities than dissimilarities, which render judicial education to be largely generic in its nature. He calls for civil-law and common-law jurisdictions to learn more from each other, for example, in case management and mediation. Justice Wallace then offers a methodology for new judicial-training institutions: first, establish specific goals of judicial education, and second, identify a plan to overcome the roadblocks to achieving those goals. Finally, he offers six characteristics for an effective judicial education program: organized structure, an integrated curriculum, committed administrative leadership, use of current tracking techniques, adequate resources, and program evaluation.

Addressing the second theme on the need for research, United States District Court **Judge Barbara Rothstein** and **Chief Justice Ivor Archie** of Trinidad and Tobago co-write the third article, making the case for establishing judiciary-based research centres. The authors define these centres as a distinct, autonomous component of the judicial branch responsible for conducting empirical research to examine court operations and proceedings. They argue that judicial bodies throughout the world recognize the benefits of conducting empirical research into judicial operations to improve judicial administration. This research is useful to assist judicial policy makers and others in evaluating and refining judicial-operating practices and procedures to improve the administration of justice. The judiciary itself best satisfies the need to research judicial operations because it can ensure the research is undertaken by trained individuals and satisfies scientific standards. In this way, courts can dispose of disputes in a more expeditious and effective manner. The paper canvasses the experience of the Federal Judicial Center (FJC), which is the research centre of the United States federal judiciary, as well as other bodies. The authors highlight the nexus between research and judicial education, observing that findings from research projects often lead to new educational programming and training for court staff and judges, which will result in improved court operations.

In the fourth article, **Judge Yigal Mersel**, of the District Court of Jerusalem, and **Dr. Keren Weinshall-Margel**, who is director of the Israeli Courts Research Division (ICRD), report on the Israeli experience establishing a judiciary-based research centre. The ICRD was established in 2010 in response to the managerial need of the courts for empirical data—initially relating to motor vehicle litigation—and the preference for that data coming from an in-house, judiciary-based capacity. Importantly, the ICRD operates independently of both executive/legislative influences and judicial administrative operations. Its mission is to conduct research that will help guide the courts' management and improve the efficiency and functioning of justice. Building on the article of Rothstein and Archie (above), the authors identify numerous benefits arising from this capacity: (1) the judiciary can ensure scientific standards; (2) guarantee the availability of data; (3) ensure that results are not compromised; (4) retrieve data that is of interest to the judiciary (and not necessarily publishable); (5) not



depend upon different funding sources; (6) acquire inter-legitimacy for research results; (7) improve research efficiency; (8) extend research capability; and (9) align research interests. To date, the ICRD has completed three studies, and collaborates with the Institute of Advanced Judicial Studies (IAJS), which is the body responsible for judicial training. In the future, it may collaborate to validate methods used by the IAJS to assess candidates for judicial nominations and the performance of judges. While it is premature to evaluate its contribution to the court system, the establishment of this research capacity has been appreciated.

In the fifth article, **John Stacey** discusses the current initiative of the Council of Europe to monitor and evaluate judicial systems across 47 European member countries. Writing in his role as president of the European Commission for the Efficiency of Justice (CEPEJ), he reports on developing a common reference scheme, which enables comparisons between countries and helps identify changes over time in a specific country or group of countries. In 2012 CEPEJ published the “European Judicial Systems Report,” which describes the functioning of the judicial systems of these states, including data and commentary on key aspects of judicial systems. CEPEJ is also developing a system of indicators of quality to help gauge developments in public service that courts offer to users, including case management, quality of decisions, functioning of courts, evaluation of judges, perceptions of users and rates of satisfaction, resource management, access, communication, and information. CEPEJ supports the Lisbon Network of European judicial-training institutions to build and strengthen bridges between training and the concepts of judicial efficiency and quality across the European region.

Addressing the third theme on curricula development, **Justice Susan Glazebrook**, of the Supreme Court of New Zealand, contributes the sixth article on the need for judicial training on communication. Effective communication is essential for public understanding of the rule of law and trust in judicial independence. But the challenge lies in finding the right balance between judges needing to use highly specialized legal language to make difficult decisions in a way that the audience—who may often lack any legal training—can understand. As she points out, different audiences require different types of communication. For this reason, the New Zealand Institute of Judicial Studies (IJS), which was established in 1998, has developed a core curriculum of programmes with a significant focus on communication training. This ranges from “crafting skills,” such as the delivery of written and oral judgments, to communication courses that address interaction with counsel, witnesses, litigants in person, and directions to juries at trial. Other courses relate to communication to specific groups, such as children and young persons. The courses highlight the different types of communication judges must engage in, including giving reasons for judgment using clear and appropriate language. They extend to the appropriate use of nonverbal communication, for example, through body language, eye contact, and hand gestures, which are also indispensable for facilitating communication inside and outside the courtroom.

In the seventh article, **Professor Felix Azon Vilas**, a member of the General Council for the Judiciary, describes the Spanish approach to judicial education. His paper outlines the legal and regulatory framework—including the Organic Law for the Judiciary—for postgraduate admission through competitive examination to the positions of judge and public prosecutor. It surveys the formal requirements for technical expertise (core knowledge and skills); analytical skills (such as reasoning and problem solving); and oral and written communication and personal (social context) skills, and provides an overview of examination and testing procedures. He then canvasses post-admission support, when the novice undergoes training provided by the Judicial School, complemented with a year of on-the-bench supervision and mentoring.

Next, **Professor Lyal Sunga**, of the Raoul Wallenberg Institute for Human Rights, Sweden, considers how UN standards should guide international judicial training to strengthen democratic governance, human rights, and the rule of law, specifically in the post-conflict context. In these situations, the judiciary has a pivotal responsibility to restore respect for the rule of law. Recent history of the “Arab spring,” Afghanistan, Rwanda, and Yugoslavia stands testament to the fragility of domestic justice systems in times of national catastrophe. Professor Sunga argues that the experience of both ad hoc international criminal tribunals and the International Criminal Court shows that internationalized criminal justice is essentially a transitional measure that sets a path for justice, which the domestic authorities themselves must eventually navigate. This is extremely difficult when conflict has destroyed a country’s justice system or turned it into an instrument of oppression and injustice. Under these circumstances, international assistance is necessary but insufficient to help reestablish the rule of law at the post-conflict stage. For justice to be restored, international assistance should support judicial training whose curriculum includes transnational criminal law; international and regional human-rights law; international humanitarian law and international refugee law; international criminal law; political arrangements and peace agreements; transitional justice mechanisms; and the constitutional relationship between international and domestic law.

In the ninth article, **Professor Karen Eltis**, of the University of Ottawa, presents an argument for “best practices” in judicial training within the context of cross-border normative migration. Her stated goal is to frame the use of comparative sources to promote coherency and avoid misuse when judges elect to use foreign precedents, as increasingly they do. Trans-judicial cooperation, comparativism, and constitutional cross-pollination are, she explains, on the rise; judges are being increasingly drawn to comparative inquiry in the face of domestic law’s insufficiency, notably, she cites in this “age of terrorism” by courts seized with security-related matters. It is in this context that she argues judicial education should inform a more principled approach to the use of comparative experience to counter its recurring misuse. She proposes the formulation of voluntary guidelines gleaning best practices of analysis for judicial use of comparative law as a practical and timely initiative that judicial education programs might

consider. This would help provide a tool for domestic judges to avoid the pitfalls arising from what she describes as the ad hoc, faddish, and erroneous use of foreign precedent.

Addressing the fourth theme on technical assistance, **Anne-Marie Leroy**, who is General Counsel of the World Bank, writes about the Bank's role in supporting justice and good governance around the world. Building on the premise that the quality of the judicial system is an essential factor in a country's development policy, she argues that justice systems generally have three essential functions: (a) prevent and manage the resolution of all types of conflict, violence, and crime, the recurrence of which the justice system endeavors to prevent; (b) ensure that institutions are accountable to the public for whom and on behalf of whom they are created; and (c) inspire trust and all the security necessary for the development of the private-sector economy. The World Bank, as an international financial institution, became aware of the need to work on the quality of the law and justice institutions some 20 years ago starting in Latin America and Eastern Europe, and now encompasses all continents. Since then, it has invested some US\$850 million in projects, including improvement of case management systems; training of judicial personnel; financing of legal aid; improvement of access to justice; alternatives to a trial, such as mediation; and the construction or renovation of infrastructure. The Bank currently supports both formal justice institutions, as well as diverse institutions through its "Justice for the Poor" (J4P) program. The Bank supports the establishment of training activities for judicial personnel and partners. While there is no direct support provided to existing judicial-training institutes, it is interested to invite members of the IOJT to enter a dialogue to exchange information on addressing the challenges facing judicial training.

In the eleventh and final article, **Gilles Blanchi**, formerly team leader of the EU's "Justice Partnership Programme" in Việt Nam, discusses what he describes as the duty of judges and lawyers from first-world countries to share their knowledge, skills, and experience with jurists in other jurisdictions who may not be so fortunate. He draws attention to the imperative for technical expertise to address the challenges and opportunities of judicial training and capacity building in developing jurisdictions arising from major political and economic transitions. He observes that training on technical aspects of law or skills has been traditionally welcomed, though mostly confined to commercial- or economic-law matters, with little or no assistance in domestic areas such as criminal or family law. Over the years, as the volume of technical assistance has increased, so recruitment of appropriate credible experts has become more difficult. More recently, recipient countries have started to demand a more active role in controlling the process and its outcomes. This requires new skills and sensitivities to align and manage mutual expectations over the content and pace of reforms, as the author illustrates from his experiences in Việt Nam and Mongolia. All said, this is important, challenging, and rewarding work for judges, lawyers, and educators to undertake.

It has been my privilege to edit this issue and to acknowledge the able assistance of our new Associate Editor, Ms. Amy McDowell, of the National Center for State Courts, and the stewardship of Professor Amnon Carmi.

# JUDICIAL TRAINING IN A GLOBALISED WORLD

BY WAYNE MARTIN\*

The overarching theme of this conference is “Judicial Training in a Globalised World.” There can be no doubt that the increasing globalisation of our world is an irresistible phenomenon. The move toward globalisation, which has received great impetus from the exponential increases in international trade and international travel over the last 50 years or so, has been dramatically accelerated by the advent of the World Wide Web over the last 20 years. The Internet has made instantaneous communication between many of the inhabitants of our planet a reality. And, of course, I am not just referring to communication by e-mail or obtaining information from Web sites. Audiovisual conversations using software like Skype are now within the economic reach of many of the world’s inhabitants. Social media like Facebook and Twitter make it possible for anyone in the world with access to technology to communicate effectively and inexpensively with any other person or group in the world. Sites like YouTube provide everyone with a computer and a camera with the capacity to publish their own movies to the entire planet. The Web has become a massive and dynamic database—the greatest assembly of knowledge and information ever undertaken by humankind, on a scale that would make the founders of the great library at Alexandria envious—and all this information is freely accessible to anyone on the planet with a computer and Web access.

Trade, travel, and information transfer have broken down national barriers in many fields of endeavour. The field of judicial training is just one of many examples. The willingness of judicial training organizations in one country to share their knowledge and expertise with other countries is exemplified by this conference and is a striking feature of the continuing professional development of the judiciary. The issues which we share in common, as educators of the judiciary, are vastly greater, and more significant, than the issues specific to our individual jurisdictions. The rule of law is a universal concept, and the skills required to maintain the rule of law effectively derive from our shared humanity, and depend much more upon the way in which we interact with our fellow human beings in the administration of the law, than the language we use, the precise structure of our particular judicial system, or, often, the content of the laws we administer.

## JUDICIAL TRAINING, CONFIDENCE, AND LEGITIMACY

Public confidence and legitimacy are closely related subjects. Although legitimacy invokes the concept of the rule of law, and the content of the rules, which comprise the laws of each of our jurisdictions, it also invokes a broader concept. That is the

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authority which derives from the community's acceptance of the court as the agency responsible for the administration and enforcement of those laws on behalf of the community. That authority depends critically upon public confidence in the courts, and upon the judicial officers who serve in those courts.

## JUDICIAL INDEPENDENCE

The rule of law depends upon the independence of the judiciary. Judges must be free to administer the law without fear or favour, free from interference. The challenges to judicial independence are many and varied. At the most extreme level, they can take the form of executive government purporting to direct the judiciary as to the manner in which they will apply and administer the law in individual cases. Less obvious challenges to judicial independence come from media criticism or commentary, or the financial or economic power and influence wielded by major commercial organizations. Even less obvious forms of threats to judicial independence can come from sustained criticism of either the judiciary as a whole, individual members of the judiciary, or perhaps from interference with the resources made available to the judiciary to perform their task. Threats to independence can also come from the content of the law. One example from my own jurisdiction of Western Australia concerns laws that impose mandatory minimum sentences for particular classes of offenses. It is, I think, a misuse of language to describe as independent a judge or magistrate who has no discretion as to the sentence that is to be imposed, in circumstances in which the outcome of a case is predetermined and mechanistic.

Public confidence provides the greatest defence to all of these threats. The greatest protection to the independence of the judiciary does not derive from government, or from written constitutions or laws, or from force that might be applied by police or armies, but from public confidence. This was brought home to me most dramatically at our last conference when we heard from now former Justice Mian Shakirullah Jan of the Supreme Court of Pakistan. When the independence of the judiciary of that country was under threat, it was not the constitution or the army that brought about the restoration of the judiciary, but the people. The people took to the streets and made it clear that they would not accept anything less than an independent judiciary, and the strength of their protest was impossible for government to ignore.

## CONFIDENCE

Public confidence depends upon the community's perception of the manner in which the judiciary discharges its important function of administering the law. This is why judicial training is so important in maintaining public confidence in the judiciary, and through that confidence, the independence of the judiciary and the rule of law. A judiciary that is not, in the view of the public, administering the law effectively or appropriately will not enjoy the confidence of the public. If public confidence in the judiciary is seriously eroded, it can reach the point where the legitimacy of the judi-

ary, in the broader sense of that word, and the rule of law is threatened.

Community confidence has many aspects. Prominent amongst the qualities likely to be rated highly by the community are:

- independence;
- integrity;
- accountability;
- transparency;
- impartiality;
- relevance;
- comprehensibility;
- accessibility (which in turn depends upon minimizing delay, cost, and complexity);
- responsiveness to community needs and expectations; and
- sensitivity to social context, including ethnic, cultural, religious, gender, and social diversity.

The capacity of the judiciary to communicate its performance in relation to these various qualities will critically affect public confidence. Communication skills, and the skills required to display the various qualities that the community reasonably expects from the judiciary, are all enhanced by judicial training.

Many of the qualities I have listed are not intuitive, and the skills required to achieve high levels of performance in these areas must be acquired. They will not be acquired merely by training in the law, or experience as a legal practitioner. They may not even be acquired by experience as a judge. One of the unusual characteristics of “on-the-job” training for judges is that, following their appointment, in many courts the judge will not see or experience any other judicial officer performing the duties of his or her office. Rather, unless they are a member of a court that comprises multimember benches, they will sit only in their own court for the rest of their judicial career. Bad habits are likely to be maintained, and good, new habits unlikely to be acquired.

For these reasons, it is in my view impossible to understate the importance of judicial training to the maintenance of public confidence in the judiciary. Ultimately, the independence and the legitimacy of the judiciary, and the rule of law, depend upon the maintenance of public confidence. One cornerstone of the safety, stability, economic prosperity, and welfare of all of the people who inhabit this planet is the rule of law, because without the rule of law there will be either anarchy or dictatorship.

## JUDICIAL TRAINING AND EFFECTIVENESS

The second subtheme chosen by the organizers of this conference is judicial training and effectiveness. Judicial training will only achieve the important objectives that I have identified if it is effective. Of course, one of the purposes of this conference is to exchange information and ideas so that we can improve the effectiveness of the training, which we all provide.

Effectiveness in this context is a multifaceted concept. Its facets include identi-

fying learning needs, delivery of training aimed at meeting those needs, including the delivery of information and, perhaps more importantly, skills and, just as importantly, the application and retention of the information and skills acquired through the process of training. An important issue is the way in which we can measure the effectiveness of our programmes both generally and specifically in relation to the various facets I have identified.

We all know that effective judicial education and training requires much more than placing a knowledgeable speaker in front of members of the judiciary. We all know that the science, principles, and techniques of adult learning must be applied if judicial training is to be effective in the sense I have described. And just as with the skills and qualities required of judges, the skills and qualities required to deliver an effective programme of judicial training are not intuitive, but must also be acquired.

One of the best ways of acquiring those skills is through interaction with colleagues and by learning from their experience and wisdom. That is why this conference is such an important feature of judicial education around the world. The networks and partnerships that are initiated, developed, and maintained through gathering at these conferences have the capacity to significantly enhance our effectiveness.

## JUDICIAL TRAINING AND INTERNATIONAL SOLIDARITY

The third subtheme chosen by the conference organizers draws upon the relationship between judicial training and international solidarity. To an extent I have touched upon these issues in my opening remarks upon the general theme of the conference, which concerns globalisation. However, since we last gathered, we have seen the impact of the global financial crisis, which was then in its infancy. Virtually all of the countries represented at this conference have been affected to a greater or lesser extent by that crisis.

In many countries, one of the effects of the global financial crisis has been to place even further constraints upon the resources available not only for judicial training, but also for the performance of the judicial function generally. In this financial environment, it is necessary for us all to obtain maximum utility and benefit from the limited resources we have at our disposal. There is no need for us each to separately “invent our own wheels” in our own countries. It was clear to me at the last conference in Sydney in 2009 that international solidarity is a significant characteristic of the global community engaged in judicial training. The networks and partnerships within that community, and the willingness of judicial trainers to share their accumulated knowledge, wisdom, and experience with others, are vital assets in our drive to maintain the effectiveness of our training despite reductions in the available resources.

The universality of the qualities and skills we seek to impart by judicial training, to which I have already referred, paves the way for the development of a truly international community of judicial educators. This conference plays a very important



part in the development of that international community, and I am very pleased and honoured to have been given the opportunity to play some small part in this conference.

# GLOBALISATION OF JUDICIAL EDUCATION

BY J. CLIFFORD WALLACE\*

When I first began working with countries overseas in the 1970s, I remember well many chief justices rejecting the idea of judicial education. They would often refer to it as “training” and insist that judges would not have been appointed if they did not have the knowledge and techniques to be judges and that, therefore, judicial training is superfluous. Indeed, some chief justices were offended by the idea. But that was then, and since that time, there has been a common recognition among most judicial leaders worldwide that appropriate judicial education to advance skills and knowledge is a vital part of improving the judiciary.

Although judicial education has been considered important by judges and others, it is usually thought of as education locally within a court or geographical unit, be it state or country. I do not minimize these localized efforts. This judicial education and training have been vital in making judiciaries effective and in providing the structure for achieving the rule of law. In most countries, some form of judicial education has been attempted or developed.

For example, some years ago, I was working on a judicial education project in the Arab countries of the Middle East. It was striking to find that most every country was making use of programs in sister countries. In addition, there was a program in Beirut, Lebanon, developed by the Arab League, that brought together all the heads of the individual judicial education programs for meetings and seminars on how they could be more effective.

As I stated earlier, up until now, judicial education has largely been thought of as local and insular. The view is that each country’s judicial system is unique, requiring a unique type of judicial education. But the question now is whether this is the only way to look at judicial education.

## WHY REINVENT THE WHEEL?

It is probably true that 20 years ago judicial education was largely separate and not interactive with other countries, based on the assumption that there were unique training needs in unique jurisdictions. After consulting with judiciaries and judicial education institutions around the world, I now doubt that assumption. My view is that much of the individuality among various countries’ judicial education results from not being sufficiently exposed to other methods. Consequently, each country goes about “reinventing the wheel.” With little or no cross-fertilization of ideas, individuality may well occur, but may be based on a lack of knowledge rather than a perception of specific needs and an understanding of judicial-training options, common-law

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jurisdictions, and what is believed to be two different approaches to judicial education. For example, one commentator suggests that the common-law countries tend to use the “modern participatory learning method,” while civil-law countries follow the “law school model,” and the scope of their courses tends to be limited to general principles of law.

Despite generalizations about the differences in judicial education programs between common-law and civil-law jurisdictions, my view is that the distinctions are decreasing or disappearing as countries adopt effective principles of judicial education, regardless of their underlying legal system. This position is supported by data from a survey I conducted in Asia and the Pacific nearly two decades ago.<sup>1</sup> Based on this research, it is clear that general principles of effective judicial education are the same everywhere. These principles do not depend on a particular type of underlying legal system to be effective; rather, judicial administration principles, and hence judicial education, function largely independent of the predominating type of legal system.

I do not take the position that all judicial education must be the same from country to country. There are, however, more similarities than dissimilarities to education that are generic in nature. Once one sets aside teaching substantive law to judges and focuses more on processes, procedures, and administrative matters, the more generic judicial training appears. For example, in the great majority of countries, the most pressing problems are decreasing the court backlog, developing the ability to process cases promptly, instituting alternative dispute resolution processes, and maintaining or establishing the independence of the judiciary. There are far more similarities than differences in education requirements in these areas.

Another example focuses on when judicial education is begun. Because judges in civil-law countries begin their career fresh out of school, they have had little or no opportunity to gain practical knowledge and, therefore, the heavy education is at the front end of service. On the other hand, common-law judges typically have been in the practice of law for years and, therefore, education is provided by way of periodic seminars after the judge has assumed his or her position on the bench. While this is still basically true, one finds more education being given to common-law judges at the beginning of their careers, in addition to the in-service seminars that they attend after they are a judge. While civil-law judges still receive training before assuming the bench, there is more training provided now after they are judges. It appears that civil-law and common-law jurisdictions learn from each other and provide for education that best fits the needs of the particular country.

## CURRICULUM AND METHODOLOGY

Once the generic nature of judicial education is accepted, awareness will emerge of the need for some method of cross-fertilization of ideas and mutual assistance. Primarily,

<sup>1</sup> J. C. Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 MICH. J. INT'L L. 877 (2000).

the need should focus in two areas: what is taught and the best ways to teach—in other words, curriculum and methodology. First, I will consider curriculum.

Judicial education curriculum is primarily in the areas of process and procedure. There is, of course, an exception in those countries that begin a judge's education fresh out of school where it is thought that substantive law training is necessary. Aside from that exception, judicial training is essentially similar everywhere: substantive-law training when new statutes are adopted or it is perceived that additional substantive education is needed, but most curriculum is focused on non-substantive-law or procedural-and-process training. This procedural-and-process curriculum includes case management, pretrial process, alternate dispute resolution, pretrial orders, control of discovery, service of summonses, enforcement of judgments, minimizing of continuances or adjournments, limiting of interim appeals, use of automation by judges and in clerks' or registrars' offices, development of an adequate case-reporting supervision of judges, and training of judicial administrators and staff. Analogous to this type of training are issues dealing with judicial independence, judicial correction, how to preside as a chief judge, and budget development and control. Curriculum development in these areas can be shared if there is a means to do so.

Although these topics can be taught, will they be learned? Which brings me to the topic of teaching techniques: what are the best methods to teach a particular topic to judges?

Even the best curriculum and most committed administrative leadership will not guarantee an effective judicial education program. The material must be presented to participants in a way that helps them retain what is taught and motivates them to apply it in their judicial capacity.

A teacher's responsibility is not merely the transmission of information to a passive audience. Simple transmission of information is generally accomplished through lectures with minimal student participation. It does not focus on real learning and change. A better method is the "peer group model." With this teaching model, experience is the primary resource for learning, and the teacher is merely a facilitator, rather than an authority figure who is the repository of all wisdom. The process of education under the peer group model focuses on active learning rather than passive learning, and group participation rather than lecture. The emphasis is not just on transmitting information and knowledge, but also on acquiring practical skills, techniques, and values and the motivation to apply that knowledge.

As you might guess, this preferred model of judicial education has not always been used. Judicial educators are commonly not familiar with this style. It requires planning, preparation, and, often, additional resources. How can local trainers learn to incorporate this model? Cross-fertilization of ideas and resources from outside can enhance the educator's ability to be effective.

But such a change will not come overnight, and it will not be made absent motivation and direction from the head of the judiciary. Judges (including judges who have

been asked to teach judicial education programs) have been taught by lecture for so long that it is difficult for them to make changes. In addition, they are sometimes fearful that they will be unable to control the development of ideas if they encourage class participation. I have seen notes used by lecturers for training in law that have yellowed with age, but the education has never improved. How to overcome this is an additional reason for cross-fertilization to secure the best ideas.

## WHAT DOES “GLOBALISATION” MEAN?

So now to my subject: how does this analysis relate to our globalisation of judicial education? To begin with, I have a problem with the term “globalisation.” What does “globalisation” mean? It is used repeatedly but with no consistency of definition. Perhaps we can sharpen our understanding of the term by listening to the criticisms of globalisation.

Some years ago, the World Trade Organization Conference in Seattle, Washington was disrupted by protesters who claimed that “globalisation” encouraged a lack of sensitivity among international organizations to environmental and labour issues. If I understand this criticism of globalisation, the protesters seemed to believe that thinking in broad, worldwide terms has a tendency to undermine important issues that would otherwise be addressed. I suppose an analogy for the judiciary might be a belief that globalisation of judicial education may tend to focus on quickly closing cases but not on achieving a just result. We are not in the business of finalizing more and more cases on a conveyor belt such as in a shoe factory; rather, each case must, so far as possible, result in a just outcome. Perhaps this is an issue we should bear in mind.

Let me also address what I believe should not be a result of globalizing judicial education. I do not think globalisation of judicial education means that all judges should be trained exactly the same way in every country. Each country has its own local customs and expectations with regard to its judiciary. Globalisation should not mean uniformity. If that were our goal, failure would be the result.

Having said that, there are aspects of the globalisation concept that would be beneficial for judicial education. For example, there are certain issues that, in my experience, continue to arise throughout the world and for which there seem to be fairly unified approaches for solution. Case management and mediation come to mind as examples. Although both case management and mediation have been universally effective for courts worldwide, their applications differ from country to country depending on local legal cultures. A brief example: when I was working in Thailand to establish mediation, I taught the basic principle of mediation to chief judges in different parts of the country, and the chief judges then experimented with implementation of the principle. The result was that there was one adaptation of mediation in Chiang Mai in the north, a second in Phuket in the south, and a third in Bangkok in central Thailand. The principle of mediation worked for all three, but it was applied honouring the local culture and needs. All three, however, were adaptations of the same principle.

This experience demonstrated to me that principles like case management and mediation are generic enough that globalisation of teaching is effective. The various styles and adaptations in Thailand were even beneficial: synergy resulted from the experiment. Judges from various parts of the country interacted and learned from one another's experience.

Expanding this example into a worldwide context opens the exciting possibility of learning from other judiciaries around the globe. With the resource of various models, each country would create its own unique application of a basic global principle. A country could observe other successes and determine if it could adopt and adapt the successful method to improve its own judiciary.

Evidence of the benefit of globalisation can be observed in regional judicial education efforts. For example, Australia and New Zealand adopted a regional training program, which serves certain Pacific Island jurisdictions. Its unique training capability allows basic overarching principles common to many of the island jurisdictions to be taught. Similarly as the educators go from island to island, they find successful applications of principles, which in turn can be shared with other countries.

While the Mekong Delta Judicial Training Institute has not had as extensive an experience, what did occur is important. Laos, Cambodia, Vietnam, and Thailand joined together to provide judicial education at one centre. The countries are similar enough in their approach to law and close enough geographically that one judicial education organization assists all four judiciaries.

Consequently, regional training has provided the opportunity for training in areas where some countries could not afford to have separate institutions. It also provides a mechanism by which successful experiences can be shared and better methodologies of judicial education developed. The question is, can these regional experiences be applied to justify a worldwide organization?

## PROGRAM STRUCTURE

I will digress here to an issue that addresses a different type of benefit resulting from the globalisation of judicial education: that of helping countries initiate or improve their own judicial education structure. A decade ago, I presented a paper identifying how a global judicial education organization could assist in the initiation and development of a country's judicial education program. I outlined various challenges in developing a judicial education program and suggested how an international judicial education body could assist in meeting those challenges. I developed an approach for beginning or improving judicial education in a country: (1) establish specific goals of judicial education and (2) identify a plan to overcome the roadblocks to achieving those goals.

I then outlined characteristics of an effective judicial education program: (1) an organized structure, (2) an integrated curriculum, (3) a committed administrative leadership, (4) the use of current tracking techniques, (5) adequate resources, and (6)

program evaluation. I then suggested how an international organization could provide resources to assist an individual judicial training program to get started or to make improvements. My paper focused on a structural or institutional approach to judicial education. I remain convinced that assistance to beginning and to improving an organized structure of training by a global resource organization is important and should not be overlooked.

## BENEFITS OF GLOBALISATION

Thus, globalisation does not represent an attempt either to amalgamate all judicial education or even to define a “right way” to educate and train judges. Rather, globalisation offers three distinct benefits: (1) the ability to share successes so countries can learn from each other; (2) a resource for judicial education programs that are beginning or attempting to improve; and (3) the sharing of educational techniques and curriculum to improve the quality of teaching.

In providing the resource, however, another challenge to globalisation becomes apparent: to provide adequate resources for the small, as distinguished from the large, judiciary. My survey of judiciaries in Asia and the Pacific, to which I referred earlier, is relevant to this issue. Establishing a dividing line at 150 judges, I formed two groups and compared countries with more than 150 judges to countries with fewer.

Generally, those countries with small judicial systems had little or no separate organization for training judges. While most of these countries did not indicate on the survey reply whether they had plans for organised training in the future, some countries appeared to have been in transition toward the development of a training program.

Generally, those nations with larger judicial systems have established organised training for their judges. These training programs appeared to range from having been well-established, such as Australia, Korea, the Philippines, and Thailand, to still developing, such as Laos PDR, or are in a state of transition, such as was indicated by Nepal.

Thus, it seems clear that any effort at globalisation of judicial education must have flexibility, keeping in mind the judiciaries with the greatest needs. While judicial training everywhere can be improved, the problems of the small jurisdiction must be identified and special attention provided to meet those needs.

## CONCLUDING REMARK: THE NEED FOR ORGANISATION

Can such a global resource be provided? Not too many years ago, globalisation of judicial education would have been considered an interesting topic to discuss but without any hope or expectation for action. Now, technological advances have resulted in a potential for communication undreamed of when I was in school. In a short period of time, technology has developed powers that can destroy the world and, on the other hand, that can provide undreamed ability to advance the rule of law.

In some countries I have visited, there is no organised judicial education program. Those countries could use assistance in how to develop judicial education. Other countries have started, and most are struggling. Providing a variety of models for individual consideration would assist judiciaries in focusing on the model that seems most relevant and adapting that model to meet the needs of the particular country. Still, other countries are interested in improving their judicial education. These countries too would be well assisted with access to a variety of successful educational techniques and ideas. With increased technology and communication, globalisation will widen educational possibilities so that countries can choose and adapt models of judicial education that have been successful elsewhere.

If globalisation of judicial education is to be implemented successfully, there must be structure and organisation. Consideration needs to be given to how and where this structure is to be developed, how it can be financed, how it will function, how it will be directed, and how it can facilitate the exchange of models, ideas, and methods. In short, some organisation will be needed to act as a worldwide resource facility for judicial education.

Globalisation means a widening of horizons. We have progressed from the practice of each country developing judicial education without outside resources to regional interaction to the opportunity of global interaction. With something as valuable as justice and the rule of law, is it not worth considering globalisation of judicial education worth pursuing?

I suppose that determination depends on one's experience. I have now studied and surveyed all of the judicial education programs in Asia and the Pacific. Over the last 35 years, I have visited and worked with judiciaries in nearly 60 countries. I conclude that it is time for the sharing of ideas and assistance in a broader context. The rule of law and the concept of justice are worldwide and fundamental principles. We have now had enough experience to conclude that worldwide mutual assistance in judicial education can be developed. I hope that through consideration we can all agree and develop a method by which the theory will have a practical application.

As a result of consideration of ideas such as those presented above, a worldwide organization was established to share ideas and help one another to improve each country's judicial education program: the International Organization for Judicial Training (IOJT). It not only has the facility through a secretariat to channel ideas to those who have particular problems on which they are working, but also hosts worldwide conferences every two years bringing together judicial administrators and experts to provide information and allow interaction to take place. It grows month after month as countries agree to participate and receive the benefits of a worldwide judicial resource.

The goal would be to improve judicial education worldwide resulting in improvement in court systems and global establishment of the rule of law. That globalisation, I suggest, is worthy of our best efforts.



# JUDICIARY-BASED APPLIED RESEARCH CENTRES: ENHANCING THE ADMINISTRATION OF JUSTICE WHILE STRENGTHENING JUDICIAL INDEPENDENCE AND IMPROVING JUDICIAL TRAINING

BY BARBARA ROTHSTEIN AND IVOR ARCHIE\*

## CHARACTERISTICS AND NEED FOR JUDICIARY-BASED RESEARCH CENTRE

### Defining the Applied Research Centre

A judiciary-based applied research capacity (ARC) is a distinct, autonomous component of the judicial branch, responsible for conducting empirical research to examine court operations and proceedings.<sup>1</sup> The results of ARC research assist judicial policy makers and others with evaluating and modifying current judicial operating procedures to improve the administration of justice.<sup>2</sup> A research centre examines current court operations to assess what works and what can be improved. This research benefits judicial policy makers by providing a solid understanding of what is actually happening.<sup>3</sup> Through improved judicial operations, judges are able to dispose of disputes in a more expeditious and effective manner, strengthening judicial independence and the integrity of the justice system.<sup>4</sup>

The defining characteristic of ARC is the use of empirical<sup>5</sup> methods to specifically benefit judicial policy makers and those working in and using the courts.<sup>6</sup> Empirical research is “information collected through systematic observation and experience”<sup>7</sup> or the “collection and analysis of data using standard social

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<sup>1</sup> Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1123-25 (2002).

<sup>2</sup> See *id.* (describing examples of recent FJC research into the federal rules of civil procedure). Defining judicial administration is no easy task—one scholar noted various people have tried to define it, but are only able to list things. RUSSELL WHEELER, JUDICIAL ADMINISTRATION ITS RELATION TO JUDICIAL INDEPENDENCE 19 (1988).

<sup>3</sup> A. Leo Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237, 257 (1981) (noting empirical research allows for the persuasion with reason).

<sup>4</sup> Judicial independence means little if courts are too backlogged or busy to resolve the disputes brought before them.

<sup>5</sup> “Empirical” denotes evidence based on observation or experience. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2 (2002).

<sup>6</sup> See Willging, *supra* note 1 at 1126.

<sup>7</sup> *Id.* Empirical research can be contrasted with information derived through logic or theory.

science methodologies.”<sup>8</sup> Data are obtained through techniques<sup>9</sup> such as surveys, observational research, case studies, and focus groups.<sup>10</sup> In contrast, true experimentation, which requires double-blind controls and random assignments, cannot be conducted for constitutional reasons. Empirical research, thus, marks a solid contrast to legal arguments or other forms of research and advocacy.<sup>11</sup>

The research centre of the United States federal judiciary is the Federal Judicial Center (FJC).<sup>12</sup> The FJC is an independent agency within the United States federal judiciary and responsible for researching how federal courts operate.<sup>13</sup> For example, the FJC routinely examines the effects of the federal rules of civil procedure to inform the judicial policy makers responsible for overseeing those rules of the rules’ effects.<sup>14</sup> The results of FJC research have led to improvements in training for judges and court staff, when the research findings reveal educational needs and best practices. This, in turn, leads to more efficient and effective judicial administration.<sup>15</sup>

For example, FJC’s research division conducted a multiyear study of how much time judges and court staff need to process cases with differing levels of complexity. The resulting data were used to develop a set of “case weights” that enable court administrative staff to equitably distribute cases among the judges in a court.

<sup>8</sup> Richard K. Neumann, Jr. & Stefan H. Krieger, Symposium, *Empirical Inquiry Twenty-Five Years after the Lawyering Process*, 10 CLINICAL L. REV. 349, 368 (2003).

<sup>9</sup> Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 199 (2004). Of course, the essential hallmark of scientific research—the controlled experiment—can hardly be used as a means of comparing procedures. Such situations, such as a judge’s desire to evaluate the effectiveness of punishment sentences by randomly sending one half of a sample of convicted felons to jail and the other half to probation, would run afoul of the equal-protection clause. See also, Levin, *supra* note 3 at 249.

<sup>10</sup> Willging, *supra* note 1 at 1132-38.

<sup>11</sup> Michelle M. Mello & Kathryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 651 (2008).

<sup>12</sup> The United States has 52 jurisdictions: each of the fifty states has their own judiciary, as does the District of Columbia. The federal government has its own judicial system, comprising one Supreme Court, 13 circuit courts, 94 district courts, and specialized courts. These federal courts have limited jurisdiction, in contrast to the state courts, which are courts of general jurisdiction. The federal judiciary is governed by the Judicial Conference of the United States. 28 U.S.C. §331 (2006). The Judicial Conference operates through several committees to address a variety of issues relating to judicial administration.

<sup>13</sup> 28 U.S.C. § 620(b)(1) (2006) (defining the Federal Judicial Center’s mission, in part, as conducting research on the operation of the United States courts). For background on the FJC’s founding see Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 31-32 (1988). For an overview of the FJC see Levin, *supra* note 3. While this article discusses the federal court system and the federal judicial system, some perspective is in order. The overwhelming majority of cases are filed in state courts, and the number of judges in the state courts greatly exceeds the number of federal judges. FJC, WELCOME TO THE FEDERAL COURTS (2006); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1120 (2006).

<sup>14</sup> See, Willging, *supra* note 1 at 1121 (describing examples of recent FJC research of the federal rules of civil procedure to benefit policy makers considering revising the procedural rules).

<sup>15</sup> See *id.* at 1152-53, 1157, 1162, 1165, 1173 (listing the actions the Advisory Committee undertook in response to the FJC’s research).

Distribution is based not on the raw number of cases, but rather in a manner that ensures judges have equal numbers of simple, moderate, and complex cases.

To provide a second example, in 1994 the FJC studied whether and how the presence of electronic media coverage impacted judicial proceedings.<sup>16</sup> This study was undertaken in response to concerns of judicial policy makers that the presence of television cameras during trials would impact the trials. The FJC ascertained the actual effects of having electronic media coverage present during court proceedings.<sup>17</sup> It surveyed judges, attorneys, and media representatives and even analysed broadcasts of the evening news.<sup>18</sup> The results of this study allowed the FJC to develop recommendations on how electronic media coverage of trials could be conducted without interfering with the trial.<sup>19</sup>

A judiciary-based applied research capacity is one entity of a country's judiciary and works in conjunction with other supporting entities of the judiciary, including the judiciary's administrative office,<sup>20</sup> training centre,<sup>21</sup> and law commission.<sup>22</sup> These entities are housed within a country's judiciary. In some situations, the same organization has more than one function.<sup>23</sup> Research offices can exist within a country's judiciary at both federal and state levels.<sup>24</sup> Research professionals within the executive and legislative branches also conduct research in the field of judicial administration, as do many organizations outside of the judiciary and government, such as universities.

<sup>16</sup> Molly Treadway Johnson & Carol Krafka, *ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS* (1994).

<sup>17</sup> *Id.* at 3-4.

<sup>18</sup> *Id.* at 11-23, 32-36.

<sup>19</sup> *Id.* at 43-46.

<sup>20</sup> *E.g.*, The Administrative Office of the United States Courts "provides a wide range of administrative, legal, financial, management, program, and information technology services to the federal courts." Admin. Office of the U.S. Courts, <http://www.uscourts.gov/adminoff.html> (last visited Feb. 9, 2011). For an overview of this office see *An Overview of the History and Functions of the Administrative Office of the United States Courts*, available online [http://www.rajp.org/documents/en/148\\_en.pdf](http://www.rajp.org/documents/en/148_en.pdf).

<sup>21</sup> *E.g.*, Slovenia's Judicial Training Centre provides initial and continuous training of judges and court staff. Judicial Training Centre (Slovn.), [http://www.mp.gov.si/en/areas\\_of\\_work/jtc/](http://www.mp.gov.si/en/areas_of_work/jtc/) (last visited Feb. 9, 2011).

<sup>22</sup> *E.g.*, The Law Reform Commission of Hong Kong reviews, revises, and proposes new laws. Law Reform Comm'n [H.K.], About, <http://www.hkreform.gov.hk/en/about/introduction.htm> (last visited Feb. 9, 2011).

<sup>23</sup> The Federal Judicial Center is both the research and education component for the United States federal judiciary. The FJC is authorized "to conduct research and study of the operation of the courts of the United States," 28 U.S.C. § 620(b)(1) (2006) and to "develop and conduct programs of continuing education and training for personnel of the judicial branch . . . including . . . judges, United States magistrate judges, clerks of court, probation officers, and persons serving as mediators and arbitrators," 28 U.S.C. § 620(b)(3) (2006).

<sup>24</sup> Examples of judicial training at the federal and state levels in the United States include, respectively, the Federal Judicial Center and the Judicial Education Center of New Mexico. Examples of the federal and state/territory dichotomy of law reform commissions in Australia include the federal Australian Law Reform Commission and, at the state/territory level, the New South Wales Law Reform Commission, Northern Territory Law Reform Committee, Queensland Law Reform Commission, Tasmania Law Reform Institute, Victoria Law Reform Commission, and Western Australia Law Reform Commission.

## The Need for Empirical Research

Judicial bodies throughout the world recognize the benefits of conducting empirical research into judicial operations to improve judicial administration.<sup>25</sup> Testimony before the United States House of Representatives summarizes that “[w]ithout the benefit of reliable empirical research, Congress might waste both time and money on law reform efforts that are neither necessary nor effective.”<sup>26</sup> Echoing that sentiment, Finland’s National Research Institute of Legal Policy states: “The lack of systematic empirical data about the practice of the courts makes it difficult to assess [the court’s] development and potential problems [and, therefore,] there is a *great need to strengthen empirical research on courts*.”<sup>27</sup>

The World Bank likewise advocates the importance of empirical research for judicial reform: “[i]n industrial countries it is widely recognized that judicial reform must be built on a solid empirical base.”<sup>28</sup> The World Bank’s statement stems from two studies it conducted, which both found a large discrepancy between perceptions of how judiciaries function compared to their actual performance.<sup>29</sup> As a result of this discrepancy, the World Bank notes judicial reforms potentially could focus on non-existent problems at the expense of addressing the actual problems harming judicial operations. The World Bank concludes “we hope our studies [demonstrate] the need to test . . . understandings of judicial problems, their causes and their solutions, and to place less faith in conventional wisdom.”<sup>30</sup>

The director of the RAND Institute for Civil Justice addressed several judicial officials from various countries at a World Bank sponsored conference to emphasize the importance of empirical research for proper judicial reform:

It is only by understanding the realities of litigation within your own court systems—what is actually going on, and what drives behaviour—that you

<sup>25</sup> John Twohig et al., *Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994*, in RETHINKING CIVIL JUSTICE: RESEARCH STUDIES FOR THE CIVIL JUSTICE REVIEW 80 (Ontario L. Reform Comm’n, 1996).

<sup>26</sup> *Oversight Hearing on the Administrative Law, Process and Procedure Project: Hearing before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Jody Freeman, Professor, Harvard Law School) [hereinafter Freeman Statement]. While Professor Freeman’s testimony was in regards to administrative rulemaking, her basic premises are easily transferable to the civil rule making process.

<sup>27</sup> Kaijus Ervasti & Hertta Kallioinen, *Problems Related to Legal Proceedings and the Application of Procedural Rules*, Pub. No. 2002, Nat’l Res. Inst. of Legal Policy [Fin.] (2003) (emphasis added). In addition, Jamaica likewise notes the importance of research for its court system and ministry of justice. Ministry of Justice [Jamaica], *Strategic Planning Policy Research & Evaluation*, <http://www.moj.gov.jm/node/view/31> (last visited Feb. 8, 2011).

<sup>28</sup> Linn Hammergren, *Reforming Courts: The Role of Empirical Research*, PREM NOTES n. 65 (World Bank), March 2002, available at <http://www1.worldbank.org/prem/PREMNotes/premnote65.pdf>.

<sup>29</sup> *Id.*; L. Hammergren, *USES OF EMPIRICAL RESEARCH IN REFOCUSING JUDICIAL REFORMS: LESSONS FROM FIVE COUNTRIES*, World Bank (2003), available at <http://siteresources.worldbank.org/intlawjustinst/Resources/usesOfER.pdf>.

<sup>30</sup> Hammergren, *supra* note 28 at 19 (emphasis added). Neumann & Kriger, *supra* note 8 at 360 (“[e]mpirical research has the capacity to test aspects of law and its practice that are based on assumptions and ‘common sense’ to see whether they reflect reality.”).

will be able to design programs that improve your systems. Such understanding requires careful quantitative and qualitative analysts. Simply relying on “common sense” will not do, because common sense—however common—is often wrong. It is only by carefully experimenting with new programs and rules in your own systems that you will learn what the consequences of such changes will be. Such experiments require considerable resources and they take significant time to design and execute. But they are the only way to test whether “reforms” will make the difference that you hope for, or whether they will have unanticipated costs—or even unanticipated benefits. Without such experimentation, you run the risk of wasting scarce resources on ineffective programs; you also run the risk of squandering support for reform, which will diminish over time if the proposed reforms do not have their promised effects. It is only by building a consensus for change, by analysing the obstacles that stand in its way and developing means of overcoming those obstacles, that you can implement programs that will truly “work.”<sup>31</sup>

The judiciary itself best satisfies the need to research judicial operations. The judiciary can ensure the research is undertaken by trained individuals and satisfies scientific standards.<sup>32</sup> The judiciary can guarantee the availability of any requested data<sup>33</sup> and ensure results are not rushed or compromised.<sup>34</sup> In-house research also carries a presumption of legitimacy.<sup>35</sup> In contrast, legislative bureaus are not organized to investigate and properly research the judiciary<sup>36</sup> and may be politically influenced. Administrative departments are generally geared to investigating administrative actions, not investigating the judicial rules and procedures.<sup>37</sup>

Likewise, the judiciary cannot reasonably rely on others outside of the judiciary to provide the empirical research that it needs to assess and implement policy. Outside research entities are often dependent upon funding sources to support their research efforts and, therefore, may prioritize their research efforts by funding source, not by what the judiciary requests.<sup>38</sup> One has only to review the many research articles about

<sup>31</sup> Hammergren, *supra* note 28 at 19. Deborah R. Hensler, Director, Rand Inst. for Civil Justice, Conference on New Approaches for Meeting the Demand for Justice: The Contribution of Judicial Reform to the Rule of Law (May 2001) available at <http://siteresources.worldbank.org/intlawjustinst/Resources/henslerspeech.pdf> (emphasis in original); see Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for “Empirical Legal Studies,”* 71 LAW & CONTEMP. PROBS. 171 (2008) (noting examples of how socio-legal scholars try to combat misinformation in law and policy with the findings from systematic research).

<sup>32</sup> ROSCOE POUND, 2 JURISPRUDENCE 604 (1959).

<sup>33</sup> *Id.* at 603-04.

<sup>34</sup> *Id.* at 604.

<sup>35</sup> Levin, *supra* note 3 at 257.

<sup>36</sup> Pound, *supra* note 31 at 592.

<sup>37</sup> See *id.* at 597.

<sup>38</sup> See Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741 (2004) (noting that scholars’ research is largely motivated by their self-interests).

judges and courts that appear in academic publications to realize that there is often a disconnect between what judges and court staff are interested in knowing and what is actually published by those outside of the court system. Accordingly, the judiciary must develop its own independent research centre to respond to the growing demand for research in the public sector and support itself.

However, the research centre must be independent to be successful. As one former FJC director notes, an in-house research centre alone will not guarantee an effective research process.<sup>39</sup> The research centre also must be independent from the rest of the judiciary. Separating the research centre from the rest of the judiciary will minimize the risks that the judiciary's administrative operations will swallow the research component and or that other interests will influence the research process.<sup>40</sup>

## THE IMPORTANCE OF INDEPENDENT EMPIRICAL RESEARCH FOR THE JUDICIARY

### The Utility of Empirical Research

Empirical judicial research examines the court system to inform policy making. It identifies both problems and solutions for court administration at all levels. The research centre is able to evaluate new policies, procedures, and rules. It can also provide data of relevance to educational programs and of interest to the public. An independent research centre enables judges and judicial policy makers to concentrate on their primary role of administering justice.

### Informing Policy Making

The primary benefit of the research centre is to provide data about how the judicial system actually operates in practice. Research results in reliable information essential for designing reform initiatives and informing the process of evaluating reform proposals.<sup>41</sup> The research centre allows court administrators to have the data and results they need to inform debates about judicial operations.<sup>42</sup> Research "remains the indispensable ingredient of any sustained effort to improve judicial administration."<sup>43</sup>

For example, research can help determine where new judgeships should go or whether appellate-level divisions should be divided.<sup>44</sup> The FJC has also investigated how the judiciary self-administered the statute governing judicial misconduct.<sup>45</sup> This

<sup>39</sup> Levin, *supra* note 3 at 242.

<sup>40</sup> See *id.*

<sup>41</sup> *Id.* at 241.

<sup>42</sup> Wheeler, *supra* note 2 at 3.

<sup>43</sup> Levin, *supra* note 3 at 241.

<sup>44</sup> *Id.* at 250.

<sup>45</sup> Jeffrey N. Barr & Thomas E. Willging, *Disciplining the Federal Judiciary: Decentralized Self-Regulation, Accountability, and Judicial Independence under the Federal Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 29 (1993).

research was needed to both measure how the statute worked in practice and provide information to policy makers looking to amend this statute.<sup>46</sup>

The benefits of empirical research are apparent in evaluating the procedural rulemaking process. In response to requests from the United States Judicial Conference Rules Advisory Committee,<sup>47</sup> the FJC conducted observational field studies to examine the effects of rules that were being considered for change. As a result of the FJC's research, the rules advisory committee decided not to change those procedural rules where the data showed the evaluated rules were fulfilling their purpose.<sup>48</sup> Conversely, the rules advisory committee has modified rules when the data show change is warranted.<sup>49</sup>

Examples of projects from other judiciary-based applied research centres include measuring settlement promotions in trial courts in Finland<sup>50</sup> and measuring discrimination against women in India.<sup>51</sup> Another example is the judiciary of Trinidad and Tobago. Trinidad and Tobago's judiciary has used empirical information to inform the development and improvement of the Civil Proceedings Rules (CPR) 1998, through the continuous monitoring and reporting of the effectiveness of the rules as they pertain to:<sup>52</sup>

1. determining how matters are to be assigned to judges;
2. the clearance rates from filing to disposition of various types of matters;
3. the manner in which matters are determined, whether through settlement (by consent order) or before a judge;
4. relief from sanctions (related to the time for filing) by the parties;
5. the number of adjournments and the reason for such adjournments; and
6. the reason for the dismissal of matters.

Focus was placed during the past year on identifying deficiencies in the case management system for criminal matters to develop draft criminal procedures rules to ensure due process and timeliness. Empirical data received from the Court Research and Statistics Unit revealed various inefficiencies and redundancies in the court management system. This included the inefficient flow and processing of information with-

<sup>46</sup> *Id.*

<sup>47</sup> The Rules Advisory Committee is one of the committees of the Judicial Conference of the United States and responsible for the procedural rules in federal courts

<sup>48</sup> *E.g.*, Fed. R. Civ. Pro. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted) remained unmodified despite concerns that it was no longer an effective rule. Willging, *supra* note 1 at 1144-45.

<sup>49</sup> *E.g.*, Fed. R. Civ. Pro. 11 was modified in response to FJC research. Willging, *supra* note 1 at 1147-53.

<sup>50</sup> Kaijus Ervasti, *Settlements in District Courts*, pub. no. 207, Nat'l Res. Inst. of Legal Policy [Fin.] (2004), available at <http://www.om.fi/optula/24663.htm>.

<sup>51</sup> L. Comm'n of India, *174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law* (2000), available at <http://www.lawcommissionofindia.nic.in/kerala.htm>.

<sup>52</sup> The Civil Proceedings Rules, 1998, were implemented in Trinidad and Tobago in 2005. The CPR's main purpose was to simplify court procedures, expedite cases, reduce costs for litigants, and provide the court with greater control over the pace of litigation.



in the judiciary and also between the judiciary and its justice-sector stakeholders. Using the research findings, the judiciary was able to better communicate with court staff and users, enabling reforms that benefited the judiciary, its partner agencies, and citizens. There were also deficiencies in the procedures and practices that govern the court's ability to manage its caseload. As a result, the judiciary has made progress in implementing modern information and communication technology (ICT) infrastructure in the court and has developed policies and procedures to enable the court to meet its planned justice outcomes. A desk manual detailing counter and registry procedures—using the findings yielded from the research initiative—is now available online and in hard copy.

The overall performance of the Family Court Pilot in Trinidad and Tobago is monitored through the use of micro-data that is obtained from customer feedback surveys and feedback from judicial officers, attorneys-at-law, and court staff.<sup>53</sup> A key goal of the pilot is to continuously test the effectiveness and efficiency of the various innovations and approaches utilized and use the results to continuously improve the services offered in the court. It was recognized that essential to achieving this goal was setting up a monitoring committee to evaluate systems, coordinate data, manage feedback, and make recommendations for change. The committee has developed a comprehensive framework of court performance indicators, some of which are nontraditional, that have become the basis for setting directions and assessing the performance of the court.<sup>54</sup>

The committee has identified 11 areas through which it can continuously assess the performance of the court. Of these areas, six are outcome performance areas and the other five are process performance areas. The six performance areas measure the impact of the court on its customers, staff, and the general public. The performance areas are:

- 1) access to justice;
- 2) expeditiousness and timeliness;
- 3) equality, fairness, and integrity;
- 4) independence and accountability;
- 5) public trust and confidence; and
- 6) environment for conducting the work of the court.

The five process performance areas measure how well the court creates an environment for continuous learning and improvement and focus on the following areas:

<sup>53</sup> The Family Court is a specialty court, which was established in 2004 and aims to bring all parties of the various social services together to address the root causes of family disputes. Through the Family Court, parties are given the opportunity and ability to resolve their problems by way of discussion and exposure to programs leading to behavioural change. See, Madam Justice Judith Jones, Judge of the High Court of Trinidad and Tobago, *The Family Court of Trinidad and Tobago: A Whole System Approach*, presentation at the Caribbean Colloquium, Gender, Culture and the Law (2011).

<sup>54</sup> The Family Court of Trinidad and Tobago Year 1 Evaluation (2005).



- 1) clear direction and leadership;
- 2) clear accountability and strong partnerships;
- 3) effective and efficient operational strategies, tools, and practices;
- 4) sufficient well-trained personnel and adequate resources; and
- 5) effective support systems.

The overall conclusion from the analysis of these indicators shows that in each of the 11 areas, the Family Court Pilot achieved a level of overall performance that compares favorably to family courts in developed countries. The information gathered from this empirical research will significantly assist the judiciary in its aim of making the court permanent and expanding the Family Court to other parts of the country.

The use of empirical data by the judiciary enhances the credibility of, and support for, ongoing reform initiatives; the goal of reform is to develop the judiciary into a high-performance organization. The effort is based on the use of key performance indicators that drive policy-making and encourage cultural and behavioural change, and promote changes in core support processes. Such indicators include timeliness and clearance rates of the case management process. The information gathered from this research will inform policy change, improve judicial operations, and ultimately improve the administration of justice in Trinidad and Tobago.

### ***Providing Information about the Courts to the Public***

Research centres provide information about the court system to the public. For example, the FJC prepared materials to help educators teach about the federal judiciary. Topics include the creation of the federal judiciary<sup>55</sup> and modules discussing significant cases in U.S. legal history.<sup>56</sup> The FJC recently paired with the American Bar Association's Division for Public Education to sponsor a conference for teachers to enhance the participants' knowledge of the federal judiciary.<sup>57</sup>

### ***Measuring the Impact of New Policies, Procedures, and Rules***

One of the primary benefits a research centre provides to the judiciary is the capacity to measure the impact of new policies, procedures, and rules. Empirical research helps evaluate how well procedural rules are implemented and whether they have achieved their goals.<sup>58</sup> Empirical research can help determine whether the rules are cost-effective, how frequently they are challenged, whether the rules survive judicial challenge, and, most importantly, whether the rules achieve their stated goals.<sup>59</sup>

<sup>55</sup> FJC, Historic Courthouse Project, <http://www.fjc.gov/public/home.nsf/hist> (last visited Feb. 9, 2011).

<sup>56</sup> FJC, Talking, [http://www.fjc.gov/history/home.nsf/teaching\\_frm!OpenFrameSet](http://www.fjc.gov/history/home.nsf/teaching_frm!OpenFrameSet) (last visited Feb. 9, 2011)

<sup>57</sup> Teacher Institute: Federal Trials and Great Debates in United States History, Am. Bar Ass'n.

<sup>58</sup> Freeman Statement, *supra* note 26.

<sup>59</sup> *Id.*

For example, judicial policy makers asked the FJC to study the various factors lawyers consider when determining whether to file class-action litigation in either federal or state court.<sup>60</sup> The study was in response to a congressional inquiry trying to decrease the amount of class-action litigation in state courts by expanding the availability for class-action litigation to be filed in federal court.<sup>61</sup> Following the FJC's studies, Congress passed new legislation to expand the federal court's jurisdiction over class-action litigation.<sup>62</sup> The FJC has since measured the impact of this legislation and presented multiple reports to the Judicial Conference Advisory Committee on Civil Rules.<sup>63</sup>

The FJC Research Division examined the number and types of filings to see whether the new legislation was meeting its intended purpose of increasing federal class-action litigation while lowering the number of state class-action cases.<sup>64</sup> This research provides feedback so judicial policy makers and Congress know whether this recent legislation is meeting its goals and, if not, what could be done to improve this legislation.<sup>65</sup>

There are other examples of how the FJC researched new procedural changes to measure the impact of new rules. In one such study, the FJC surveyed attorneys and judges to ascertain their thoughts concerning the new procedural rule governing sanctions of attorneys.<sup>66</sup> This rule was changed in 1993, and the survey was conducted two years later to determine the impact of the 1993 amendments to the rule.<sup>67</sup>

### **Guiding Judicial and Court Staff Education**

There is a clear nexus between research and judicial education. Findings from research projects often lead to new educational programming and training for court staff and judges. Thoughtful and responsive training for court staff results in improved court operations.<sup>68</sup> The FJC's experience has consistently shown that findings from its research activities add content to and enhance its educational offerings. For example, the Rules Advisory Committee asked the FJC to study whether attorneys should have

<sup>60</sup> See *supra* notes 17-19.

<sup>61</sup> *Id.* Federal courts, in contrast to state courts, are courts of limited jurisdiction.

<sup>62</sup> Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified as amended in scattered section of 28 U.S.C.). This legislation expanded the federal courts' diversity-of-citizenship jurisdiction over class-action litigation, with the intent to shift some class-action litigation from the state courts to the federal courts.

<sup>63</sup> E.g., Thomas E. Willging & Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005, Second Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FJC (2006); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FJC (2008).

<sup>64</sup> See Class Action Fairness Act, *supra* note 62.

<sup>65</sup> There was an increase in the number of class-action proceedings filed. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FJC, 1-2 (2008).

<sup>66</sup> John Shapard et al., *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure*, FJC (1995).

<sup>67</sup> *Id.* Part of the impetus for the 1993 amendments was a 1991 FJC survey concerning this procedural rule.

<sup>68</sup> NAT'L ASS'N CT. MGMT., *THE COURT ADMINISTRATOR: A MANUAL* 16 (n.d.).

a right to participate in the jury selection process.<sup>69</sup> Based upon FJC's research findings, the committee declined to make any changes to the procedural rule itself, but did request the FJC to include an overview of jury selection methods as part of its educational programming for new judges.<sup>70</sup> In another example, a judicial committee examined the law governing judicial misconduct.<sup>71</sup> After determining this law was properly followed, the judicial committee recommended that the FJC develop an educational program to familiarise new judges with the judicial misconduct legislation.<sup>72</sup>

During a recent FJC conference, one presentation explored major challenges the federal courts will face over the next 20 years.<sup>73</sup> For example, the changing nature of the evidence-gathering process was discussed, including how familial DNA, brain scans, and gene therapy are used as evidence at trial.<sup>74</sup> The speaker suggested that the FJC develop training on these topics, noting good education is always the answer.<sup>75</sup>

The Judicial Commission of New South Wales, Australia, prepared a series of educational programs to inform judges about new civil procedural rules before their implementation.<sup>76</sup> The Philippine Judicial Academy also describes itself as able to ensure "judicial competence and efficiency through continuing judicial education."<sup>77</sup>

The Trinidad and Tobago Judicial Education Institute (JEI) was established with the aim of promoting excellence in the administration of justice through continuous training and professional development of judges and other judicial and nonjudicial staff attached to the judiciary. The Institute encourages and promotes research with respect to legal issues, judicial administration, court systems, and court management support activities. It also intends to serve as a resource centre where a judicial education products database will be created and maintained for the benefit of the judiciary.

The JEI takes a holistic approach to judicial education by addressing all aspects of judicial development. Appropriate training objectives are determined from surveys conducted among judges and other judicial officers at the beginning of the law term and during the year. The institute also utilizes empirical data received from the Court Research and Statistics Unit to determine current training needs. During a six-month

<sup>69</sup> Willging, *supra* note 1 at 1162-65. Voir dire is the process by which potential jury members are questioned and selected to sit as a jury.

<sup>70</sup> *Id.* at 1165. The FJC complied with this request and produced a DVD about the voir dire process: Voir Dire: What Works? What Doesn't? (1997)

<sup>71</sup> Stephen Breyer et al., *Implementation of the Judicial Conduct and Disability Act of 1980*, Judicial Conduct and Disability Act Study Comm. (2006).

<sup>72</sup> *Id.* at 8.

<sup>73</sup> See Lewis & Clark Law School, FJC 40th Anniversary Event, <http://www.lclark.edu/dept/lawevent/fjc2008sched.html> (last visited Feb. 9, 2011). The handouts from this event are on file with the FJC.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> JUDICIAL COMMISSION OF NEW SOUTH WALES, ANN. REP. 2005-2006 at 16 (2006).

<sup>77</sup> PHILIPPINE JUDICIAL ACADEMY, ABOUT US (copy on file with authors).

period in 2011, statistical data collected by this unit showed that there is a demand for alternative means to dispute resolution apart from the formal court process (litigation). Addressing this need, the institute recently conducted training programs in mediation for judges and other judicial officers. Other recent training programs focused on developments in climate change and environment law.

The JEI seeks to make information more accessible by developing supplemental library services and by establishing a technology resource centre, which will be used by judges, masters, magistrates, registrars, and other employees attached to the judiciary for training and development activities. The emphasis, therefore, is on creating an environment of continuous learning, training, and development. This will allow judges and other judicial officers to embrace new ideas and utilize better ways of carrying out their functions for the benefit of the administration of justice.

Over the past decade the institute has embarked on a reform program by introducing a number of new approaches to facilitate improved court operations. These include providing new and upgraded technological solutions, creating customer-focused court services, and adopting court performance standards.

Within this context, JEI has revised its organizational structure to include a dedicated information technology coordinator, who will systematically collect and analyse data to inform the development of an education curriculum, policies, and plans for the institute. The coordinator will also have the important responsibility of developing the technology resource centre. The positions of judicial research officer and research and publication specialist have also been created. The research and publication specialist will be required to conduct research to improve training programs and techniques and evaluate the effectiveness of training programs currently being delivered. This specialist will also select and study source documents, statistical tabulations, and other empirical data to improve training plans and programs for the institute. The research and data gathered by the JEI will enhance the education and training of judges and other judicial officers of Trinidad and Tobago.

### ***Improving Courts' Efficiency and Responsiveness***

Empirical research in the judicial branch improves court efficiency.<sup>78</sup> One way research centres do this is by evaluating, adopting, and promoting the best practices employed by different court districts.<sup>79</sup> The research centre evaluates the different approaches each judicial district or division employs to develop a picture of what practices work best to improve judicial administration.

For example, under the Civil Justice Reform Act of 1990, Congress designated five federal district courts to serve as demonstration districts. These districts adopted different systems of case management or experimented with various systems for

<sup>78</sup> Efficiency is the measure of amount of resources consumed in relation to function performed. *Id.* at 13.

<sup>79</sup> Freeman Statement, *supra* note 26.

reducing delays and costs.<sup>80</sup> The FJC compared the experiences of the experimental courts with other courts to assess the practices employed by the demonstration courts.<sup>81</sup> The FJC developed a report that described what procedures worked well and what practices did not make a significant difference.<sup>82</sup> Findings from this study also have been incorporated into FJC's *Benchbook for District Court Judges*, a guide that assists less-experienced judges with procedural issues that emerge in civil and criminal proceedings.

## WHAT RESEARCH ISSUES SHOULD BE ADDRESSED BY THE JUDICIARY, FOR THE JUDICIARY

### What Judiciary-Based Research Centres Might Study

A judiciary-based research centre may undertake several types of research. The ARC should not conduct doctrinal research in substantive law, aimed at discovering what the law is on disputed points.<sup>83</sup> A research centre should also avoid conducting legal research to assist in the resolution of any active case that is currently or potentially pending in any court.<sup>84</sup> The dangers of a court-based entity independently conducting legal-case-related research on a case currently before the court are readily apparent: the loss of impartiality and the independent integrity of the judge. A research centre focuses on judicial administration as a whole, not on how an individual case is resolved.

For example, the FJC has prepared a guide for judges addressing issues that arise during terrorism-related litigation.<sup>85</sup> This guide does not address the appropriateness of anti-terrorism legislation<sup>86</sup> such as the USA Patriot Act.<sup>87</sup> Similarly, FJC has developed resources for judges outlining the law regarding state secrets. This FJC

<sup>80</sup> Civil Justice Reform Act of 1990, Pub. L. 101-650, as amended Pub. L. 104-33, 109 Stat. 292. Of course, although Congress uses the word experiment, and there is an experimental group and control group, this project is not a true experiment because the double-blind, random assignment of participants is lacking.

<sup>81</sup> Donna Stienstra, Molly Johnson & Patricia Lombard, *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established under the Civil Justice Reform Act of 1990*, FJC (1997).

<sup>82</sup> *Id.*

<sup>83</sup> Levin, *supra* note 3 at 243. Classical doctrinal research is best undertaken by academicians, law professors, scholars, and judges.

<sup>84</sup> *Id.*

<sup>85</sup> E.g., John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

<sup>86</sup> E.g., ROBERT TIMOTHY REAGAN, *TERRORISM-RELATED CASES: SPECIAL CASE-MANAGEMENT CHALLENGES*, FJC (2008); ROBERT TIMOTHY REAGAN, *KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS*, FJC (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/\\$file/secrets1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/$file/secrets1.pdf).

<sup>87</sup> UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT of 2001, Pub. L. 107-56, 115 Stat. 272, FJC (2001).

product does not suggest to judges how to resolve where the line should be drawn between balancing the public's need for information against potential security harms.<sup>88</sup>

### **Research Projects that Can Readily Translate into Judicial Training**

When selecting research projects to pursue, it is important to consider the ramifications of research findings for educating and training judges and court staff. The experience of the FJC has consistently shown that the findings of its research program provide added content value to the agency's educational offerings.

The FJC has worked with the Israeli judiciary as it sought to develop a judicial-based applied research centre within the Institute for Advanced Judicial Study (IAJS)—see the companion article of Mershel and Weinshall-Mergal in this issue. In consultation with the IAJS, the FJC suggested several research projects that could be conducted as part of its initial research agenda. Projects whose results can translate into training materials are listed below and can be readily adapted to assist any judiciary:

*A descriptive study of calendar management practices among the judges in the Nazareth District Court.*

Findings regarding calendaring may be relevant for the other four district courts of Israel. Practices that, at a minimum, will translate into saving start-up and training costs to help the other courts try similar procedures to meet their increasing caseloads. The research team's findings in the Nazareth Court, for example, could encourage other district courts to undertake or experiment with their calendaring practices. The cumulative experience of the research staff will be available not only to conduct studies but also to advise and assist the president judge of the Supreme Court and the director of the courts in setting up innovative procedures, all of which can and will translate into savings of money and resources for the courts and the litigants.

*A descriptive study of the duties and roles of the president judges of the district courts of Israel.*

The product of this research could be a handbook or manual that describes the formal and informal duties of the office of the president judge of the district court. The results might also translate into training, especially for new president judges of the district courts.

*A descriptive study of the duties and roles of the president judges of the magistrate courts of Israel.*

The product of this research could be a handbook or manual that describes the formal and informal duties of the office of the president judge of the magistrate court.

<sup>88</sup> E.g., Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261 (2003).

The results might also readily translate into training, especially for new president judges of the magistrate courts.

*A descriptive study of the practices of the district and magistrate courts with issuing written vs. oral judgments.*

This research could include a sample survey of the bar in each of the district courts regarding their views of the efficacy and value of written vs. oral judgments. The results of this research might be translated into training for judges.

## CONCLUSION

This article has examined how a judiciary-based applied research centre enhances the administration of justice and, by doing so, strengthens judicial independence. Well-designed and executed research provides the judiciary with data and information necessary to better focus its limited resources. By employing empirically validated effective case management approaches, the judiciary reduces its reliance on others outside the judiciary to help it identify innovations that are worth pursuing. The products of a judiciary-based applied research centre can and should be employed to enhance and improve education and training for judges and court staff.

The FJC and the judiciary of Trinidad and Tobago wish success to other judiciaries as they develop their own judiciary-based applied research centre. We are proud of our collaboration with judiciaries around the world and looks forward to working with others to enhance the administration of justice, improve judicial education and training, strengthen judicial independence, and promote the international rule of law.

# ESTABLISHING A JUDICIARY-BASED RESEARCH CENTRE— THE ISRAELI EXPERIENCE

BY YIGAL MERSEL AND KEREN WEINSHALL-MARGEL\*

## The Need for Judiciary-Based Applied Research in the Israeli Court System

The need for a judiciary-based applied research capacity in Israel is no different than that of other court systems. This need stems from two complementary considerations. First, there is the need for empirical feedback and data. Second, it is understood that this data should come from an in-house, judiciary-based capacity.

### The Need for Empirical Data

Empirical data is essential to establish any managerial policy. This is true especially in large scale and widely dispersed institutions,<sup>1</sup> such as the court system. As judicial procedures in Israel are becoming more and more complex (as in the case of most democracies), and as the caseload expands,<sup>2</sup> the courts' management can no longer rely on intuition or common sense. Empirical feedback is needed to ascertain what works, what does not, why, and how to fix it.

In a paper elaborating the benefits from judiciary-based applied research centres, Judges Rothstein and Archie<sup>3</sup> referred to the general importance of empirical data while planning judicial reforms. We would like to provide an example from our recent experience that supports this view. Lately, a general rise in “bumper-to-bumper”

\* This paper was presented at The 5th International Conference on Judicial Training, Bordeaux (2011), less than a year after the establishment of the Israeli Courts Research Division. In the subsequent years, the ICRD has developed and progressed, and many of its research projects have been utilized in making empirically based managerial decisions and policy reforms in the Israeli judiciary. One such example is a research project concluded in 2013 regarding continuances of hearings in the Israeli judiciary, whose findings have brought about practical steps for diminishing the scope of these continuances. This and other research projects are made available to the public via the ICRD website, at <http://elyon1.court.gov.il/heb/Research%20Division/menu.htm>. The data sets created by the ICRD, upon which these projects are based, have also been made available on this website in electronic and reusable forms. Some of the ICRD's work has also been published in leading peer-reviewed journals, such as “Overlooked Factors in the Analysis of Parole Decisions,” published in 2011 in the *Proceedings of the National Academy of Sciences* (PNAS), and “Case Weights for the Assessment of Judicial Workloads in Israel, to be published in 2014 by the Israeli *Mishpatim* law review. Yigal Mersel has gained a LLB, LLM, and LLD. He is a Judge at the District Court of Jerusalem and Secretary General of the International Organization of Judicial Training. Keren Weinshall-Margel has gained an LLB, BA, MA, and PhD, and is Director of the Israeli Courts Research Division.

<sup>1</sup> Cheol H. Oh, *Explaining the Impact of Policy Information on Policy-Making*, 10 KNOWLEDGE AND POLY: INTL. J. KNOWLEDGE TRANSFER & UTILIZATION 25 (1997).

<sup>2</sup> RAANAN SULITZEANU-KEINAN, AMNON REICHMAN & ERAN VIGODA-GADOT, JUDICIAL BURDEN—A COMPARATIVE STUDY OF 17 STATES (Haifa Center for Public Management and Policy 2007) [in Hebrew].

<sup>3</sup> Barbara Rothstein & Ivor Archie, *Judiciary-Based Applied Research Centers: Enhancing the Administration of Justice while Strengthening Judicial Independence, and Improving Judicial Training 1* (2011) (paper presented at The 5th International Conference on Judicial Training, Bordeaux).



damage claims has been felt in the Israeli Magistrate Courts. These are low-scale claims resulting from damage to vehicles in road accidents. While such claims used to be settled between insurance companies in a voluntary Automobile Subrogation Arbitration Agreement, they now seem to be flooding into the magistrate courts. In response to this, the Israeli court management considered setting up a new initiative for mandatory arbitration between car insurance companies. The first research project of the new Israeli Courts Research Division (ICRD), therefore, centred on car subrogation claims. The results of this study showed that although claims for car damage were increasingly submitted to the courts, mandatory arbitration between car insurance firms would not help.

Empirical data from the study showed that insurance companies still solved most disputes using arbitration. More and more citizens, however, were choosing to reject insurance compensation and pursue their damages in court, thus avoiding having to pay policyholder's participation fees. An increasing number of lawyers were also encouraging people to litigate, many of whom based their livelihood on the lawyer fees ruled by the court in such claims.

The empirical data obtained by the ICRD by analysing a sample of car damage claims, and interviewing lawyers, insurance agents, and plaintiffs, was therefore able to prevent a reform that was not called for.<sup>4</sup>

### **The Need for a Judiciary-Based Research Capacity**

Empirical data has been used to help ensure the efficiency and functioning of justice in Israel for many years. Academics from leading universities or private applied-research companies were frequently outsourced to plan judicial reforms or to make more informed administrative decisions. This outsourcing of research, although mostly fruitful, has led to the realization that the Israeli court system needs an in-house research capacity.

Judges Rothstein and Archie mention six benefits arising from a judiciary in-house research capacity: the judiciary can (1) ensure scientific standards; (2) guarantee the availability of data; (3) ensure that results are not compromised; (4) retrieve data that is of interest to the judiciary (and not necessarily publishable); (5) not depend upon different funding sources; and (6) acquire inter-legitimacy for research results. We would like to add three more benefits from our modest experience.<sup>5</sup>

First, an in-house research capacity develops a long-range relationship and an in-depth institutional knowledge of the court system and the available resources. This specialization allows for a more efficient research process. For example, it took an Israeli private research company more than a year just to collect data on

<sup>4</sup> This is yet another example of the importance of empirical data for planning judicial reforms. For more examples in different countries, see Linn Hammergren, *Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries*, World Bank (2003).

<sup>5</sup> Rothstein & Archie, *supra* note 3 at 5–6.

case-weighting,<sup>6</sup> whereas the data collection for a comparable study carried out by the ICRD took only four months. Moreover, as all the in-house research is aimed at answering questions about judicial policies and procedures, time and resources can (as they should) be spent on developing empirical methodologies that are especially suitable to research on the judicial branch.

A second advantage of in-house research specialization is that its in-depth knowledge allows challenges that the system itself is not aware of to be identified. All empirical research begins with a research question. Defining research questions is crucial because it directs the answers that the empirical endeavour might provide. Research questions originate in the court system and are then given to the research unit. If necessary, a “repeat player” researcher of the judiciary can use his or her pre-existing knowledge to extend their research beyond the defined research questions received.

Finally, an in-house capacity has the same general objective as the court system, which is to improve the efficiency and functioning of justice. This reduces the likelihood of problematic behaviour motivated by different interests and agendas.

## THE ICRD'S ESTABLISHMENT AND INSTITUTIONAL DESIGN

### **The ICRD's Establishment and the Federal Judicial Center's (FJC) Role**

The ICRD was finally established in December 2010, but its history begins a few years earlier. Between 2000 and 2003 a research unit started to operate within the Israeli court management system. The unit was headed by a magistrate judge, and almost all of the personnel were legal advisors. The unit's proximity to court management and a lack of methodological training led to its closure after only a short time.

A second attempt to establish an in-house research capacity was launched at 2008 following consultations with heads of esteemed judicial research centres, mainly the FJC.<sup>7</sup> After decision makers within the judiciary decided to establish a judicial research centre, other governmental bodies had to be convinced that the centre was worth spending funds on. The Israeli judiciary is not completely separated from the governmental branch (court management is a unit within the Ministry of Justice), so court budgeting is the responsibility of the treasury. We provided the treasury with examples of how a judiciary-based research centre can save money and discussed how future relations between such a centre and the Parliament Research and Information Centre, or other governmental research centres, could be developed.

<sup>6</sup> Daniel Wasserteil & Shlomi Parizat, *Applied Summarizing Report for The Jerusalem District Court—Estimation of the Relative Work Load of Judges, by Type of Case*, 2005 (2006) [in Hebrew].

<sup>7</sup> See James B. Eaglin, *The Mission, Vision, Governance, and Importance of an Independent Judiciary-Based Research Program for the State of Israel: A Report with Recommendations to the President of the Supreme Court of Israel, the Director of the Courts in Israel, and the Director and Deputy Director of the Institute for Advanced Judicial Studies* (2007).

The ICRD's establishment was in many ways a bottom-up operation. All initiative for its establishment came from within court management field work. There is no law or mandatory requirement that outlines the research mission, as in the case of the United States federal system.<sup>8</sup> Although there are many advantages to founding an entirely new institution, with no directed guidelines, it also poses great challenges. There are both large-scale challenges, such as who determines the research projects to be carried out, and some small-scale challenges, such as the citation method to be adopted.

As a starting point, we adopted the institutional features of the FJC's research division, which had proven experience as a leading judicial research centre, and established the ICRD according to the FJC's research division model. We learned and implemented from the FJC's mission, research methods, senior and junior staffing, and other institutional features. However, differences in law or in the judicial system structure led to many disparities, which we will describe further.

### **The ICRD's Mission, Methods, and Staff**

The ICRD's mission is to conduct research that will help guide the courts' management and improve the efficiency and functioning of justice. All studies conducted by the ICRD focus on judicial system institutional operation and not on individual cases or substantive law. This is similar to the FJC statutory duty to conduct and promote research on federal judicial procedures and court operations.<sup>9</sup>

Like the FJC's research division, the ICRD uses diverse social science methodologies to conduct its institutional research. Quantitative methods are used to identify in-depth trends in case filings. For the purpose of sophisticated quantitative analysis, the ICRD has already constructed a data set containing a representative sample of data on 8,000 court cases, including information that does not exist in simple court statistics. Qualitative methods, mainly interviews or observation of court hearings, are combined to analyse reasons for behaviours and trends. Finally, comparative methods are used to learn from the experience of other court systems that often face the same challenges.

To carry out studies, which conform to the highest standards of social sciences, we searched for suitable personnel who combine education and experience in institutional social research with the ability to speak the legal language. This is a rather rare combination in Israel, as legal education is an undergraduate degree, and law schools do not teach empirical methods. We first recruited the ICRD director, a former legal adviser in the Law and Constitution Committee of the Israeli parliament, who wrote her PhD thesis in political science, specializing in legal empirical studies and political methodology.

<sup>8</sup> 28 U.S.C. §§ 620-629 (1967).

<sup>9</sup> 28 U.S.C. § 620(b)(1) (2006).

The ICRD was established as a small operation, which we hope will grow in the future. The ICRD director leads a team of two researchers, assisted by two student research assistants. The researchers have dual education and training in both law and social sciences. At present, ICRD staff have qualifications in psychology, economics, sociology, cognitive studies, and political science. Knowledge of fields other than law allows the ICRD to observe and investigate judicial operations from different perspectives, while utilizing each member's unique methodological training. The ICRD is also involved in its members' ongoing training, providing lectures on various new research methods, and training courses in software, such as SPSS (statistical program), SQL (computer software), and ATLAS (qualitative research software).

### **The ICRD Independence and Steering Committee**

Judges Rothstein and Archie stress that a judicial research centre must be free from executive or legislative influences and independent from judicial administrative operations.<sup>10</sup> In the Israeli case, independence from court management was especially important because court management is itself partly an executive body, under the authority of the Ministry of Justice.

To ensure the ICRD's independence, a special steering committee was founded. The committee's functions can, in many ways, be compared to that of the Judicial Conference of the United States, which governs the federal judiciary.<sup>11</sup> The ICRD steering committee is headed by the president of the Supreme Court of Israel. Its members include the director of the Institute for Advanced Judicial Studies (IAJS), and a district court judge.

The ICRD's steering committee is the only authority guiding and directing the ICRD, thus keeping it free of pressures originating within or outside the court system. The steering committee sets and prioritizes the research agenda, guides and overlooks the activity of the ICRD, and helps determine its mission in both the short and the long terms.

Learning from earlier efforts to create a judiciary research unit that was not physically separated from court management, the ICRD headquarters is now placed in the Supreme Court of Israel, in close proximity to its steering committee and to the IAJS.

Although the institutional design is rather strict, in practice the ICRD and court management work together closely. The court management is perceived as the main client for the ICRD research. The court manager participates in the steering committee's meetings, and research projects are determined by the steering committee after consulting him.

### **The ICRD and the Institute for Advanced Judicial Studies**

The relations between the IAJS and the ICRD are based foremost on the professional guidance given by the IAJS and its president, a member in the ICRD's steering

<sup>10</sup> Rothstein & Archie, *supra* note 3, at 6.

<sup>11</sup> 28 U.S.C. §331 (2006).

committee. The IAJS and ICRD both reside in the Supreme Court as institutions that are exterior to the courts main judicial mission, but exist to serve it. Education and research are naturally interlinked, as can be seen in most academic institutions and in the other judicial research centres mentioned in this paper. Our hope is that the ICRD will serve to improve judicial studies in many ways.

At the theoretical level, research units can identify challenges in court proceedings that can be addressed in IAJS educational judicial seminars. We frequently debate what should be the active force initiating judicial learning processes.<sup>12</sup> Should these be bottom-up processes, originating from the demands of acting judges; top-down processes, initiated by presidents of courts; or should training needs be defined by outside players, such as legislators or lawyers? Whatever the answer should be, a research body can provide empirical inputs that will eventually lead to better planning of judicial training. It can both help identify target areas within the judiciary that are in need of training and validate the eventual success of completed programmes.

The ICRD is now conducting a time-series study aimed at improving judicial studies by evaluating judges' satisfaction with seminars held by the IAJS. The ICRD's first step was to analyse the results of previous questionnaires distributed in seminars. The results showed a rather high percentage of participants answering the anonymous questionnaires: about 70 percent of judges participating in all seminars responded. The results also indicated a very high satisfaction rate in the seminars—the average score was about 4.5 when 5 was the highest satisfaction mark possible. Almost no variance was detected between the results of different seminars or across judges. Finally, the ICRD noticed that when satisfaction levels were relatively low (4), fewer participating judges tended to answer the questionnaires.

Assuming that not all seminars are successful, and that they vary in their level of interest or importance, it seems that judges are not comfortable with giving low scores or with criticizing the seminar. They prefer not to answer the form when they are not satisfied.

In response to this realisation, the ICRD designed new questionnaires, which include the option of being generally happy with a seminar to varying levels of satisfaction. Whereas the previous maximum score available was 5, the new form extends this to 7 and sometimes 9. The new questionnaire also separates satisfaction levels in different dimensions: the level of interest is measured differently than the level of importance or utility to judicial work. In addition, the questionnaire adds two questions to assess the experience of the judge and his field of expertise (these questions were phrased very widely so that they would not jeopardise anonymity). This additional information will allow the IAJS to recommend certain seminars to new or

<sup>12</sup> See, for example, George Thomson, *The Judicial Education Curriculum: Developing a Framework for Judicial Learning* (paper presented in The 2th International Conference on Judicial Training, Ottawa, 2004), available at <http://www.nji.ca/nji/internationalforum/thomson.pdf>.

experienced judges, or to distinguish between seminars for judges specializing in criminal versus civil matters.

To assess long-range satisfaction and to estimate the seminars' utility from the judges' subjective point of view, the ICRD will hand out very short questionnaires about six months after each seminar. Finally, with the intention of hearing from all judges, not just those who regularly participate in seminars, the ICRD will interview a sample of judges.

In future work, the ICRD can also help to validate (or not, depending on results) methods used by the IAJS to assess the compatibility of candidates for judicial nominations. The IAJS holds six-day courses for lawyers who are candidates for judicial nomination. These courses include discussions and simulations to observe the candidates in different situations and to assess their suitability to serve as judges in Israel. At the end of the course, a team of three senior judges, aided by a psychologist, prepare a written, nonbinding recommendation regarding each candidate and submit this to the Committee for the Selection of Judges.

A suited research plan can test the functioning of appointed judges a few years after their appointments and compare them to varying recommendations given by the IAJS. Rarely are judicial appointments of the Committee for the Selection of Judges inconsistent with IAJS assessments and recommendations, so it could be hard to verify the impact of bad recommendations (this also affects the robustness of verifying good recommendations). Another methodological challenge is the restriction of range of the judges' sample in the study, as we cannot test candidates who were rejected.

Assessing the performance of appointed judges can be done by focusing on easily measurable factors, such as effectiveness and clearance rates. These factors, however, are not sufficient to define "good judges." The quality of a judge is better determined by the quality of their decisions, judicial temperament, and ability to manage court proceedings in a fair manner. These characteristics were once considered "unmeasurable." However, the quality of judges has been empirically tested in the last few years by measuring factors such as reversal rates of decisions by courts of appeal (from all appeals, relative to the average reversal rate); by using peer review of other judges, who observe hearings; by using judges' subjective assessment of themselves; and by reviewing surveys of parties to judicial proceedings.<sup>13</sup> A future research project

<sup>13</sup> The quality of judgments is tested using the first two methods in the Netherlands. See De Rechtspraak, *Quality of the Judicial System in the Netherlands* (2008); The Netherlands Council for the Judiciary, *Bench Marking in an International Perspective: An International Comparison of the Mechanisms and Performance of the Judiciary System* (2004); and using the two latter described measurements in Finland, *The Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland: How to Assess Quality in the Courts?* (2005) (checklist for promoting the quality of justice and the courts). For more ideas on how to measure quality of justice, see R.A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000); S. J. Choi & G. M. Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004-2005); National Center for State Courts, *Judicial Performance Evaluation Resource Guide*, available at <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Performance-Evaluation/Resource-Guide.aspx>.

aspiring to define “the good judge,” and assessing the current ways of predicting who will become a good judge, will be of great value to the IAJS. The benefits of such a project may extend to judicial management at large.

### **Forming Institutional Norms and Work Procedures**

We have addressed the main institutional design and framework of the ICRD, such as its mission and relations with its steering committee. The establishment of the ICRD, as a new institution has, however, involved, and continues to give rise to, countless dilemmas and decisions that, due to space limitations, we cannot attempt to cover here. These range from deciding if and how to publicize the results of studies and raw data; questions of relations with other applied research units in the administrative and legislative branch; ways of recruiting staff and the human resources from which to recruit (is legal education really necessary?); who should decide on budgeting for the ICRD; and how budgeting impacts the ICRD’s independence.

We would like now to develop the discussion surrounding one of these dilemmas, which we are currently facing. The ICRD’s empirical research is meant to serve and assist policy making. This can be done either by providing decision makers with an accurate portrayal of current systems and letting them decide on the normative implications of that portrayal, or by directly recommending certain policies that should be adopted as a result of what the ICRD has observed through its research. Applied research capacities in all fields, including judicial research units, can be placed on a scale ranging from those focusing only on empirical data to those that recommend normative policy making. Where should the ICRD be placed? Should the ICRD act as a normative recommending body on matters of policy?

Many arguments can be made against the ICRD acting as a recommending body. First, the academic reputation of such a body is compromised because its studies will often look as though they were designed to meet a desired policy outcome. There is an element of truth to this, and the academic level itself may be affected by the fact that the research body gives normative policy recommendations.

Second, a recommending body is more vulnerable to political influence and attempts to harm its academic independence. This point is especially valid in research units like the ICRD, which receive dictated research questions and work in close contact with court management.

Third, acting as a recommending body affects the type and the depth of the data that are being passed on to a research unit. Not writing policy recommendations frees interviewees from having to advocate the utility of their preferred policy. For example, in the car subrogation study previously described, the formulation of answers by lawyers and judges who were interviewed changed when they were told that the subrogation research conclusions would not include operational recommendations. Their answers seemed less “absolute” and expressed a wider range of dimensions.



Finally, a recommending body's recommendations can obviously be rejected by decision makers. This might endanger the prestige and perceived integrity of a new institution such as the ICRD.

On the other hand, there are arguments in favour of working as a policy-recommending body. First, in many cases, it is a small step from empirically analysing trends within and reasons for a problematic phenomenon to stating how to solve that problem. This is why empirical research often leads to proposals for policy change. Omitting policy recommendations may seem incomplete.

Second, defining the ICRD as a recommending body increases the motivation for various parties to cooperate. The research department can reach a wider audience and have a greater impact if it includes recommendations in its research.

This policy dilemma has not yet been resolved. For now, we choose a middle path, adding policy recommendations only when they are clearly called for, as we will now further describe.

## RESEARCH PROJECTS ADDRESSED BY THE ICRD

The ICRD's first task was building research infrastructure. This included two data sets: one containing data on 8,000 Israeli court cases and one dedicated to international comparative data on court systems.

The ICRD has completed three studies to date. As we have discussed, the first focused on car subrogation claims in the courts and did not include policy recommendations. The second tested the reliability of data collected within the Israeli online case management software. This study identified where and why data were not reliable and, as a natural extension, included detailed recommendations on how to improve data quality. This research was undertaken as a preliminary study, testing the kind of data that the ICRD could base future research on. It has also proved to be an important study for court management that requires reliable data to manage courts efficiently. As a direct result of this study, changes are now being programmed to the case management software, and new guidelines for updating data have been distributed to court administrative staff.

A third study has analysed results of criminal proceedings in magistrate and district courts. The results are very different from the public's perceptions on conviction rates. For example, the study has proved that the conviction rate in magistrate courts is about 70 percent from all indictments brought to the court (not 99.8 percent, as previously thought). The study also tested complex relationships between representation, plea bargains, and sentencing.

A case-weight study is also in its advanced stages. Its goal is to assess the varying amounts of judicial workload that different types of cases impose. Case-weights are a common tool in court management today, and evaluating case-weights is a task shared by judicial research centres of many countries. In its research plan, the ICRD has relied on previous studies published by national judicial research centres, such as



the National Center for State Courts<sup>14</sup> and the FJC's<sup>15</sup> case-weighting studies.<sup>16</sup> Moreover, the ICRD contacted the FJC researchers that worked on the latest 2005 federal case-weight research. Some of the methodologies used by the FJC to quantify judges' impressions of their workload are now being implemented in the Israeli study.

The research plan set by the steering committee for the next year comprises 10 research projects. These include descriptive studies on small claims in magistrate courts and a study that will focus on attorney costs and fees. This latter study arose as a result of different trends in awarding attorney fees that were observed in the former car subrogation claims study and which seem to have an impact on lawyers' behaviour. Three more studies are devoted to judicial reforms in different stages. The first is a study assessing the effects of changing civil procedure rules of expeditious proceedings. The goal is to analyse costs and advantages of a meaningful change in civil procedures, which has been contemplated for many years. In the other two studies the ICRD will estimate the efficiency of two small-scale reforms that have already been adapted: one in ADR within the courts, and one in adding evening hearings in cases decided by magistrate courts' registrars.

## CONCLUSION

It is too early to assess the function of the ICRD or its contribution to the court system. Nevertheless, the need for its establishment was greatly felt and for now it seems that the ICRD is starting to fill the void.

What we can best learn from the Israeli experience is how un-unique it really is. The need for in-house judiciary research, its mission, the research methodologies, and even many of the research projects are the same across different court systems. The many similarities between judicial-based research centres suggest the benefits of working together. Joint efforts between research centres from different judiciaries representing different legal systems should prove helpful and enriching.

<sup>14</sup> B.J. Ostrom, C.W. Ostrom, D. Hall, W.E. Hewitt, T. Fautsko, *Florida Delphi-based Weighted Caseload Project—Final Report* (National Center for State Courts 2000).

<sup>15</sup> P. Lombard and C. Krafka, *2003-2004 District Court Case-Weighting Study—Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* (FJC 2005).

<sup>16</sup> Also see A. Lienhard & D. Kettinger, *Research on the Caseload Management of Courts: Methodological Questions*, 7 UTRECHT L. REV. 66 (2011).

# ASSESSING THE QUALITY OF JUSTICE

BY JOHN STACEY\*

The efficient functioning of a high-quality judicial system depends on a complex and subtle interaction, where each of the authorities concerned and each of the protagonists within these authorities has an essential role to play. This interaction and the accountability of policy makers and of all judicial practitioners is the key to a high-quality judicial public service, since, to hear and decide cases well, it is not enough merely to give judgment, nor even to give judgment in an impartial manner within an independent system. To fully perform their role, which is to create a social bond, all judicial practitioners must be resolved to serve the community with court users' interests in mind.

Council of Europe member states must, together, seek concrete means to ensure that judicial systems fully meet the requirements of the European Convention on Human Rights and the legitimate expectations of the public (and taxpayers) as to what a public service should offer. The independence of judges and the efficient functioning of a high-quality judicial system are obviously two sides of the same coin. The aim should therefore be to strike the best possible balance between these principles.

The Council of Europe rightfully has a role in this fundamental debate on how to establish the rule of law in modern societies. Here it is a matter of constantly repositioning the cursor to take account of changes in society and in public expectations: what was acceptable in the past is not necessarily acceptable in today's world where there is exponential growth in the demand for justice while, at the same time, the fundamental principles themselves remain inviolable.

Justice is a public service, but one which is admittedly quite different from other public services, given that it is based on the principle of independence. The function of administering justice may be shared among representatives of the executive, legislative, and judicial authorities, but judgments can only be handed down by judges. This distinctive feature does not, however, exempt the justice system from certain requirements arising from its relationship with the political system and the public.

The issue of the quality of justice is bound up with a public-policy approach, which involves policy makers, judicial institutions, judicial practitioners, and court users, and which concerns resources (budgets, staff, and amenities), processes, and relations between the various players.

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## WHAT IS CEPEJ?

In setting up the European Commission for the Efficiency of Justice (CEPEJ) in 2002, the Committee of Ministers of the Council of Europe therefore sought to establish an innovative body, required to work on a different basis from more traditional intergovernmental committees, so as to take account of the complex reality of judicial systems. The work of the CEPEJ now helps to ensure that all players in the judicial system are confronted with their share of responsibilities.

If the different players in the judicial system are to behave responsibly, they must be fully familiar with the context in which they are working. The CEPEJ therefore now conducts a regular (biennial) and thorough assessment of the daily functioning of judicial systems in all its member states. Although many bodies regularly address the issues of delay in judicial procedures, difficulties of access to the courts, or, more generally, the “crisis of the judicial system,” to date such studies have seldom been supported by concrete figures, as there are no sufficiently precise and comparable statistics in the different countries.

The judicial systems of the Council of Europe member states are, of course, different: each state has its own history and its own social and economic organisation, which is reflected in the way its judicial system is organised and which should be respected—it is not for the Council of Europe to try to harmonise the judicial systems of its member states. But this diversity—which is a great asset for Europe—is not a valid reason for making no attempt to solve the problems.

The backlog of cases in the registry of the European Court of Human Rights shows that judicial systems throughout Europe suffer from similar ills. The scheme for evaluating judicial systems set up by the CEPEJ is applicable to all European states and now includes over 200 questions concerning financial and human resources, the organisation of the courts, judicial procedures, caseload management, the organisation of the judicial professions, and relations with court users.

The CEPEJ has now succeeded in stabilising this common reference scheme (there are over two million entries in the database), which facilitates comparisons between countries and helps identify changes over time in a specific country or group of countries. It is the first initiative of this kind and of this scope in the field of justice. The process is unique in Europe, both in terms of the methods used—which are now widely recognised by the legal and scientific community—and in terms of the breadth of the information collected and analysed.

## LATEST REPORT: 2012

The fourth evaluation cycle, published in the 2012 edition of the “European Judicial Systems Report,” provides a precise picture of the functioning of the judicial systems of 47 European states and an analysis of statistical series.<sup>1</sup> It includes comparative

<sup>1</sup> The 2014 report, which will be based on data from 2012, will be published in October 2014.

tables and a commentary on key matters of relevance to help understand the functioning of judicial systems. The report identifies common indicators for evaluating courts' abilities to manage caseload, for example, the *clearance rate* and *disposition time*. By underlining the means and the processes available to the various protagonists, it makes it possible to grasp the main trends, to identify difficulties, and to guide public policy in the justice sphere towards more quality, fairness, and efficiency in the public interest. The CEPEJ therefore holds a genuine key to understanding the workings of judicial systems in Europe, with a view to energising public policies in this sphere.

This work on the evaluation of judicial systems is also followed closely by the European Union, as it is fundamental for mutual confidence between the judicial systems of EU member states and essential to the proper application of EU instruments for judicial cooperation.

If the different judicial practitioners are to be able to play their public service role to the full, they must be able to offer court users a certain measure of predictability with regard to the functioning of the system and, in the event of problems, to make a preliminary diagnosis of the reasons why the system is malfunctioning so they can be rectified. Through its SATURN Centre for the analysis of judicial time management, the Council of Europe is setting up a permanent European observatory of judicial time frames.

Few European states are currently capable of providing detailed figures concerning the time frames of proceedings for specific types of cases (for example, divorce without mutual consent or violent robbery). However, although people bringing court cases are capable of understanding that good justice is not necessarily very rapid, they may legitimately expect to be informed of the foreseeable duration of their proceedings. The issue of judicial time frames must accordingly be deemed one of the prime concerns for public justice policies in Europe.

## COURT USERS' SATISFACTION SURVEYS

To be able to play their own specific role to the full, the different judicial practitioners must also know and understand the expectations of court users and how these users evaluate the service provided to them. The CEPEJ has accordingly produced a handbook for courts that wish to conduct user satisfaction surveys in their jurisdiction. The Checklist for Promoting the Quality of Justice and the Courts, adopted by the CEPEJ in July 2008, is an essential point of reference for this work. Satisfaction surveys are a key element of policies aimed at introducing a culture of quality, both within the ministries responsible for framing such policies and among judicial practitioners who, individually or collectively, are required to apply such policies in their courts. Taking expectations as its starting point, a public-satisfaction approach reflects a concept of justice focusing on the service user. Surveys can be used both nationally, in the context of plans for a specific court, and at the European level.

The handbook, which was initially tested by the CEPEJ through its network of pilot courts, is now being sent out to a wider range of courts so as to gradually make this process of measuring user satisfaction with the public service of justice delivered in Europe a regular exercise. This exercise will be complementary to the biennial evaluation of the functioning of judicial systems and constitute a “barometer” of Europeans’ satisfaction with their justice system, a further tool that helps public policy makers and judicial practitioners to understand, analyse, and consequently reform the judicial systems for which they are jointly responsible.

Finally, the CEPEJ has just launched a particularly difficult but absolutely essential activity: identifying concrete indicators of quality to help gauge developments in the public service courts offer to users. It is still too early to give a detailed account of this work, but it is possible to identify some of the main issues, which are already the subject of intense debate:

- case management
- quality of decisions (including the difficult question of the percentage of cases challenged via an appeal)
- functioning of the court
- individual evaluation of judges
- perception by users and rate of satisfaction
- resource management
- access to the court
- communication/information

## TRAINING

And what about training? Training plays a major role in improving the quality of judicial policies. Curricula should be developed to ensure that these aspects of particular relevance to the efficient management and the quality of the judicial service form part of judges’ everyday concerns. They can then subsequently strike a proper balance in their professional activities between their main task—hearing and determining cases in an unbiased manner—and their obligation to manage the resources made available for that purpose.

With these considerations in mind, the CEPEJ was able to support the continued existence of the Lisbon Network, which is made up of judicial training institutions from the 47 member states of the Council of Europe. The aim is to build and strengthen bridges between training and the concepts of judicial efficiency and quality. This must be done without turning judges into machines for recording statistics and increasing output, while at the same time ensuring that they are aware of their responsibilities with regard to the smooth, daily functioning of the courts, provided appropriate resources are made available by the state.

In the current economic climate, and the consequential pressures on public finances, judicial authorities need to continually evaluate how and where services are

delivered. But this must not be undertaken in a way that impacts on the quality of justice. With these pressures within Europe, the role of CEPEJ with its experts, its networks, and its competences, the CEPEJ will continue to be a key player in the debate on the quality of justice in Europe and beyond.

# RESTORING IMAGE AND TRUST THROUGH JUDICIAL TRAINING ON COMMUNICATION

BY SUSAN GLAZEBROOK\*

The importance of judicial communication and the necessity of striving to improve how judges communicate with those affected by their decisions and the public cannot be overstated. On the one hand, judges must use their highly specialised legal training and experience to make difficult decisions according to often complex substantive and procedural rules. On the other hand, to maintain their independence, judges rely on the confidence of the public, the vast majority of whom have no legal training. The upshot is that to maintain public confidence, judicial communication must be of the highest quality. It is no wonder that judges in many different jurisdictions have recognised the need to provide training for judges in that area.

The wide variety of audiences for judicial communication necessitates a range of different courses to facilitate communication with each type of audience. Different audiences also require different types of communication. Accordingly, judicial communication courses offered in New Zealand include courses that improve judgment writing; courses that address interaction with counsel, witnesses, and juries at trial; and courses relating to communication to specific groups, such as children and young persons. Judges are also involved in public information programmes where they actively promote knowledge of their role in the wider community.

## COMMUNICATION AND THE RULE OF LAW

Before discussing the courses in more detail, I stress the importance of judicial communication to the rule of law. By examining judicial communication through the lens of the rule of law, its importance is underlined, and the many different ways in which communication is fundamental to the judicial role are demonstrated.

There is currently much debate on exactly what is meant by the rule of law. However, no matter which formulation of the rule of law is adopted, judicial communication is fundamental to its protection. First and foremost, no formulation of the rule of law would exclude judicial independence as an essential element. Professor

\* Justice Susan Glazebrook serves on the New Zealand Supreme Court and is the immediate past Chairperson of the New Zealand Institute of Judicial Studies. She thanks Court of Appeal clerks Anthony Wicks and Yasmin Moinfar and Supreme Court clerk Andrew Row for their assistance with this paper. This paper accompanied a workshop on judicial communication presented by Justice Glazebrook at the Fifth International Conference of the International Organization for Judicial Training (IOJT) held at the Ecole Nationale de la Magistrature in Bordeaux from 31 October to 3 November 2011. The attendees in the workshop held at the IOJT Conference participated in a selection of practical exercises taken from the New Zealand communication courses but adapted to an international audience.

Joseph Raz, in one of the most influential “thin” accounts of the rule of law, still maintained that:<sup>1</sup>

the rules concerning the independence of the judiciary . . . are designed to ensure that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.

Judicial independence, however, rests on public confidence. Justice Frankfurter noted that “the Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”<sup>2</sup> In the many systems where judges are unelected, judges do not even have the public’s express approval for office. Rather, judges must rely on confidence in the institution to maintain legitimacy. Confidence in the institution can only be maintained by judges communicating with the public. A judge must convince the parties and the public that, no matter the result of a case, the case was decided according to an impartial, fair process. Therein lies the importance of the often-quoted maxim that “justice should not only be done, but should be manifestly and undoubtedly seen to be done.”<sup>3</sup>

However, as Hon. Daniel E. Wathen, the former Chief Justice of the Maine Supreme Judicial Court, has put it, “[i]f justice must not only be done, but be seen to be done, much of what is seen depends on the communicative skills of the judge.”<sup>4</sup> Similarly, the President of the Supreme Court of the United Kingdom, Lord Neuberger, formerly Master of the Rolls in England, pointed out that “if justice is seen to be done it must be understandable.”<sup>5</sup>

Good communication by judges is also essential to uphold other aspects of a formal conception of the rule of law. In his recent speech, Lord Neuberger went on to say that “if the law is to be properly accessible, then the courts are under the same duty of accessibility as is placed on the legislature” and criticised judgments that are “readable by few and comprehensible by fewer still.”<sup>6</sup> A clear judgment is also a protection against the arbitrary exercise of power. If, as the chief justice of New Zealand has suggested, reasons for judgment “demonstrate that the case has been decided in accordance with valid legal rules and principles and not to fit the personal beliefs of the

<sup>1</sup> Joseph Raz, *The Rule of Law and Its Virtue*, 93 LQR 195, 201 (1977).

<sup>2</sup> *Baker v. Carr*, 369 US 186 (1962) at 267. Justice Aharon Barak, the former president of the Supreme Court of Israel, drew on these words when he noted that the judge has “neither sword nor purse. All he [or she] has is the public’s confidence in him [or her]”; see AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (Princeton University Press 2006) at 109.

<sup>3</sup> *R v. Sussex Justices*, 1 KB 256 (1924) at 259.

<sup>4</sup> Daniel E. Wathen, *When the Court Speaks: Effective Communication as Part of Judging*, 47 ME. L. REV. 449, 451 (2005).

<sup>5</sup> Lord Neuberger of Abbotsbury, “Open Justice Unbound?” (Judicial Studies Board Annual Lecture, London, 16 March 2011) at 5, [www.judiciary.gov.uk](http://www.judiciary.gov.uk).

<sup>6</sup> *Id.* at 7.



Judge,”<sup>7</sup> then the better the judge can express his or her reasons, the more easily he or she will convince the parties and the public that the decision is a proper application of legal principle.

Good communication is equally important for substantive conceptions of the rule of law, which incorporate human-rights norms. Especially in the area of criminal justice, the role of the courts in upholding human-rights standards is controversial and can be misrepresented by some elements in the media.<sup>8</sup> The better courts communicate their role in these cases and their reasons for a particular decision, the greater public understanding of the issues will be. This, in turn, will decrease the chance that decisions will be misrepresented.

The preceding discussion on the relevance of judicial communication to the rule of law indicates the wide range of audiences with whom judges must communicate. The Chief Justice of New Zealand has recognised that there are “real challenges” in giving reasons for judgment because the audience is so varied.<sup>9</sup>

At one end of the spectrum, there are those directly affected by the courts’ decisions: the parties and their counsel. Additionally, in many cases there are likely to be a set of people in a similar position to the parties, for example in the same industry, who will be reliant on a clear articulation of the law. Decisions will also frequently need to be read by other courts; whether by an appellate court for the purposes of appeal or in common-law jurisdictions as a precedent for a court in the same or lower position in the hierarchy. In making a decision, courts are also communicating with the profession who will rely on it in advising clients, and with academics, who may critique it. Moreover, judicial decisions are important to legislators and policy makers, who may frame policy and legislation in response to a decision.

Finally, there is the public at large, who obviously have a legitimate interest in the activities of the courts. Communication with the public at large will most often be through the media. It is thus important for the courts to engage constructively with the media.<sup>10</sup> Many courts now provide judgment summaries and press releases on important decisions for the public and the media.<sup>11</sup>

Judicial communication, however, extends well beyond the reasons for judgment. Parties’ perceptions of the procedural fairness of a court proceeding is very important

<sup>7</sup> Sian Elias, “*The Next Revisit*”: *Judicial Independence Seven Years On*, 10 CANT. L. REV. 217, 228 (2004).

<sup>8</sup> See the examples given by Lord Neuberger, *supra* note 5, at 38-39.

<sup>9</sup> Elias, *supra* note 7, at 221.

<sup>10</sup> See, for example, Steve Leben, *Ten Tips for Judges Dealing with the Media*, 47 CT. REV. 38 (2011); and Hon. Paul de Jersey, AC, “The Courts and the Media in the Digital Era” (speech delivered at Bond University, Gold Coast, 12 February 2011).

<sup>11</sup> For example, see the press releases and judgment summaries on the Courts of New Zealand website: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz). Judicial decisions of public interest are also posted on the Courts of New Zealand website, mostly from the Supreme Court and Court of Appeal. These are often accompanied by press releases explaining the decisions. There is also a searchable database of decisions from the Supreme Court, Court of Appeal, and High Court: <http://forms.justice.govt.nz/jdo/Introduction.jsp>.

to their confidence in the judicial system.<sup>12</sup> Accordingly, all communication both in court and before and after court, which can be as subtle as body language,<sup>13</sup> can affect perception of the courts.

Some communication may be beyond the direct reach of the judge. For example, the judge may have no direct control on general information on the court process given to litigants, witnesses, or jurors. However, the extent and quality of such communication to help people cope with the often unfamiliar environment of a courtroom can greatly affect their experience once in the courtroom. Judges are also often reliant on procedures and the scope of a hearing being explained to parties and other affected persons by lawyers. The extent to which it is appropriate or necessary for judges to take on this role directly may be a matter of controversy, but again understanding is key to having a positive perception of the courts.

Effective judicial communication also needs to recognise that communication is multifaceted, requiring sensitivity to the needs of the particular audience with whom judges are communicating. Communication is not simply a matter of conveying information to the public or the parties. Rather, good communication requires a degree of community engagement and solution-focused judging, whereby judges consider active steps that may need to be taken to meet the needs of the parties and the community.<sup>14</sup> Communication may also need to be tailored in particular circumstances to respect cross-cultural differences.<sup>15</sup>

It is also vital to recognise that communication is a two-way street. The important communication in courts is not primarily communication from the judge. The most important communication is that made to the judge by the litigants and their counsel. Ensuring that parties (and, in particular, the losing party) feel that their points have been understood and considered impartially and fairly will go a long way to ensuring confidence in the courts. Moreover, understanding not just the words but also the underlying drivers or needs and the social context of the litigant and the dispute (to the extent possible) is also important.<sup>16</sup>

Furthermore, legislators and policy makers, along with the legal profession, academics, and the public, will be interested not just in particular decisions but in the role

<sup>12</sup> Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference*

<sup>13</sup> See David Givens, *The Way Others See Us*, 19 JUDGES' J. 21 (1980).

<sup>14</sup> For example, the establishment of two specialised drug courts in New Zealand was a judiciary-led initiative, which sees sentencing delayed while offenders undergo rehabilitation and detoxification treatment. For more information about the specialised drug courts, see [www.justice.govt.nz/courts](http://www.justice.govt.nz/courts).

<sup>15</sup> Another judiciary-led initiative is the establishment of Rangatahi (youth) Courts in New Zealand, which aims to engage Māori youth with their culture and their local community by shifting some official youth court proceedings to a marae (traditional Māori meeting house) setting. See Matiu Dickson, *The Rangatahi Court*, 19 WAIKATO L. REV. 86 (2011).

<sup>16</sup> Although discussed in the context of effective communication by counsel, see the principles in John Barkai and Virginia Fine, *Empathy Training for Lawyers and Law Students*, 13 SW U. L. REV. 505 (1982); and Stefan Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199 (2001).

and function of the courts in general. Therefore, it is important for courts to communicate with the public outside of their decisions. The Chief Justice of the Wisconsin Supreme Court, Shirley S. Abrahamson, makes the point well:<sup>17</sup>

The public will have confidence in the judicial system if it believes the system is serving the public interest, but the public will not know the system is serving its interest if it does not know the basic features of the system or understand the concept of judicial independence.

Communication about the role of the courts can take the form of speeches and lectures. The Chief Justice of New Zealand has made an effort to raise public consciousness of the role of the judiciary by speaking about it on every possible occasion.<sup>18</sup> In recent years, some courts have undertaken a variety of programmes to educate the public about their activities, including court open days, visits by high school students to courts, and development of educational material.<sup>19</sup> The Internet provides a further platform for communication about the work and role of the courts, with many courts now having their own websites.

Maintaining public confidence through engaging with the public is especially important as a counter to unjustified criticism of judges. In New Zealand, and in other jurisdictions, there has been concern about intemperate attacks on the judiciary.<sup>20</sup> Given that, by convention, judges are very restricted in responding to criticism, fostering public understanding of the judicial role that allows the public to evaluate criticism is the best defence.<sup>21</sup>

Of course, extra-judicial communications are a fine balancing exercise. In speaking about the law and trying to improve the foundations of judicial independence, a judge must be careful not to undermine his or her own independence. Exactly when it is appropriate for a judge to make extra-judicial comments and how these comments should be expressed is not clearly defined and “in New Zealand at least” has sometimes caused controversy.<sup>22</sup>

<sup>17</sup> Shirley S. Abrahamson *Courtroom with a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L. L. & DISP. RES. 13, 24 (2000).

<sup>18</sup> Elias, *supra* note 7, at 217.

<sup>19</sup> See, for example, the summary of the Supreme Court of Wisconsin's efforts in Abrahamson, *supra* note 17, at 28-31. In New Zealand, the Environment Court recently had a very well attended court open day where the public could see around the courtroom and attend mock court sessions. As part of a broader initiative to further community engagement, the District Court in Porirua also held an open day of its court, with an educative focus, in 2010.

<sup>20</sup> J. M. Priestly, *Chipping Away at the Judicial Arm?*, 17 WAIKATO L. REV. 1, 16 (2009); David Pannick, *Insulting and Abusing the Judiciary Will Undermine the Rule of Law*, TIMES ONLINE (UK), 1 July 2011.

<sup>21</sup> Kevin M. Esterling, *Public Outreach: The Cornerstone of Judicial Independence*, JUDICATURE, Nov.-Dec. 1998, at 113.

<sup>22</sup> Grant Hammond “Judges and Free Speech in New Zealand” (speech delivered on 11 March 2010), available at [www.courtsofnz.govt.nz/from/speeches-and-papers/](http://www.courtsofnz.govt.nz/from/speeches-and-papers/).

Once the range of different audiences for judicial communication, the different types of communication, and the fine balance that often has to be struck by judges in communicating with the various audiences is appreciated, it is easy to see the value in including judicial communication courses in judicial-training programmes.

## NEW ZEALAND COURSES ON COMMUNICATION

The environment in which judges operate in New Zealand has changed significantly in relatively recent times. Twenty years ago, judges might have considered the courtroom their own and a place to practice their craft, with little orientation to court users who found the environment difficult at best and at worst alienating. Today the New Zealand judiciary is more conscious that the legitimacy of the courts, judicial independence, and the rule of law requires that court users experience the courtroom as a forum for the discovery of truth and that the principle of “fairness” is explicit, as well as implicit.

The New Zealand Institute of Judicial Studies (the IJS) was established in 1998 as an initiative of the New Zealand judiciary. It has developed a core curriculum of programmes with a significant focus on communication training. This ranges from “crafting skills,” such as the delivery of written and oral judgments, to communication skills required to understand and respond fairly to particular groups of court users.

The extent and pace of change in society has given rise to new and difficult social and technical issues. There is increasing recognition that judges should be informed about and part of the society in which they judge; that they be able to communicate effectively with all those who come before the courts and with the public more generally; and that good communication can contribute significantly to resolving the difficulties experienced by many court users.

I now move to a description of the communication content of some of the courses offered by the IJS.

### **Judgment Writing**

One of the programmes in the IJS’s core curriculum is on judgment writing. This course is offered annually. The objective of the programme is to encourage judges to use clear, plain, and appropriate language in judgment writing. The principles of good judgment writing and organising, structuring, and editing a judgment are covered.

The judgment-writing course was adapted from a Canadian course, which advocates an issues-based judgment-writing method. The issues-based method requires judgments to explain first what is in issue in the proceeding and then deal with each of the issues in turn. During lectures, the participants are reminded that the overall aim of this style of judgment writing is to ensure that judgments are understandable to all audiences, and in particular that the judgment explains to the losing party why he or she has lost. It is also emphasised that this method of writing is not merely

concerned with form but that it also promotes more focused thinking and, therefore, a better substantive judgment.

The judgment-writing course involves a number of practical sessions where the judges participate in individual workshops.<sup>23</sup> In these workshops, the participants submit one or two judgments that they have previously written for constructive criticism by an intelligent lay audience (consisting of people who write for a living, such as novelists and poets and report writers for government departments) and a judge. This not only provides the opportunity for the judgment to be reviewed in a way that ensures that it is intelligible for all audiences, but also means that, if a participant does not take kindly to criticism from a lay person, there is a judge present to reiterate the importance of ensuring that an intelligent lay person can understand the judgment.

The participants are given the opportunity to rewrite one of their judgments in light of the principles identified in the lectures, paying particular attention to directness, clarity, and conciseness. For example, the participants are expected to rewrite the opening page of the judgment in a style that ensures that the judge identifies what the case is about, the parties, and the main issues to be decided. The participants are also required to construct a list of headings that reflect the issues to be decided; provide a structure for the rest of their judgment; and rewrite the entire judgment and reduce its length by at least one-third.

### **Oral Judgments**

The IJS has also introduced a course on delivering oral judgments. This two-day course focuses on the structure and delivery of oral judgments. The course covers preparation, note taking, reasoning, and credibility findings. It is divided into lectures, discussions, workshops, and video-recorded exercises.

The oral judgments course begins with an introductory presentation on giving effective oral judgments. During this presentation, the participants are reminded that oral reasons can be more effective than written reasons, as judges are able to address parties directly; repeat, clarify, or explain matters if necessary; and place emphasis on certain matters using both verbal and nonverbal cues, such as eye contact, facial expressions, hand gestures, and other body movements. The participants are reminded that, like written judgments, effective oral judgments need to adopt a clear, logical structure. Judges also need to establish a credible “voice,” which illustrates respect for the needs of the listeners and readers.

The participants are then provided with a case study (the participants can choose whether to consider a civil or criminal case study) and are required to draft speech notes for an introduction that states the issues and foreshadows the structure of the judgment. The participants are given an opportunity to deliver their brief introduction (of no longer than five minutes), which is video recorded and subsequently evaluated in small groups.

<sup>23</sup> The lead presenter of the course is a professor of English.

On the second day, the judges participate in a workshop that focuses on simplifying and humanising judgments. During this workshop, the participants view a DVD featuring examples of good and bad communication when giving oral judgments.<sup>24</sup> The challenges of communicating with diverse audiences are highlighted. The participants are encouraged to simplify vocabulary, shorten sentences, create lists for clarity, and guard against unconscious bias.

Following this, the participants are given the opportunity to use the case study and speech notes from the day before to draft additional speech notes to aid them in giving their full decision (of no longer than ten minutes). They are then given the opportunity to deliver the full decision, which is also video recorded and evaluated.

### Directions to Juries

Judges in New Zealand have for some time been concerned to ensure that directions given to juries are understandable. This concern was magnified after research conducted by the New Zealand Law Commission<sup>25</sup> and led to a total redraft of the New Zealand criminal benchbook,<sup>26</sup> moving away from standard directions and putting much more emphasis on tailoring the directions to the jury to the particular case and the issues involved in that particular case. Judges are also encouraged to give written material to the jury, including question trails with references to the evidence.<sup>27</sup> Judges are encouraged to discuss with counsel what is truly in issue and direct the jury only on those matters.

The ideal summing up is now considered to be the one suggested by Professor Edward Griew on the law and Lord Devlin on the facts. Professor Griew said:<sup>28</sup>

It should be the function of the judge to protect the jury from the law rather than to direct them on it. The judge does in practice typically tell the jury that the law is for him [or her] and the facts are for them. This should become more profoundly true than it now is. A brief statement about the law will normally be unavoidable if the case is to be intelligible. But what is said should not be by way of formal instruction. When it comes to instructing the jury on their task, the job of the judge should be to filter out the law. He [or she] should simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence.

<sup>24</sup> A truncated version of this was viewed by participants in the IOJT workshop in Bordeaux.

<sup>25</sup> See research published by the New Zealand Law Commission summarised in *JURIES IN CRIMINAL TRIALS PART TWO: A SUMMARY OF THE RESEARCH FINDINGS* (1999). For a discussion of that research, see William Young, *Summing up the Juries in Criminal Cases—What Jury Research Says about Current Rules and Practice*, CRIM. L.R. 665 (2003).

<sup>26</sup> Largely by Sir William Young.

<sup>27</sup> It is common practice now for juries to be given a transcript of the evidence to assist them in their deliberations.

<sup>28</sup> Edward Griew, *Summing up the Law*, CRIM. L.R. 768, 799 (1989), quoted in Young, *supra* note 25, at 686.

Summing up on the facts was described by Lord Devlin as follows:<sup>29</sup>

All the material that gets into the ring that is kept by the rules of evidence is not of course of equal value, and the task of counsel and then of the judge is to select and arrange. In discharging this task counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law. It is his [or her] duty to remind them of the evidence, marshal the facts and provide them, so to speak, with the agenda for their discussions. By this process there emerges at the end of the case one or more broad questions—jury questions—which have to be decided in the light of commonsense.

It was recognised by the IJS that judges needed some assistance on this new approach, and seminars accompanied the release of the new benchbook. However, judges embraced the new approach with mixed enthusiasm and competence.<sup>30</sup> It was thus felt that more was needed.

Every year, the IJS offers a two-day course on directing juries.<sup>31</sup> The programme consists of a mixture of lectures, discussion, workshops, individual tutorials, and redrafting exercises. The objective of the course is to assist judges in structuring and delivering jury directions in a way that is understandable.

During the first part of the course, the participants are provided with a mock case, including an outline of evidence from Crown and defence witnesses. The participants are then required to draft a fact-based question trail, which specifically addresses the facts and issues in the case. The participants discuss these draft question trails in small groups, each of which is facilitated by an IJS faculty member. The participants also hear from experts on the research done by the New Zealand Law Commission on juror comprehension.<sup>32</sup>

During the second part of the course, the participants draft jury directions, based on the question trail. The participants are encouraged to use plain language in their summing up, which is then discussed and evaluated within small groups.

In the final segment of the course, the participants are asked to draft appropriate general directions as to the onus and standard of proof and general directions on relevant rules of evidence, and to identify where in the summing up such directions

<sup>29</sup> PATRICK DEVLIN, *TRIAL BY JURY* (Stevens and Sons Ltd 1966), at 115-16.

<sup>30</sup> For an example of a case where the new approach would have been preferable, see *Hepi v. R* NZCA 503 (2010).

<sup>31</sup> In New Zealand, juries (consisting of 12 jurors, who are drawn by ballot from a jury list, which contains a random selection of the names of people who are registered on the electoral roll) are used commonly in criminal trials. In certain serious cases, defendants must always be tried by a jury. Defendants previously charged with offences punishable by a maximum sentence of imprisonment of three months or more had the right to elect trial by jury: Summary Proceedings Act 1957, § 66(1); New Zealand Bill of Rights Act 1990, § 24(e). However, § 50 of the Criminal Procedure Act 2011 has raised the threshold at which a jury trial can be elected to two years' imprisonment.

<sup>32</sup> New Zealand Law Commission, *supra* note 25.



best fit. The participants are reminded that the goal is to ensure that directions (including general directions) are applicable to and reflect the facts of the particular case.

### **Communication and Courtroom Management**

In 2008 the IJS offered a two-day course on communication and courtroom management. In 2010 the course related to communication only. The communication-in-court workshop focused on developing judges' presentation skills in the courtroom. The objective of the workshop was to help judges identify behaviours that would assist them to manage the courtroom effectively. The approach was experiential, with an emphasis on "learning by doing." The programme identified the participants' current presentation style by videotaping each participant as they delivered a short speech. Participants then received constructive, tailored feedback on the elements of a good presentation, vocal and body-language dynamics, clarity, and managing of courtroom demeanour in stressful situations.

During the workshop, the participants were given the opportunity to assess different courtroom presentation styles. A courtroom text was delivered in three different styles: the first reading was delivered in a distracted and disinterested fashion, the second in a bored and monotone fashion, and the third in a declamatory and judgmental fashion. After each example, the participants were asked to identify what they had observed in terms of vocal dynamics and body language. The participants were asked what their response was to each person and why, and the impact that vocal dynamics and body language had on their assessment.

The next part of the workshop gave the participants an opportunity to practise their presentation skills by improving their vocal range, projection, and expression.

The workshop concluded by providing an opportunity to explore, practise, and discuss ways to handle situations that give rise to tension in the courtroom for parties and for judges. Participants discussed how communication between judges and parties could be improved in such circumstances by understanding cultural issues, managing unrealistic expectations, managing the emotions of all parties in the courtroom, applying techniques for diffusing highly charged hearings, and understanding why people become or present as "difficult."

### **Litigants in Person**

The litigants in person course is a two-day workshop offered annually by the IJS and is designed to assist judges to respond effectively to the increasing number of self-represented litigants appearing in the courts. Self-represented litigants pose challenges to judges seeking to ensure procedural fairness, while maintaining order and efficiency. During the course, judges consider the legal and practical dimensions of these challenges. The course utilises role plays with actors to allow judges to practice the skills that are taught. It is facilitated by legal practitioners who specialise in conflict resolution processes.



The course begins with a session on the fundamentals of active listening. Participants are reminded that the court environment is foreign to many self-represented litigants and that being heard and acknowledged in the process goes a long way to engaging with them and encouraging them to participate in a constructive manner. Active listening skills are essential for facilitating that participation.

In the first session, the participants practice using the following skills of active listening through a series of exercises conducted in pairs:<sup>33</sup>

- Using appropriate body language and demeanour: the participants are reminded that their responses in terms of their posture, gestures, demeanour, and tone have a significant impact on the way that their courtroom management and judicial role are perceived by parties. Facial expressions, body position, eye contact, attentiveness, avoiding distraction and distracting mannerisms, and not showing disinterest or negative opinions, all assist in engaging with parties, building communication, and generating a constructive environment for effective communication.<sup>34</sup>
- Using “minimal encouragers”: the participants are reminded that even the slightest negative tone or movement can indicate to parties their support or lack of support for their involvement in proceedings. The participants are advised to use “minimal encouragers,” such as nods, smiles, positive sounds, looks of understanding, questioning, and empathy, to encourage people to participate in communication.<sup>35</sup>
- Adopting an approach based on genuine curiosity: the participants are reminded that when parties have the opportunity to talk about their situation from their perspective, this gives them a sense of being heard.
- Paraphrasing: the participants are reminded that paraphrasing can help convey respect and empathy, indicate a genuine desire to understand the litigant’s problems, help develop a good relationship with the parties, prompt correction (if necessary), facilitate further disclosure, and calm and relax the speaker. The goal is to make the speaker feel heard and understood, but not judged. This is done by the judge repeating back to the party what he or she has said in the judge’s own words, in a way that reassures the party that the judge has heard both the factual and emotional content of what he or she has said.
- Using normalising statements: this involves taking a third-person approach to put parties at ease in what otherwise can be a difficult and stressful situation.<sup>36</sup>

<sup>33</sup> A handout on active-listening skills used in the course is attached as Appendix A, and some exercises are attached as Appendix B.

<sup>34</sup> A handout on the importance of body language is included as Appendix C.

<sup>35</sup> One of the issues for self-represented litigants in particular is the sense of not being heard. Minimal encouragers help to address that issue at an early stage.

<sup>36</sup> For example, “Many people who represent themselves feel overwhelmed with all of the court rules and procedures.”

The participants are reminded that using normalising statements helps relieve tension by assuring the party that it is not unusual for someone in their situation to feel or respond in the way that they do. The use of normalising statements is also a less confrontational way of making a suggestion to a party. The judges are reminded that care needs to be taken that normalising statements are not perceived as judgmental or patronising by the party.

- Reframing: this involves paraphrasing, summarising, and asking questions in a way that attempts to neutralise negative statements, attacks, or inferences against other parties, restates the issue in more general terms, and puts statements into a logical sequence.

The next session involves a number of brief role plays. The participants are divided into groups of three, with a different person acting as a self-represented litigant, the judge, and an observer in each role play.

The role play begins with the self-represented litigant explaining the nature of the case and the issue being addressed.<sup>37</sup> The judge is then required to “recognise” the litigant’s underlying frame of mind and “relate” to the litigant using the skills practised in the earlier session. To maximise learning, the judges are asked not to “respond” to the legal problem at hand. The observer records his or her views on the effectiveness of the judge’s response to the self-represented litigant’s underlying needs and discusses these with the other two participants after the exercise has been completed.

Evaluations of the litigants in person course indicate that participants have found the course extremely helpful in showing how the theory of active listening can be applied through altering body language and vocal dynamics. The IJS has adapted the material presented in this course for use in a number of the other courses it offers, which feature a communication component.

### **Settlement Conferences**

The IJS has also offered a course on effectively communicating with parties in settlement conferences. In 2010 the IJS offered a practical, three-day course designed to enhance the efficient and effective use of settlement conferences in commercial and family disputes. The format included faculty presentations and settlement conference simulations. During these simulations, participants considered options and strategies for reaching agreement between parties, identified interventions to deal with difficult situations, evaluated options through “reality testing,” and considered how cases could be shaped for a trial or hearing.

### **Solution-Focused Judging**

The multifaceted nature of judicial communication is highlighted in the IJS’s programme on solution-focused judging. Solution-focused judging involves adopting a

<sup>37</sup> The self-represented litigant is provided with a cue card in advance, which specifies the nature of the case, the issue being addressed, a statement that the self-represented litigant will make to start the exercise, and the self-represented litigant’s underlying frame of mind.

problem-solving approach by attempting to engage court participants in the resolution process and dealing with the underlying causes of offending. This approach relies more on the standing of the judge as a respected authority acting on the community's behalf, rather than on the judge's coercive powers.<sup>38</sup> The objective of this seminar is to assist judges in incorporating solution-focused approaches into the work of the mainstream courts. The participants discuss the developing area of non-adversarial justice and consider lessons learned in specialist therapeutic courts<sup>39</sup> that may inform their understanding of solution-focused judging. There is a particular focus on judicial interaction with participants in the court process.

### **Te Reo Intensive and Marae Visit**

Another core programme in the IJS's curriculum is an intensive te reo Māori<sup>40</sup> language course, which is designed to aid communication with and understanding of New Zealand's indigenous people. The programme is offered annually and is held on a marae over three days. The course is streamed into four levels to cater to beginners, as well as those who are more advanced. The workshop also encompasses aspects of tikanga Māori<sup>41</sup> so that judges can familiarise themselves with Māori culture and life. In addition, the IJS offers a four-day marae visit every year to provide a further opportunity for judges to understand and explore Māori culture and, thus, enhance cross-cultural communication. The participants are formally welcomed onto the marae, and a presentation on Māori tikanga and the significance of land and history is presented by a kaumātua (elder).

### **Judicial Orientation Programmes**

Effective judicial communication is also briefly addressed during a judicial orientation programme held every year by the IJS to welcome new judges. The programme addresses a number of topics, which feature a communication component, such as judicial conduct, social context issues, courtroom management, and sentencing. This gives new judges the opportunity to identify behaviours to assist them in managing their courtroom effectively by adopting an appropriate courtroom tone,<sup>42</sup> creating an appropriate courtroom environment, and managing unusual situations that arise.

<sup>38</sup> M. S. King and J. Wager, *Therapeutic Jurisprudence and Problem Solving Judicial Case Management*, 15 J. JUD. ADMIN. 28, 32 (2005).

<sup>39</sup> For example, drug courts, family violence courts, mental health courts, and community courts.

<sup>40</sup> The Māori language. Māori, English, and New Zealand Sign Language are the three official languages of New Zealand.

<sup>41</sup> Tikanga Māori is the customary practices, attitude, and regulation of behaviour of the Māori people. A two-day course on tikanga is to be offered for the first time in 2014.

<sup>42</sup> The participants are asked to fill out a questionnaire on setting the right tone in the courtroom.

## CONCLUSION

The wide variety of audiences for judicial communication is apparent from the numerous courses in the IJS curriculum that address effective communication.<sup>43</sup> The challenge for judges is to facilitate communication and respond to the varying needs of each type of audience. Litigants, counsel, juries, and the wider public vary greatly in their knowledge of the law and legal procedure, educational level, social and cultural background, racial or ethnic background, and linguistic and cognitive ability.

The courses offered by the IJS also highlight the different types of communication judges must engage in. It is clear that effective judicial communication is not limited to giving reasons for judgment using clear and appropriate language. The appropriate use of nonverbal communication, for example, through body language, eye contact, and hand gestures, is also indispensable for facilitating communication inside and outside the courtroom.

Finally, it is clear that the courtroom is also a forum where, occasionally, unexpected and difficult situations can arise. Like all of those with a public role, judges can benefit from identifying techniques to manage situations that give rise to tension in the courtroom for parties and for judges.

<sup>43</sup> Other courses will also be developed dealing with communication issues, for example, relating to communication with children.

## APPENDIX A

### ACTIVE LISTENING SKILLS

#### Introduction

Being able to effectively communicate with parties in the court process is a cornerstone of managing communication and behaviour in such a high stress environment.

It is important to be able to interact with participants in the court process in a way that engages with them and maintains that level of engagement.

The five principal skill components of good active listening are:

#### 1. Body Language/Demeanour:

How you respond in terms of your posture, gestures, demeanour, and tone has a significant impact on the way that your courtroom management and judicial role are perceived by parties.

Facial expressions, body position, eye contact, attentiveness, avoiding distraction and distracting mannerisms, and not showing disinterest or negative opinion, all assist in engaging with parties, building communication, and generating a constructive environment for effective communication.

#### 2. Minimal Encouragers:

Even the slightest negative tone or movement can indicate to parties our support or lack of support for their involvement in a conference process.

Nods, smiles, positive mmmhms and ahhahhs, looks of understanding, questioning and empathy all encourage people to participate in communication, which builds trust and assists them to have the confidence to discuss sometimes very difficult issues. One of the issues for self-represented litigants in particular is the sense of not being heard. Minimal encouragers help to address that issue at an early stage.

Care needs to be taken that these do not signal agreement.

#### 3. Genuine Curiosity:

An approach based on genuine curiosity is as much a philosophy as a skill. The underpinning of respectful curiosity is that parties themselves understand best what is going on for them, or if they do not, then the best way for you to find out where the gaps are is to hear them talk. A respectfully curious approach allows parties to give voice to their stories and their worldview. Parties get to talk about their situation from their perspective and you allowing them to do so provides space for interpretation and possibilities to arise that we may never think of. Genuinely curious questions are deceptively simple. They include examples such as:

*“Why are you defending this matter?”*

*“What were you hoping to achieve by bringing this claim to court?”*

*“When you talk about shared care what does that look like to you?”*

#### 4. Paraphrasing:

Paraphrasing is a mini intervention with parties that feeds back to them what they have said in a way that assists them to know that you have heard both the factual and emotional content of what they are saying. For example:

*“You are upset because this matter has been adjourned 3 times because they aren’t ready and now they are asking for another adjournment?”*

*“You are worried because you are not used to appearing in court and you are not sure what you need to do here?”*

#### 5. Normalising Statements:

Normalising statements take a third-person approach to setting parties at ease in what otherwise can be a difficult and stressful situation. The focus of a normalising statement is to relieve tension by ensuring the party knows that it is not unusual for someone in their situation to feel or respond in the way that they do. An example of a normalising statement is:

*“Many people feel overwhelmed with all of the court rules and procedures.”*

Care needs to be taken that such comments are not experienced as judgmental or patronising.

#### 6. Summarising:

As judges, this is one of your areas of particular expertise. You will have all had experiences of good and not-so-good summing up and the effect that it has on others in the courtroom. The process of summarising does not need to be limited to the end of hearing a case—a well-timed (clear, fair, and well-enunciated) summary of a party’s explanation, statement, or evidence can be used to good effect.

Summarising back to parties gives them the sense that you have heard and understood their view of the issues. Care is necessary that they do not take your “understanding” as agreement.

#### 7. Reframing:

Paraphrasing, summarising, and asking questions can all be done in a reframing way. The features of reframing are:

- Neutralising negative statements.
- Neutralising attacks or negative inferences against other parties.
- Restating the issue in more general terms that the parties may be able to progress from.
- Putting a series of statements into a logical progressive sequence.

Example:

*“That @#\$\$% has never been there for our son. I was always the one that looked after Toby, now he wants him so he can bum around on the benefit (welfare). That’s not what Toby wants.”*

Which might be reframed as:

*“You have told me that you are and have always been there for your son Toby, and that you are worried now that he will be taken away when he wants to stay with you.”*

### **Conclusion**

The court environment is foreign to many litigants. Being heard and acknowledged in the process goes a long way to engaging with them and encouraging them to participate in a constructive manner. Research shows that people tolerate unsatisfactory outcomes far more easily when they perceive they have been heard and respected from a procedural perspective. Active listening is a cornerstone of building that level of personal and procedural satisfaction.

## APPENDIX B

### ACTIVE LISTENING EXERCISES

#### 1. Body Language

- a. In pairs—seated back-to-back—one person talking the other not responding. Break after two minutes.
- b. Ask each for their experience. Make observations.

#### 2. Minimal Encouragers

- a. In pairs—seated face-to-face, one person talks and other person listens (reverse from exercise 1). Listener makes no response at all, no eye contact, no minimal encouragers.
- b. Ask each for their experience. Make observations.

#### 3. Genuine Curiosity

- a. One person listening and being curious, one person speaking:
  - Why did you become a judge?
  - Has it been all you hoped it would be?
  - What keeps you enthusiastic and fresh faced every day?
- b. Try suggesting answers instead of asking questions—how was that?
- c. Ask each for their experience. Make observations.

#### 4. Paraphrasing

- a. One person in pair interviews the other about their “most difficult, frustrating or enjoyable moment as a judge.”
- b. Interviewer then paraphrases (facts and emotion).
- c. Paraphrase can be right or wrong. Swap and try reversing roles.
- d. Ask each for their experience. Make observations.

#### 5. Normalising statements

- a. One participant interviews the other and asks “what was the most difficult thing you encountered when you began as a judge?”
- b. Interviewer then makes normalising statement as if talking to a new judge during the morning adjournment on a hard day.
- c. Ask each for their experience. Make observations.



## APPENDIX C

### ALBERT MEHRABIAN COMMUNICATION STUDIES

Albert Mehrabian is currently Professor Emeritus of Psychology, UCLA. He is most well known for his publications on the relative importance of verbal and nonverbal messages.

Mehrabian comes to two main conclusions in his studies:

(a) There are basically three elements in any face-to-face communication:

- Words
- Tone of voice
- Nonverbal behaviour

(b) The nonverbal elements are particularly important for communicating feelings and attitude, especially when they are inconsistent (i.e., if words disagree with the tone of voice and nonverbal behaviour); people tend to believe the tonality and nonverbal behaviour.

#### Verbal, Vocal, and Visual

For effective and meaningful communication about emotions, the verbal, vocal, and visual parts of the message need to support each other—they have to be “congruent.” For example:

*Verbal: “I do not have a problem with you!”*

*Nonverbal: person avoids eye-contact, looks anxious, has a closed body language, etc.*

It becomes more likely that the receiver will trust the predominant form of communication, which is non-verbal rather than the literal meaning of the words.

In summary Mehrabian found:

- 7% of a message pertaining to feelings and attitudes is in the words that are spoken.
- 38% of a message pertaining to feelings and attitudes is the way the words are said.
- 55% of a message pertaining to feelings and attitudes is in facial expression.

Mehrabian did not intend the statistic to be used or applied freely to all communications and meaning as they frequently have been. They derived from experiments dealing with communications of feelings and attitudes (i.e., like-dislike) so unless a communicator is talking about their feelings or attitudes, these percentages are not applicable.\*

\* For further information, go to Albert Mehrabian’s website at [www.kaaj.com/psych/](http://www.kaaj.com/psych/).

# JUDICIARY SCHOOL—THE SPANISH APPROACH

BY FELIX V. AZON VILAS\*

## UNIVERSITY ENTRY TO THE JUDICIAL AND PROSECUTION SERVICE

### **Regulatory Framework**

Entry to the judiciary or prosecution service in Spain was previously regulated by legislation. Those entering these services were required to obtain a law degree before they could be permitted to undertake the entry examinations of the Judiciary School or the Public Prosecution Service. Spain has since signed the Bologna Declaration of 19 June 1999, which proposed the creation of a new European Higher Education Area. As a consequence of this, in addition to a legal degree, candidates must now also complete further studies at either the master's or doctorate level.

The master's degree will require students to undertake advanced studies in both theoretical and practical training of a specialised or multidisciplinary nature, geared towards academic or professional specialisation. The master's syllabuses are designed to enable students to obtain the required judicial skills.

### **Nature of the Master's Degree**

The same master's degree enabling entry to the judicial and public prosecution service is commonly held by other legal professionals, including lawyers, court agents, clerks of the court, notaries, registrars, and state attorneys. This provides a uniform orientation to the profession and promotes a shared understanding amongst those who play a role in the administration of justice.

Access to the judicial and public prosecution service is not restricted to those candidates who have obtained a specific master's degree. All those who have obtained a master's degree in legal studies may undertake the public competitive examination, provided that qualification guarantees the acquisition of the required skills outlined below.

The General Council of the Judiciary and the Ministry of Justice determine the qualifying parameters for the public entry examination to the master's degree. These parameters are based on the skills and expertise outlined in this document. They pronounce these entry parameters in the light of suggestions and proposals received from various universities. Some provision for the recognition of master's degrees from universities in other European countries will also need to be considered.

### **Current Status of the Public Competitive Examination**

During the last decade there has been a marked decline in the total number of applicants for the post of judge and public prosecutor and the number of new candidates.

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The total number of applicants has dropped from 5,374 in 2001, to 3,580 in 2008. In the same period, the number of candidates applying for the first time dropped from 1,011 to 728. The total number of candidates has risen slightly in the 2009 and 2010 examinations (with up to 3,676 and 3,779 aspirants, respectively). While the reasons for this decline are numerous and difficult to analyse, it may be prompted by the drop in law graduates, which in turn can be largely attributed to demographic reasons. In 1997 there were 20,773 law graduates, but by 2008 only 9,409 qualified. In 1997 the Spanish population included some 703,034 persons aged 23 years. Since 1997 this population has declined to some 470,362 persons. Over this period, the percentage of recent law graduates sitting the public competitive examination has oscillated at around 5 percent.

The average age of persons approved in the most recent Judiciary School intake has climbed from 29 to 30 years. This reflects an increase in not only the average age of those entering the Judiciary School but also the number of times that candidates have sat the competitive examination. Since 2004, for example, the number of persons passing the examination on their fifth attempt has climbed from 33 percent in 2004 to 53 percent in 2009. This suggests that the preparation time for the examination is well above five and a half years and that a considerable number of candidates pass the examinations having dedicated 10 to 11 years of their time to this endeavour.

At the same time, the number of vacancies that have not been covered has been progressively growing. In 2004, for example, all the vacancies were filled; in 2005, 17 posts (or 8 percent) were left unfilled; and in 2009, 57 (or 1 percent) were left unfilled.

## ACCESS TO THE JUDICIAL AND PUBLIC PROSECUTION SERVICES THROUGH THE CATEGORIES OF JUDGE AND PUBLIC PROSECUTOR

### **Principles Applicable to the Entrance System**

Article 301 of the Organic Law of the Judiciary, taken from art. 103.3 of the Spanish Constitution, states that:

1. Entry to the Judicial Service shall be based on the principles of merit and ability to perform the jurisdictional function.
2. The selection process shall guarantee in an objective and transparent manner equality of entry to said system of all citizens possessing the conditions and skills required, in addition to the suitability and professional sufficiency of the persons selected to perform the judicial function.

The European Charter on the Statute for Judges, drawn up by the Council of Europe in 1998, establishes in matters of selection, recruitment, and initial training of judges that:

The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect to individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority ensures the appropriateness of training programmes and of the organisation 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.

In accordance with the foregoing, we consider that the guiding principles for the design of a good selection system should be:

1. Principle of merit: relating directly to the requirement that the selection process should be objective.
2. Principle of ability, suitability, and professional sufficiency: during the selection process technical knowledge should be assessed, as well as other aptitudes and personal skills.
3. Principle of equal opportunities: which implies not only the prohibition on discrimination (art. 14 EC), but also the development of the conditions required to ensure that this equality is effective in practice (art. 9.2 EC). A number of examples of the application of this principle can be seen in the Organic Law of the Judiciary, which reserves a quota of posts for disabled persons (art. 301.8) and includes an obligation to respect the principle of gender equality (art. 310). The principle of equal opportunities further requires the provision of a system of subsidies and grants for candidates in reduced financial circumstances.
4. Principle of transparency, basically applicable to the selection process.

### **Open Public Competitive Examination**

The competitive examination is a key entry point in the training and selection process of a judge. It is preceded by a period of university education to which a preparatory

phase, specific to the examination, is added. Both stages will be subject to imminent changes. The university education phase will be changed as a result of the new syllabuses required by the implementation in Spain and throughout the European Union of the European Higher Education Area, while the preparatory phase is soon to undergo changes for reasons of convenience.

In effect, it is generally felt that the time dedicated to preparing the public examination (which is on average five years) is excessive, and that this makes the training process too onerous for future judges and public prosecutors.

Additionally, in 2010 the Commission on Demarcation and Planning of the Ministry of Justice recommended the creation of basic or first-instance courts to hear cases of a less complex nature. These would provide for starting positions for those newly appointed to the judicial profession.

The Study Group on Access to the Judicial and Public Prosecution Service of the General Council of the Judiciary has also proposed two measures designed to increase the numbers of those preparing for entry to the services. The first is a reduction in the preparatory phase of the competitive examination, while the second is the provision of professional openings for those who are ultimately unsuccessful in the selection process.

There is also a need for consistency, not only in content but also in form, in the new competitive examination. This will assist in building a greater connection between the legal culture of the university postgraduate, and his or her already acquired mode of approach to it, and the selective system of judges and public prosecutors. Learning to be a judge or a public prosecutor is a career-long task, which is at its most intensive during the initial years of the service. For this reason, subsequent training stages should not be neglected either; the public competitive examination does not lead to entry to the judicial and public prosecution services but instead is followed by an initial training stage, which is also part of the selection process. The competitive examination does not legally qualify a candidate for the discharge of jurisdictional duties, as the Organic Law of the Judiciary requires training to continue before the candidates for judge or public prosecutor commence their duties. In this respect and irrespective of the legal regulation, it would appear clear that the competitive examination as a selective system should verify not only the candidate's skills but also the candidate's ability to acquire new skills, a characteristic that will be necessary not merely during the training period, but throughout his or her career.

### **Requisite Skills**

The competitive examination should be designed to ascertain whether a candidate is able to demonstrate that he or she has sufficient technical expertise, although this should not exclude other abilities at the same time. The skills required at this stage of the selection process are as follows:

1. Technical expertise:

- (a) Sound knowledge of the basic concepts and institutions of the legal system in particular, constitutional law, and European Union civil, penal, and procedural law. This further implies knowledge of positive law, theory and doctrine, case law, and the roles of different institutions and their connection with the general principles of the constitutional system.
- (b) The ability to put that knowledge into practice.
- (c) Capacity for written expression, which is grammatically correct, set out in a comprehensible manner and with legal rigour, ensuring effective communication and the principles of consistency and cohesion in texts, in addition to the capacity to skilfully and dexterously handle computer equipment, in particular word processors and databases.

2. Analytical skills—notably reasoning and synthesis, specifically ability to:

- (a) Understand situations including their essential elements, defining facts and resolving problems logically through a systematic analysis of their component parts.
- (b) Understand a situation overall and resolving problems on the basis of the sum of all its parts.

3. Communications skills—the candidates' ability to express themselves orally and in writing.

4. Personal skills—Knowledge and understanding of the broader social context is also essential.

In 2001 the “State Agreement on the Reform of Justice” proposed that the selection of a judge should be made through:

tests which complement the topics with disciplines which are considered a requisite supplement for discharging judicial duties. The tests should permit an evaluation of the culture, maturity and debating capacity of the candidate.

## **Basic Features of the Public Competitive Examination**

1. Examination venue

The location of the test and the other written exercises should take place at the various High Courts of Justice under the supervision of a single tribunal or panel. All other examinations should be held at the same venue.

## 2. Frequency of official announcements of examinations.

Article 306 of the Organic Law of the Judiciary states that the “The public entrance examination for the Judicial and Public Prosecution Service for the category of Judge and Public Prosecutor shall be announced every two years as a minimum.” This provision needs to be amended to allow for annual examinations, as has been the practice since 1998.

In regard to scheduling, the examination sittings should be sat in September-October over one day or several consecutive days. After sufficient time for the correction of the papers, the oral exercises shall then take place during the months of April and May, with a specific date being assigned for each candidate.

## 3. Number of posts announced and level of coverage

Article 301.4 of the Organic Law of the Judiciary states that:

The official announcement of the competitive examination for entry to the Judicial Service which shall be carried out jointly with that of entry to the Public Prosecution Service shall include all the posts vacant at the time and an additional number which will be sufficient to cover any vacancies which may occur before the next official announcement occurs.

To ensure that all posts that are announced are filled, implementation of this provision will require the establishment of a judicial plan (which is currently under revision) and an organisational chart for staff of the Public Prosecution Ministry adapted to current needs. It will require the number of posts to be announced in the corresponding period to assist the operation of the Judiciary School and the Centre for Legal Studies (CEJ). Finally, it will require the General Council of the Judiciary and the General State Prosecution Service to include a study of the impact of their proposals for purposes of organisational planning.

## 4. Joint official announcements with the Judicial and Public Prosecution Services

The joint public competitive examination system may be adapted as required.

## 5. Limiting the official announcements

All members of the Study Group on Access to the Judicial and Public Prosecution Service of the General Council of the Judiciary are extremely concerned that the average time taken for preparing the competitive examination is over five years, and agreed that steps need to be taken to redress this situation in a self-regulated process.

### **The Tribunal or Panel**

The principles of merit and ability, objectivity and equality, and transparency point to the use of a single tribunal or panel for the selection of judges and public prosecutors. But the current public competitive examination system, with the high number of candidates and the use of non-dedicated panel members who are only able to act in this role in their afternoon session, renders the goal of a single tribunal or panel practically impossible.

When selecting members of a single tribunal, a primary attribute should be technical expertise and knowledge, teaching skills, and motivation in the arduous task of selecting judges and public prosecutors. All the panel members would be appointed on the basis of publicly available and transparent requirements attesting to the skills they have obtained through their professional qualifications.

The tribunal should also comprise members specialised in the subjects with which the examination is concerned.

### **List of Topics**

#### **1. Number of topics**

The list of topics should be rationalised and adapted to the current needs of the jurisdictional task. This process should not, however, be viewed as lowering the level of expert skills required of the future judge or public prosecutor.

A wide knowledge of the law is required, although it is neither necessary nor possible to have a fully encyclopaedic knowledge. Legal databases have rendered the need for an exhaustive detailed knowledge of the law and the changing legal system obsolete. In its place is a need to demonstrate the ability to move within this field with competence. This requires knowledge of the law, institutions, and general principles that govern them, and the skill to apply that knowledge to the case being heard.

#### **2. Essential content and type of topics**

As outlined above, the examination should involve constitutional law, European Union law, civil law, penal law, and procedural law. It is not necessary in the entrance examination to address in-depth those branches of law that are unconnected with the judge's basic skills. In terms of mercantile, administrative, and labour law, only the principles of knowledge of basic institutions will be required. Following entry to the judicial service, the Judiciary School will provide specialised training in these subjects to those who, having been appointed, will be passing to these specialised jurisdictions or bodies.

There is a need to simplify the naming and scope of subjects. Topics that are superfluous or rarely used in practice should be dispensed with. More emphasis should be given to topics relating to the performance of jurisdictional duties, the functions of judges, and public prosecutors. It is therefore necessary to identify the basic topics within each



of the main subjects. Candidates will be required to have an extensive knowledge of these, which at the same time will demonstrate the candidate's knowledge and comprehension of the subjects in general. By way of an example, it is far more important to be familiar with general contracts theory than with the rights and obligations of each typical contract and the special laws regulating them. Similarly, for a judge or public prosecutor at the start of his or her professional career, it is much more useful to have a sound knowledge of the crime of bodily harm than of treason, crimes against peace or state independence, or those crimes relating to national defence.

In short, the contents of this first phase should provide the candidate with a systematic, wide, and extensive knowledge of law and workings of the whole legal system.

## **Tests and Examinations**

### **1. The test**

The test will provide an initial evaluation of the candidate's knowledge, thus facilitating the selection of those who are best prepared to continue the process. The test will take place at the premises of the High Courts of Justice in whose territory there is a sufficient number of candidates, provided that confidentiality in conveying the questions is guaranteed. The result will simply be pass or fail.

The test shall be carried out as follows: a team of anonymous speakers will present the appropriate questions to the tribunal, which will devise the specific exercise. Questions concerned with issues that rarely arise in practice, together with obscure questions and those exclusively concerned with rote learning, will be avoided by those carrying out the selection process. Questions that address fundamental aspects of each subject, and those which require a systematic and reasoned knowledge of the legal system, shall be given priority.

With regard to subject matter, half the questions will be concerned with constitutional law and procedural civil and penal law, and the other half shall be concerned with civil and penal law. In this way the candidate's general knowledge will be initially ascertained. The marking will be computerised to ensure anonymity.

### **2. Written exercises**

In a second testing phase, two written exercises will be performed. The first written test will concern topics specified by the tribunal, it will assess candidates' technical knowledge of law and their conceptual logic. This test will cover basic constitutional law and European law, civil procedural law, and procedural penal law, along with mercantile, administrative, and labour law.

The second written exercise will require candidates to set out how one or various practical cases on civil/procedural civil law and penal/procedural penal law ought to be resolved.

### 3. Oral exercises

These will consist of a “viva,” or presentation, before the tribunal where the candidate must explain various aspects of civil and penal law. The panel may then question the candidate on the topics. The exercise will include questions from the panel to assess the candidate’s comprehension of the subject.

An examination schedule will be designed and each candidate informed of the time and date of the test. If all elements of this examination process are carried out by a single panel or tribunal, it should be possible to examine all the candidates in a period of approximately two or three months. In eight-hour daily sessions, the civil and penal committees may examine around 50 candidates per week, which amounts to approximately 600 in a three-month period.

### **Foreign Language Qualification**

The introduction of this requirement is essential in an international context where relations with neighbouring countries are becoming increasingly frequent. The General Council of the Judiciary and the Ministry of Justice may provide an official qualification to attest knowledge of a foreign language.

### **Psychological Test**

Before entering the Judiciary School or the Centre for Legal Studies, a personality and aptitude test will be administered to ascertain the ability of the candidate to carry out judicial or public prosecution duties.

### **Financial Assistance and Preparatory System**

To ensure equality of opportunity, grants of assistance will be awarded on the basis of the academic performance and needs of candidates.

## RECAPITULATIONS—THE JUDICIARY SCHOOL

In summing-up, the system of judicial entry in Spain requires:

- A. a law degree and a generic master’s degree in law studies as a prerequisite to be eligible to sit the competitive examination;
- B. reduction of average time spent in preparing for the examination; and
- C. rationalisation of the entrance examinations to assess the acquisition of judicial skills.

The entry requirements will be complemented with a period of selective theoretical and practical training in the Judiciary School, designed to consolidate the technical and analytical competence and personal and communications skills outlined above. Competitive selective entry to the Judiciary School will also be maintained.

Entry selection should be carried out either by way of continuous assessment, or through a final examination, which may be totally or partially external in nature.

The introduction of a period of guided practice work, supervised by judges, should also be considered. This would provide candidates with their first practical experience of a court.

# HOW SHOULD UN STANDARDS GUIDE INTERNATIONAL JUDICIAL TRAINING IN POST-CONFLICT SITUATIONS?: PERSONAL REFLECTIONS 20 YEARS AFTER THE RWANDAN GENOCIDE

BY LYAL S. SUNGA\*

The Arab Spring reminds us that ordinary people, coming together, can pull down the mightiest of dictators. Real-time news chronicled key moments of the popular struggles against tyrannical oppression right across the Middle East and North Africa, while social media helped to further focus people power and mobilize women's human rights activists.<sup>1</sup>

Revolutions are inherently risky affairs with destiny, and demonstrations, riots, uprisings, and rebellions do not necessarily guarantee a better future. At least they can brighten prospects for better governance, individual and social justice, and, it is hoped, the promotion and protection of human rights for all. However, such prospects for sustainable human security require serious and concerted efforts at institution building. Otherwise, small concessions or quick fixes that incumbent rulers may offer are bound to disappoint the people, if not exacerbate their resentment. The situation in Egypt illustrates this very well. Peaceful protests began all over the country on 25 January 2011 and quickly provoked the overreaction of security forces and the army, eventually incurring the loss of hundreds of lives. Protests against rising food and living costs and entrenched corruption, and for an end to President Hosni Mubarak's 30 years of one-party rule and state of emergency, ultimately forced his resignation. The Supreme Council of Egyptian Armed Forces took over the reins of government on 11 February 2011.<sup>2</sup> But then protestors had to risk their lives for several more months to pressure the stubbornly intransigent military government into actually setting a date for

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1 See, e.g., *The Role of Social Media in Arab Women's Empowerment*, 1 ARAB SOC. MEDIA REP. (Dubai School of Government), November 2011, at 26; see also Alyson Neel, *Collaboration Among Arab Spring's Women Activists Beneficial, Crucial*, TODAY'S ZAMAN, 20 December 2011.

<sup>2</sup> On 3 August 2011, proceedings in Cairo commenced in Mubarak's criminal trial for premeditated murder and corruption-related offences. *Military Ruler Testifies in Mubarak Trial*; *Hussein Tantawi Testifies in the Trial of Hosni Mubarak as Demonstrators Rally Outside of the Court House* (Aljazeera, 25 September 2011), <http://www.aljazeera.com/news/middleeast/2011/09/201192410551080602.html> (accessed on 4 December 2011).

upcoming elections, moving forward on constitutional change, and taking popular demands for democratic reform more seriously.<sup>3</sup> Mohammed Morsi, leader of the Muslim Brotherhood's Freedom and Justice Party, took power in democratic elections in June 2012, but following months of protests against his inept handling of the economy, and above all, his arrogation of constitutional powers, Egyptian armed forces then ousted his government on 3 July 2013. After the Egyptian people struggled for democracy, they rejected the democratically elected government and supported a new military junta! The unelected military government soon outlawed the Muslim Brotherhood as a terrorist organization on 25 December 2013 and immediately rounded up dozens of Morsi supporters.<sup>4</sup> The new military government imprisoned Morsi and charged him with responsibility for the murder of prison guards committed during a prison breakout in 2011 in which Morsi himself escaped from jail; espionage; conspiracy to commit terrorism; insulting of the judiciary; and fraud.<sup>5</sup> Can the Egyptian judiciary now be trusted to grant Morsi and his supporters fair trials in line with international standards?

The Arab Spring reminds us that in the aftermath of civil war or other major political crisis, the judiciary must reassume its pivotal role in ensuring full respect for the rule of law, including accountability and adjudicative transparency, human rights, and equal access to justice, including for those most vulnerable, preferably sooner than later. Unless the judiciary can meet these responsibilities, and be seen to be meeting them, the chances for peace, confidence, and stability can diminish quickly into a state worse than that seen in prerevolutionary days. Summary "justice" bodes ill for a nation's future, whether it takes the form of assassinations, summary executions, victor's justice, or revenge attacks, all of which undermine the rule of law and signal a continuation of hostilities, rather than progress towards peace and security. The killing of Colonel Qadhafi in Sirte very soon after he surrendered to rebel forces is just one example among many hundreds of extrajudicial, summary, or arbitrary executions perpetrated across the region over the last few years.<sup>6</sup> At the time of writing of this article on 1 May 2014, in postrevolutionary Libya as in Egypt, the independence of the judiciary and the right to fair trial seemed far from assured, particularly with regard to high-profile political cases, such as that of the son of former leader of Libya Muammar

<sup>3</sup> *Cairo's Tahrir Square Fills with Protesters; Tens of Thousands of Protesters Have Rallied in Cairo to Press for Speedier Reforms from the Egyptian Government*, (BBC News, 8 July 2011), <http://www.bbc.co.uk/news/world-middle-east-14075493> (accessed on 4 December 2011).

<sup>4</sup> Richard Spencer, *Three Dead, 265 Arrested, as Muslim Brotherhood Protesters Clash with Police*, THE TELEGRAPH, 27 December 2013, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10539443/Three-dead-265-arrested-as-Muslim-Brotherhood-protesters-clash-with-police.html>

<sup>5</sup> *What's Become of Egypt's Morsi?* (BBC News, 24 March 2014), <http://www.bbc.com/news/world-middle-east-24772806>.

<sup>6</sup> Colonel Qadhafi was captured and killed by rebel forces in Sirte, Libya, on 20 October 2011. See *Muammar Gaddafi Killed as Sirte Falls; Former Libyan Leader Dies as last Bastion Falls, but Questions Remain about the Circumstances of His Death*, (Aljazeera, 20 October 2011), <http://english.aljazeera.net/news/africa/2011/10/20111020111520869621.html> (accessed on 1 March 2012).

Gaddafi, Saif al-Islam, who fled to Niger as the military balance shifted in favour of the rebels. He was captured on 19 November 2011 about 650 kilometres south of Tripoli, and transferred to Zintan, where he remained as of 1 May 2014.<sup>7</sup> On 23 January 2012, Libya announced its intention to try Saif al-Islam, rather than to surrender him to The Hague for ICC prosecution.<sup>8</sup> Many doubted whether he could possibly get a fair trial in Libya.<sup>9</sup>

It is therefore important to consider how UN standards could assist countries to recover from conflict by strengthening democratic governance, human rights, and the rule of law through the judiciary. First, I argue that in many post-conflict situations, the country needs to be supported by a range of transitional justice solutions. Second, reflecting on my personal experiences in the immediate aftermath of the civil war in Rwanda, I underline that international criminal law could be a necessary but insufficient element of the equation to enable the judiciary to resume its key role in promoting justice, the rule of law, human rights, and peace and stability. Finally, I recommend certain substantial normative fields that should guide international judicial training to strengthen democratic governance, human rights, and the rule of law in the post-conflict context.

### TRANSITIONAL JUSTICE AS A NECESSARY BUT INSUFFICIENT MEANS FOR PROMOTING THE RULE OF LAW

In many instances of severe violence or civil war in which ethnic, racial, or religious animosity takes the form of crimes against humanity, war crimes, or even genocide, the judiciary may have been destroyed, as in Rwanda<sup>10</sup> or in Somalia, or it may have been seriously compromised by the executive, as in some of the successor states of the former Yugoslavia.<sup>11</sup> In some countries affected by conflict, such as Libya, Papua New Guinea, Somalia,<sup>12</sup> or Afghanistan,<sup>13</sup> reconstruction and rehabilitation of the formal

<sup>7</sup> Chris Stephen & David Batty, *Saif al-Islam Gaddafi Captured in Libya; Interim Tripoli Government Says Son of Muammar Gaddafi Was Arrested While Attempting to Flee to Neighbouring Niger*, THE GUARDIAN, 19 November 2011, <http://www.theguardian.com/world/2011/nov/19/saif-al-islam-gaddafi-captured>.

<sup>8</sup> Ali Shuaib, Sara Webb, Oliver Holmes & Ben Harding, *Libya Says It, Not ICC, Will Try Gaddafi's Son Saif al-Islam*, Reuters, 23 January 2012.

<sup>9</sup> *Saif al-Islam Gaddafi Transfer for Tripoli Hearing Blocked; the Militia Holding the Son of Late Libyan Leader Muammar Gaddafi, Saif Al-Islam, Has Refused to Transfer Him to the Capital for a Pretrial Hearing*, (BBC News, 19 September 2013), <http://www.bbc.com/news/world-africa-24161544>.

<sup>10</sup> See, e.g., UN Security Council Resolution 997; S/RES/997 of 9 June 1995, paragraph 9 of which encourages all UN member states and donor agencies to support the ICTR and the rehabilitation of Rwanda's justice system.

<sup>11</sup> See Alejandro Chehtman, *Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a "Success Story"*, 9 J. INT'L. CRIM. JUS. 547 (2011).

<sup>12</sup> Historically, Libya, Papua New Guinea, and Somalia have been more reliant on customary or tribal justice systems, which are not necessarily well suited to dealing with mass claims arising from armed conflict. See generally WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES (Erica Harper ed., 2011).

<sup>13</sup> Livingston Armytage, *Justice in Afghanistan—Rebuilding Judicial Competence after the Generation of War*, 67 HEIDELBERG J. INT'L. L. 185 (2007), available at <http://www.centreforjudicialstudies.com/wp-content/uploads/HeidelbergJournalIntLaw.pdf>.

justice system could require even the first-time introduction of current human rights and rule-of-law concepts, norms, and standards.

The enormity of such challenges became painfully obvious to me during my mission with the UN Security Council's Commission of Experts on Rwanda to the country in October 1994, a few months after the civil war had ended, in which between five hundred thousand and one million Tutsi and politically moderate Hutu civilians were slaughtered in a premeditated, preplanned, deliberate, and systematic genocide. Rwandan society had been torn apart while the UN and international community failed to prevent the genocide. During the critical moments in April 1994, when the plans to eliminate the entire Tutsi minority were put into horrific action, instead of rapidly increasing its peacekeeping mission strength in Kigali and authorizing it with a robust mandate to protect the civilians about to be slaughtered, the UN Assistance Mission in Rwanda was suddenly reduced, playing right into the hands of the *génocidaires* and costing the UN considerable credibility in the process.<sup>14</sup> I vividly recall General Paul Kagame's remark during the commission's meeting with him: "I hope you can understand that we in Rwanda have learnt not to expect too much from the UN." The Security Council mandated the Commission of Experts on Rwanda to find ways to bring criminal justice to the country and to help fill the immense institutional void in justice capacity.

Once Kagame's Rwandan Patriotic Front managed to halt the genocide, secure effective control over Rwanda, and install a new government, it became clear that insisting on the immediate holding of democratic elections would have been entirely reckless on the part of the international community. Democratic elections most likely would have brought the Hutu majority back to power and, quite possibly, could have also re-empowered the extremists to exterminate the Tutsi minority, which, before the genocide, comprised around 14 percent of the Rwandan population. Democratic elections could not provide any magic solution in post-conflict Rwanda.

The government of Rwanda wisely accepted the assistance of the UN High Commissioner for Refugees, the UN Development Programme, the United Nations Children's Fund, and other UN humanitarian agencies to help stabilize the country.<sup>15</sup> It also welcomed the establishment, by the UN Office of the High Commissioner for Human Rights in early autumn of 1994, of the Human Rights Field Operation in Rwanda, which reached a maximum strength of 168 human rights field officers deployed throughout Rwanda to monitor, investigate, and report on past violations,

<sup>14</sup> See *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257 (16 December 1999), which incisively chronicles the series of failures on the part of the entire UN system to prevent or halt the genocide in Rwanda.

<sup>15</sup> See, e.g., UN General Assembly Resolution 49/23 on Emergency International Assistance for a Solution to the Problem of Refugees, the Restoration of Total Peace, Reconstruction and Socio-Economic Development in War-Stricken Rwanda, A/RES/49/23 (22 December 1994).

including genocide; monitor ongoing violations; assist in the return of IDPs and refugees to their home communes; and provide the government with human rights technical cooperation.<sup>16</sup>

General Kagame's new Tutsi-dominated government showed every intention to prosecute the perpetrators of the genocide and associated violations, but the country's judiciary had been completely demolished. Eighty percent of judges and lawyers had been deliberately targeted and killed, and judicial premises throughout Rwanda had been smashed. What to do with the thousands of genocide suspects who were herded into severely overcrowded penitentiaries, prisons, and local detention centres? The problem was that in almost all cases, there were no dossiers even documenting grounds for arrest, let alone providing justification for continued detention. If the government were to follow international fair trial standards, it would have had to release almost all detainees immediately, but that could have endangered post-conflict Rwandan security by releasing perpetrators alongside individuals who had no blood on their hands. In November 1994 Rwanda voted against the Security Council resolution establishing the Tribunal, but the Government knew it had to support enforcement of international criminal law for the violations, since it was itself incapable of prosecuting the *génocidaires*.<sup>17</sup> So thousands of suspects rotted for many years in Rwandan jails without the benefit of any legal process in dangerously overcrowded and severely unhygienic conditions, since the government, although determined to prosecute, was incapable of doing so, and the ICTR could not, and in fact never did, fill the gap.<sup>18</sup> It was not until 2005 that the Rwandan customary gacaca system was up and running in a way that could administer justice with respect to thousands of genocide suspects, and one could only hope, perhaps naively, that such trials preserved the presumption of innocence and honoured other international fair-trial standards.<sup>19</sup>

It was clear from the outset that ICTR prosecutions could only ever provide a small, though important, part of the longer-term solution for moving beyond the ruin

<sup>16</sup> See *Report of the High Commissioner for Human Rights on the Activities of the Human Rights Field Operation in Rwanda, Submitted Pursuant to General Assembly Resolution 50/200, E/CN.4/1996/111* (2 April 1996).

<sup>17</sup> Rwanda happened to be sitting in the Security Council as a non-permanent member at the time Security Council Resolution 955 was adopted by 13 votes in favour, 1 vote against (Rwanda), and 1 abstention (China). The Government of Rwanda welcomed the establishment of the Tribunal, but disagreed with its temporal competence (from 1 January to 31 December 1994) as being too limited, the lack of capital punishment as a possible sentencing option, and certain other matters relating to procedure and competence. See, further, Lyal S. Sunga, *The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda: A Note*, 16 HUM. RTS. L. J. 121 (1995); and Lyal S. Sunga, *The First Indictments of the International Criminal Tribunal for Rwanda*, 18 HUM. RTS. L. J. 329 (1997). See, further, VIRGINIA MORRIS AND MICHAEL P. SCHARE, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (Transnational Publishers 1995) (2 volumes).

<sup>18</sup> See *Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative, Mr. Michel Moussalli, Pursuant to Resolution 1998/69, E/CN.4/1999/33* (8 February 1999), which refers to the difficulties in ensuring fair and expeditious justice in post-conflict Rwanda and the deplorable conditions of detention for those awaiting trial.

<sup>19</sup> *The Justice and Reconciliation Process in Rwanda*, UN Background Note, at <http://www.un.org/en/preventgenocide/rwanda/pdf/Backgrounder%20Justice%202014.pdf>.



and despair of armed conflict towards a brighter future. Ultimately, the Rwanda judiciary would have to take over the trials from the ICTR, and this process began to pick up in 2009, as the ICTR implemented its completion strategy and transferred some of its cases to Rwanda. Thus, international criminal justice plays a critical role in fighting impunity where the domestic legal system has failed. However, in Rwanda, international criminal trials were terribly few in comparison to the large number of perpetrators evidently implicated in the atrocities. By 1 May 2014, the ICTR had completed only 44 cases; there were four cases in progress and four cases transferred to Rwanda's domestic jurisdiction for trial.<sup>20</sup> The ICTR's budget for 2010-11 was around USD ¼ billion.

Similar stories played out with regard to trials relating to crimes committed in the successor states of the former Yugoslavia. The International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted a number of high-level officials, including Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic, as well as lower-level commanders and even camp guards and militia. However, ICTY prosecutions also have been relatively few, although more numerous than those of the ICTR: by 1 May 2014, the ICTY had concluded proceedings with respect to 141 accused.<sup>21</sup>

The experience of the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia, and of tribunals mixing international and domestic law, for example, the Special Court for Sierra Leone,<sup>22</sup> the Special Tribunal for Lebanon,<sup>23</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>24</sup> and even that of the permanent International Criminal Court, shows that international and internationalized criminal justice can be a necessary but insufficient condition by which to resurrect justice in post-conflict societies. International criminal justice can be useful, even essential, as a

<sup>20</sup> See the ICTR website at <http://www.unictr.org/Cases/tabid/77/Default.aspx?id=4&mnid=4> (accessed on 1 May 2014). See also the *Sixteenth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, A/66/209–S/2011/472 (29 July 2012), which explains the ICTR's current status of cases, activities, and completion strategy.

<sup>21</sup> See <http://www.icty.org/sections/TheCases/KeyFiguresoftheCases> (accessed on 1 May 2014). See *Eighteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, A/66/210, S/2011/473 (31 July 2011), which explains the ICTY's current status of cases, activities, and completion strategy.

<sup>22</sup> The Special Court for Sierra Leone was established jointly by the United Nations and the Government of Sierra Leone to enforce responsibility for serious violations of international humanitarian law and the law of Sierra Leone committed in Sierra Leone since 30 November 1996.

<sup>23</sup> The Special Tribunal for Lebanon was established to enforce individual criminal responsibility with regard to the attack of 14 February 2005, which killed the former prime minister of Lebanon, Rafiq Hariri, in Beirut and 22 other people.

<sup>24</sup> The Extraordinary Chambers in the Courts of Cambodia was set up to try former senior Khmer Rouge officials for crimes under international law, including genocide, and crimes against humanity and violations of the Cambodian criminal code committed in Cambodia between during the Khmer Rouge regime, which held power between 17 April 1975 and 7 January 1979.

transitional measure, but it only sets a path for justice, which the domestic authorities themselves eventually have to navigate. Transitional justice, therefore, forms an essential part of a more comprehensive post-conflict UN strategy, which has to fully recognize the role of domestic courts and other dispute resolution mechanisms to enforce criminal law and reestablish the rule of law in line with relevant international standards, principles, and norms. International criminal justice and transitional justice mechanisms in post-conflict situations have to complement and support domestic formal and informal judicial mechanisms in line with international human rights standards, not least to prevent the post-conflict judicial regime from becoming an instrument of injustice and oppression.

### ESSENTIAL NORMATIVE ELEMENTS FOR INTERNATIONAL JUDICIAL TRAINING IN POST-CONFLICT SITUATIONS

Where conflict has destroyed a country's justice system or turned it into an instrument of oppression and injustice, the route to reestablishing fair and effective justice that honours rather than undermines human rights and the rule of law can be extremely difficult without international assistance. The collapse of state institutions including the judiciary can be so severe that lawlessness pervades the territory for decades, such as in most of Somalia since the end of the Siad Barre regime (1969-91), which itself had systematically perpetrated serious human rights violations throughout the country. In some instances, entire territories within a state may be devoid of the rule of law, or subject to tribal or clan rules that completely disregard or actively violate the human rights of women, children, and certain ethnic minorities, or violate other human rights. In parts of Afghanistan, Pakistan, and the Democratic Republic of Congo, even the police and army fear to tread. The former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Lebanon, and some of the countries shaken up by the Arab Spring demonstrate the complexity and enormity of post-conflict justice long after the initially traumatic events. These examples underscore the imperative for imaginative solutions through which the international community can work with the government or territorial authority to restore the rule of law in ways that respond well to specific circumstances and local conditions, culture, and political sensitivities of the particular country at hand, and which also meet all international standards relating to the administration of justice.

The point is that international assistance remains necessary but insufficient to help countries establish or reestablish the rule of law at the post-conflict stage. On the one hand, the challenge of rendering justice in post-conflict situations simply does not permit judges and lawyers to ignore the past or pretend that the conflict that has torn their country apart never existed at all. Claims relating to restitution of unlawfully confiscated or stolen property, torture, rape, murder, unlawful detention, and so many other kinds of disputes relating to war, impunity, and systematic human rights violations cannot be fairly adjudicated without reference to the context in which they

arose. The requirements of impartiality, independence, and objectivity demand that justice should be rendered on an equal and nondiscriminatory basis. It is therefore unrealistic, and probably undesirable, to expect the judiciary to be completely blind or oblivious to the history of the conflict or the social and political context in which violations occurred. On the other hand, particularly in situations where ethnic conflict has pitted individuals and groups against one another, the level of distrust and cynicism in state institutions, including the judiciary, is likely to be very high. Judges and lawyers therefore must reach for the highest standard to protect the judiciary from any sort of bias or perceptions of bias. That in turn requires that, as soon as conditions of peace and security permit, the vision of national judges and lawyers in post-conflict countries must be broadened to encompass internationally recognized rule-of-law solutions and appropriate transitional arrangements, in particular, through international judicial training that focuses on the following.

### **Political Arrangements and Peace Agreements**

Judges in post-conflict situations should take full account of any transitional arrangements that may have been installed in the country so as to minimize conflict with the spirit of such agreements. Accordingly, judges need to become well informed about any treaty arrangements or peace agreements that form part of the political context in which the judiciary has to render justice.

### **Transitional Justice Mechanisms**

Judges need to be trained on the relationship between national truth and reconciliation commissions that might have been established on the one hand, and criminal prosecutions on the other, whether international or domestic, to maximize adjudicative harmony within post-conflict justice and reconciliation.<sup>25</sup>

### **Relationship between International and Domestic Law as a Constitutional Matter**

Judges must understand that international law creates obligations binding on the state and that they are under an obligation to apply international law. In many jurisdictions, judges fail to apply international law in cases before them out of sheer ignorance of the applicable norms. They therefore miss opportunities to dispense justice in line with the rest of the world's best practices.

### **Transnational Criminal Law and Mutual Interstate Cooperation in Criminal Matters**

Judges in a country where serious human rights violations have been perpetrated might have to rule on requests for extradition and arrest warrants or subpoenas in connection with the prosecution of suspected perpetrators who may have fled to other countries. Particularly in post-conflict situations, judges should be made aware of the

<sup>25</sup> See, further, Lyal S. Sunga, *Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions*, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT* 1075 (José Doria, Hans-Peter Gasser & M. Cherif Bassiouni eds., 2009).

web of bilateral and multilateral agreements that facilitate interstate cooperation in criminal matters across national frontiers.

### **International Criminal Law**

Judges should keep up-to-date on the main developments in international-criminal-law jurisprudence. This would help them adjudicate cases in line with current definitions of crimes under international law and reflect evolving principles and norms. Knowledge of the purpose and operation of international criminal law is particularly important where the International Criminal Court or other international or internationalized justice mechanism may be functioning in the country.

### **International and Regional Human Rights Law**

The international right to fair trial provided in Article 14 of the International Covenant on Civil and Political Rights, 1966, forms a fundamental part of customary international law, and is also very likely part of the corpus of rights from which no derogation is permitted, even in time of public emergency, such as war.<sup>26</sup> Judges should therefore apply international and regional fair trial norms and standards and, indeed, all other international and regional legal norms pertaining to their work. In this regard, UN human rights treaty body recommendations and general comments offer considerable guidance relating to the administration of justice, as do many UN guidelines and best practices, including those set out in the UN Office of Drugs and Crime's *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*.<sup>27</sup>

### **International Humanitarian Law and International Refugee Law**

Judges should become more familiar with the main normative principles and application of international humanitarian and refugee law so as to be able to recognize these kinds of issues if they arise in cases coming before them. In this connection, the commentaries produced by the International Committee of the Red Cross may be very useful,<sup>28</sup> as well as the practice of the UN High Commissioner for Refugees.<sup>29</sup>

<sup>26</sup> See UN Human Rights Committee General Comment No. 5 on Derogation of Rights, Article 4 of the International Covenant on Civil and Political Rights, 1966 (31 July 1981).

<sup>27</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, *COMPENDIUM OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE* (2006), at <http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html> (accessed on 1 March 2012).

<sup>28</sup> See, e.g., Commentary on Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva (12 August 1949).

<sup>29</sup> See *refworld*, the UNHCR's refugee-law database, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain> (accessed on 1 March 2012).

# JUDICIAL TRAINING IN AN INTERDEPENDENT WORLD: GUIDELINES FOR BEST PRACTICE IN THE USE OF COMPARATIVE LAW

BY KAREN ELTIS\*

The purpose of this article is to focus on the question of “best practices” as it pertains to judicial training, in light of cross-border normative migration. More specifically, this article endeavors to highlight the importance of developing basic guidelines in the judicial-training context, with an eye towards promoting a more coherent, systematic use of comparative sources.

The goal here, it is worth repeating, is to frame the use of comparative sources, when judges elect to use them (rather than to prescribe their use) to help avoid decontextualization and misuse when foreign precedent is cited. Plainly put, when courts do choose to examine or cite foreign precedent (as they increasingly do) it should be done in a manner that fosters coherence, rather than in an anecdotal fashion or one that imports other problems inadvertently.<sup>1</sup> This is all the more true in times of “crisis,” as shall be further discussed.

## THE REALITY OF TRANS-SYSTEMIC LAW AND JUDICIAL TRAINING

Constitutional cross-pollination is on the rise. Judges are increasingly conversing, most notably with respect to their role as guardians of justice and democracy. This global judicial dialogue is particularly illuminating with regard to matters of transnational apprehension, not least among which is the ability to vigorously defend human rights while repelling the scourge of terrorism. Significantly, these matters involve the recurrent use of foreign precedent by courts seized with security-related matters.

Pragmatically, judges are drawn to comparative inquiry in the face of domestic law’s insufficiency in times of crisis. That is to say, in the absence of requisite solutions to novel problems, foreign perspectives can supply courts with the analytical tools needed for addressing urgent, unchartered problems. This is all the more true when there are several jurisdictions facing the same or similar predicaments, and in times of crisis, as is the case with issues of counterterrorism or the “clash of titans,” as Justice Binnie of the Supreme Court of Canada so aptly named it.

*Inter alia*, the “migration of ideas” is prominently evidenced by the House of Lords’ landmark decision respecting the detention of suspected terrorists without bail

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<sup>1</sup> For a more in-depth discussion on judicial use of comparative sources, including “implicit borrowing” see K. Eltis and J.F. Gaudreault-Desbiens, “Implicit Comparativism at the Supreme Court of Canada,” in Canadian national report on the use of foreign sources in constitutional law cases, International Academy of Comparative Law Conference, Vienna 2014 (forthcoming; on file with author).

that specifically draws on Canada's Oakes test. It is similarly prevalent in Canada itself, where judges hitherto unaccustomed to counterterrorist adjudication increasingly draw on foreign precedent. Although certainly not immune from criticism, pointing to a similar path taken by experienced courts in comparable jurisdictions can serve to shore up public confidence in the judiciary—to "bolster the credibility of a particular argument simply by highlighting that the same *reasoning* has been adopted by judges or courts whose decisions we respect."<sup>2</sup> Confidence that is all the more crucial in times of crisis, particularly in the national-security context, where debate tends to be stifled for fear of appearing "unpatriotic" and courts—even individual judges—are scapegoated and attacked as "activist."

As Chief Justice Lutfy of the Federal Court of Canada observed, "much of our system has been challenged by the age of terrorism." There is therefore strength and credence to be found in trans-judicial unison. For our purposes, *judicial training* and its methods must endeavor to reflect that reality, via international solidarity and cooperation. The benefits of sharing experience as a judicial tool risk otherwise being undermined by their ad hoc use or even misuse.<sup>3</sup>

It therefore stands to reason that in an age of legal "cross-fertilization," judicial education should inform a more principled approach to the use of comparative experience and to counter its recurring misuse. It should strive to develop practical guidelines that courts reviewing security matters in particular can draw upon in advance of possible crises to circumscribe error and enhance coherence when foreign precedent is cited (rather than to prescribe borrowing per se).

Accordingly, the following speaks to the practical steps that judicial education programs might consider taking to address the challenges associated with judging in an "age of terrorism," and the "cross-fertilization of ideas." In a word, it is an invitation to develop and further refine training programs sparking, enabling, and facilitating transnational judicial dialogue, in a more consistent, structured, and systematic fashion. Programs that "expan[d] the pool of knowledge and experience available to judges, foster dialogue, and offer a diversity of perspectives that strengthens judicial reasoning and decision making"<sup>4</sup> in this context and in times of "crisis." Programs that

<sup>2</sup> See, e.g., Lisa Sofio, *Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation*, 30 HASTINGS INT'L & COMP L. REV. 131, 138 (2006): "Terrorism is an international problem and other countries have labored over how best to fight it while still guaranteeing civil liberties. Foreign experiences with anti-terrorism laws may be . . . useful."

<sup>3</sup> Examples of misuse abound. See, e.g., Justice Breyer's arguable misuse of Swiss precedent and subsequent attacks by Justice Scalia and other broad brush critics of comparativism in, for example, *Printz v. United States*, 521 US 898 (1997). As NYU professor Rick Hills notes, "European central governments have had a monopoly on the implementation of central directives. . . . The difficulty with extending this analogy to the United States is that Congress has the option of sidestepping the states and using a purely federal bureaucracy if the states do not implement federal law exactly according to federal specifications. Being commandeered without any monopoly on implementation is no power at all." See Rick Hills, *Is Breyer's Pro-Commandeering Argument in Printz the Worst Comparative Constitutional Law Ever?*, PRAWFSBLAWG (Sept. 9, 2008, 8:32 AM), <http://prawfsblawg.blogs.com>.

<sup>4</sup> Quoting National Judicial Institute website.

might, ultimately, consider assembling purely voluntary guidelines for judges engaging in comparative practices.

## A WORD ON METHODOLOGY

At this juncture, and to avoid any confusion that terms such as “guidelines” might occasion, a point of clarification: since the primary objective is to provide context (rather than to suggest a “one-size-fits-all” approach), this paper fits more closely into what Sujit Choudhry, discussing the methodology of comparative law, calls the “Dialogical” approach.<sup>5</sup> This is to say that comparative case law is deployed to stimulate self-reflection or insight. In Choudhry’s words “comparative materials are not asserted to be true or right; rather, they reflect a particular way of articulating underlying values and assumptions. Moreover, comparative materials are neither valid nor authoritative in the positivist sense. They need only be authoritative and valid for the system which is the source of comparative insight. . . . In dialogical interpretation courts [might] identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions. Through a process of interpretive self-reflection, courts may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant the use of comparative law. Conversely, courts may conclude that comparative jurisprudence has emerged from a fundamentally different constitutional order; this realization may sharpen an awareness of constitutional difference or distinctiveness. Dialogical interpretation appears to make no normative claims; it is more a legal technique than a theory of legal interpretation.”<sup>6</sup>

## ESTABLISHING VOLUNTARY GUIDELINES FOR THE USE (AND TO CURB THE MISUSE) OF COMPARATIVE LAW

More concretely and as noted, judicial-training professionals and institutions might—through international cooperation (much of which is already in place)—consider assembling and publishing a guide for the use of foreign precedent. Again, such a guide (or restatement) would in no way be binding (and will in no way commit judges to the actual use of foreign precedent), but it will instead endeavor to allow them to do so in a more systematic and informed manner when they so choose.

<sup>5</sup> Sujit Chodhoury, *Globalization in Search of Justification: A Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819, 825-26 (1999). See also, Gunter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L. J. 411 (1985); and MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 142 (1987). “Comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems.”

<sup>6</sup> Chodhoury, *supra* note 5, at 825-26. See also Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).



In other words, the idea would be to set forth guidelines, gleaming best practices and pertinent modes of analysis respecting the judicial use of comparative law. These modes primarily seek to reduce the sort of misuse that gives comparativism a “bad name”<sup>7</sup> and impinges on judicial legitimacy, mindful of both the tremendous benefits and hidden pitfalls of comparative inquiry, particularly in terms of the coherence of national systems.

An approach such as this, it stands to reason, can help serve to sustain and bolster judicial legitimacy in an era where many courts, particularly those using foreign precedent, find themselves in precarious positions, scrutinized and at times scapegoated by the media, politicians, and the public.

Although by no means a panacea, establishing voluntary guidelines by way of judicial training will at the very least constitute a valuable tool for curbing the ad hoc, faddish and erroneous use of foreign precedent that eventually risks bringing the practice of comparatism, judges, and justice into disrepute.

Countless times members of the judiciary have stressed the importance of public confidence as a *sine qua non* for the justice system’s functioning and for upholding the rule of law. That principle does not exclusively hinge on the judges’ own integrity and competence but also on the perception thereof.

In consequence and mindful of the dangers of improper use of comparative inquiry, the preceding sought to stress the need for *framing* international judicial dialogue, often involving the use of foreign sources.

## A FINAL WORD

Transjudicial cooperation and comparativism are constructive, increasingly popular, if not requisite, tools for domestic courts that have come to assume a central role in “international” counterterrorism policy making. Judicial education can valuably serve to guide and facilitate this process, thereby shoring up courts’ legitimacy and the rule of law at a time when it is most needed worldwide.

<sup>7</sup> As U.S. Chief Justice Roberts once remarked: “[With f]oreign law you can find anything you want. If you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They’re there.” Adam Liptak, *The Court at a Crossroads*, COLUM. L. SCH. MAG., winter 2009, available at <http://www.law.columbia.edu/magazine/1873/The%20Court%20at%20a%20Crossroads?layout=magazine.print>.



# WORLD BANK SUPPORT FOR JUDICIAL SYSTEMS SERVING GOOD GOVERNANCE

BY ANNE-MARIE LEROY\*

This article carries two messages. The first seeks to eliminate any ambiguity about our role in helping increase awareness—as necessary—of the World Bank's work and the framework within which our teams view the role of justice systems in states' governance reform efforts as being critical: "a judicial system serving good governance." The second message is an invitation for us to come together—judicial-training institutes on one hand, teams of experts on the other—to strengthen the role of justice systems in states' governance reform policies, because the resources needed for good governance are also desirable for justice.

Let me start by proposing that we all agree with the apparently simple idea that the quality of the judicial system is an essential factor in a country's development policy. And even though the details of the causal relationship between the two may be difficult to define (a debate we will happily leave to the economists),<sup>1</sup> the fact remains that people all over the world aspire to live in a just society, one in which power—regardless of its form—is not exercised arbitrarily, where the most basic rights are known and respected by all.

Justice institutions of all kinds<sup>2</sup> are therefore faced with the difficult task of transforming these aspirations into a political, economic, and social reality for every individual, given these individuals' level of participation in the economic and social life of their community hinges on this singular promise of the rule of law. Thus, justice systems generally have three essential functions:

- (a) *Prevent and manage the resolution of all types of conflict, violence, and crime, the recurrence of which the justice system endeavors to prevent.*

The 2011 World Development Report<sup>3</sup> also clearly highlights the role accorded to justice in halting the spiral of conflict, violence, and crime, and recent analyses by economists suggest a direct and strong correlation between the rule of law and a country's growth.<sup>4</sup>

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<sup>1</sup> We can cite contributions from Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); Daniel Kaufman, Aart Kraay, and Pablo Zoido, "Governance Matters," World Bank Policy Research Working Paper no. 2196; Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009).

<sup>2</sup> The World Bank's definition of "judicial system" broadly includes "the institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behavior; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions," Dory Reiling, Linn Hammergren, and Adrian Di Giovanni, *Justice Sector Assessments: A Handbook* (World Bank Legal Vice-Presidency, 2007).

<sup>3</sup> World Development Report 2011, "Conflict, Security, and Development," World Bank

<sup>4</sup> See, for example, Stephan Haggard and Lydia Tiede, "The Rule of Law and Economic Growth: Where Are We?," *World Development* 39 (2011): 673-85.

- (b) *Ensure that institutions are accountable to the public for whom and on behalf of whom they are created.*

In their mediation capacities and through their prosecutorial and sentencing bodies, justice institutions must be able to prevent arbitrary decision making and discourage the elite capture of public resources.

- (c) *Inspire trust and all the security necessary for the development of the private-sector economy.*

Through the promotion of equitable, predictable, and effective regulations in the local and national business environment, as well as for regional and international trade. In this area as well there is no shortage of work by economists.<sup>5</sup>

In light of these observations, how can we, in our capacity as legal experts and professionals at these institutions, respond to this threefold challenge facing justice systems and their reform?

Good intentions in this area are commensurate with expectations. The idea of development based on the rule of law is as appealing in theory as it is difficult to implement in practice and there has been a fair amount of criticism—rightly or wrongly—leveled at us by citizens. The challenge is indeed a daunting one, and some have criticized our inability to keep promises related to the rule of law and justice as a vector of development. The performance of institutions continues to vary across countries and across regions within the same country. In the face of such disparities, which we are struggling to overcome, access to justice is weakened, and good governance is seriously compromised. Whenever, owing to the lack of an impartial investigation, a fair and predictable application of the law is absent from the prosecution and sentencing process, whenever the cost of conflict resolution is directly proportional to the level of corruption of the institutions, it is the “good governance” of this country that is found wanting and a finger pointed at its judicial system.

Is the judge the custodian of promises?<sup>6</sup> Philosophy teaches us that justice is a complex aspiration, and political science that its quality can always be enhanced. And even when the obligation is an impossible one,<sup>7</sup> we must support peoples’ demands with respect to judicial systems, while simultaneously ensuring that we provide these systems with the necessary tools for their transformation, because operating behind the idea that everyone can obtain justice are real institutions.

<sup>5</sup> See, for example, IFC and IBRD, “Financial Infrastructure: Building Access through Transparent and Stable Financial Systems” (2009).

<sup>6</sup> See Antoine Garapon, *Le gardien des promesses—Justice et démocratie* (Odile Jacob, Coll. Sciences humaines, 1996).

<sup>7</sup> See the introduction by Marie-Anne Frison-Roche in *La justice. L’obligation impossible*, Editions Autrement, Série Morale no. 16 (1994).

The World Bank, as an international financial institution dedicated to the development of its member countries (and clients), became aware of the need to work on the quality of the law and justice institutions some 20 years ago.<sup>8</sup> Since then, it has supported a number of projects key to improving governance (particularly in Latin America and Eastern Europe). This effort has been expanded in this past decade and now encompasses all continents,<sup>9</sup> to the extent permitted by the Bank's mandate (the founding treaty signed at Bretton Woods), its available funds, and the requests submitted by countries. All the institutions of the World Bank Group—the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA, for the poorest countries), the International Finance Corporation (IFC, responsible for private-sector projects), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID)—work together to promote the rule of law and justice as catalysts of an enabling environment for economic investment, growth, and poverty reduction.

Since 1994, the World Bank has invested US\$850 million in 36 projects supporting the justice sector in countries that have submitted requests for this support. These projects represent such diverse investments as improvement of case management systems; training of judicial personnel; financing of legal aid; improvement of access to justice; alternatives to a trial, such as mediation; and the construction or renovation of judicial infrastructure. Between 2005 and 2010, lending amounting to approximately US\$335 million per year was provided for broader support activities for development to finance operations as varied as facilitating access to justice institutions for firms in Guinea-Bissau; developing points of access to the legal system in Benin; and improving the land tenure-system in Peru. Loans are made available to states, in addition to grants and analytical and advisory activities conducted by World Bank teams. The Bank is now sought after for its rich human capital (as a “knowledge Bank”) and not just for its financial capital. It is the wealth of diverse skills within our teams that allows the World Bank to support the development of mobile courts in the Philippines, which enables judges to have access to the most remote island communities; to help the judicial authorities in Venezuela reduce the case management time for civil matters by 20 to 70 percent, depending on the case type; and to help Sierra Leone rebuild institutions known as “Timap,” which are tasked with hearing and resolving conflicts, thus breaking the cycle of civil unrest in which they had become entrenched.

## WORLD BANK SUPPORT FOR LAW AND JUSTICE

These are but a few examples that nonetheless illustrate well what World Bank expertise in “law and justice” currently covers:

<sup>8</sup> See Ibrahim F. Shihata, “Judicial Reform in Developing Countries and the Role of the World Bank” (1993).

<sup>9</sup> For an overview of relevant themes and countries, see *Initiatives in Justice Reform* (World Bank Legal Vice Presidency, 2009).

- (a) *Support to formal justice institutions*: a particularly broad range of analytical and intervention activities from a thematic and geographical perspective that can harness the diverse skills of professionals from the courts and tribunals of different countries, public-sector-reform specialists in general, and social and human development experts; particular attention is accorded to fragile and post-conflict states, which are witnessing the emergence of dedicated research, and operational teams with-in the Bank are responsive to the specificities of the countries in which the institutions, in particular the justice institutions, are the most ill-equipped. I will call this area of expertise “*support to formal justice institutions*”: courts and tribunals, their alternatives, specialized agencies, policies, and all the professions and functions that revolve around the courts and tribunals.
- (b) *Support to diverse justice institutions*: The second feature of World Bank expertise is perfectly illustrated by the “Justice for the Poor” program administered by the Legal Vice Presidency.<sup>10</sup> Along with formal justice institutions, it takes into account the plethora of customary law systems and *informal justice institutions*, as well as the need to extend access to legal systems to all sectors of society. The study of male-female relationships, differences between the city and the countryside, and the exploitation of agricultural land or regulation of revenue from the extractive industry are just a few of the examples that I could cite. Thus, the “Justice for the Poor” program, targeting countries struggling to achieve the Millennium Development Goals, adopts a bottom-up societal approach that, ideally, must be able to establish a link with more conventional form, for formal justice institutions. This area of expertise, which is expected to be expanded from Asia—where it has historically been deployed thanks to funding from AusAID, the Australian Government’s development agency to Africa, is clearly an additional challenge for the Bank, which could be content with promoting solutions to improve the performance of formal institutions. However, if the missing link between poverty and growth is, as economists suggest, legal security that fosters investment and individual initiative in society, then it is indeed the entire society that must embrace the idea of justice and not just a few institutions whose operations can be more or less modeled in an abstract sense.

This last comment prompts me to expand on a number of the effective resolutions adopted by the World Bank Board recently, and other in-depth discussions that we continue to have internally, with a view to improving our work and the impact of our actions on our clients’ and beneficiaries’ projects.

<sup>10</sup> For information on this program, visit the website at [www.worldbank.org/justiceforthe poor](http://www.worldbank.org/justiceforthe poor).

## WHAT IS A JUDICIAL SYSTEM SERVING IN GOOD GOVERNANCE?

A judicial system serving good governance, today, for the World Bank, entails:

- (a) Prioritizing case studies over an exclusively sectoral approach. If there is a single definition of good governance, judicial systems themselves are composite realities (political, economic, and social) whose presumed weaknesses have multiple and singular origins. Judicial systems must be able to be diagnosed in their environment and not for their own sole objective of improving their efficiency, which is only one of several steps required for the establishment of good governance.
- (b) Recognizing the inherent risk in reforming complex institutions such as justice institutions, the challenge of establishing with certainty the success of one policy in itself and of its effects on the entire system, and of developing the appropriate instruments to measure and monitor the impact of justice policies.
- (c) Enhancing the eligibility of the criminal justice and security sectors for the mobilization of World Bank funds, and making it a specific area of expertise, to include all justice institutions in the governance reform effort.
- (d) Proposing to clients and beneficiaries an easily identifiable point of access and reference on judicial issues, giving access to the currently dispersed ensemble of World Bank expertise separated into regions and thematic networks to meet its administrative organization needs. If the judicial system is serving good governance, the World Bank must in turn be able to make justice systems accessible.

To tackle this challenge in an organization of almost 10,000 people around the world, the Legal Vice Presidency intends to lead by example and has already launched a number of initiatives.<sup>11</sup> Our team of legal experts in Washington comprises a group of justice reform specialists hailing from diverse backgrounds. These specialists are working on the formulation of a “reference group,” hand in hand with all the World Bank professionals who, directly or from afar, contribute to development policies based on justice, whether these individuals are based in Washington or in our regional and national country offices.

On a subject that concerns you directly, our group of justice specialists initiated a review of our methods and competencies where, in the context of a specific operation, we support the establishment of training activities for judicial personnel and partners, and no direct support is provided to existing judicial-training institutes. This review, which has a mobilizing effect well beyond our team of legal experts in the

<sup>11</sup> See “Strengthening the Role of Law to Respond to the Needs and Challenges of the Bank in a Changing World—The Road Ahead for the Legal Vice-Presidency,” World Bank (2010).

regions and thematic teams, seeks to initiate reflection on how to address the issue of training and support for training institutions as a tool to support reforms, an indispensable tool for ownership.

There is no doubt that we cannot be content with simple internal deliberations, regardless of the quality of our specialists, some of whom have experience in institutions like yours. I believe such an important subject provides the opportune moment for us to engage in dialogue—if you so desire—to enrich our discussions with your own experiences on reform policies and the consideration of training needs and on the impact of projects on judicial-training institutes, so that the issue of training is systematically taken into account and evaluated as early as possible during the preparation of a project.

In view of the fact that we give priority to dialogue with justice institutions, the Legal Vice Presidency is also launching a platform for exchanging information and knowledge on the dynamics between law, justice, and development and, above all, for coming together. Each year in Washington, all the institutions of the World Bank Group organize three days of conferences and discussions to mobilize legal experts from all the countries and from numerous institutions on issues as varied as the role of intellectual property in development or environmental governance, in addition to a status report on justice reforms in China, the prospects for reform in Arab countries, the model for harmonizing business law in Africa, and other subjects such as anticorruption efforts, the challenges associated with combating crime and ensuring security, and gender equality.<sup>12</sup> In future years, we could no doubt consider launching an entire thematic session, under the auspices of the IOJT, on the policies and instruments for training legal experts and judicial personnel in development policies, which everyone here will ultimately support in one way or another.

## COLLABORATION IN JUDICIAL EDUCATION?

However, the platform for exchanging information that we have launched must also exist autonomously, in between each annual meeting inevitably constrained by time and distance. The Legal Vice Presidency is therefore launching a Global Forum on Law Justice and Development (GFLJD)—a platform for collaborative research open to scientific partnerships with universities, research centers, think tanks, and professional organizations, with a view to generating innovative solutions to development challenges: a research program based on experimentation; an electronic platform for information and communication on the state of knowledge; and a results-based forum for discussion. I would also like to invite your association, the IOJT, and its members to join this forum by creating a space for discussion, information exchange, and action on the challenges facing judicial training with the teams from the Legal Vice Presidency,

<sup>12</sup> Law, Justice and Development Week, November 14-17, 2011, Washington, D.C.

along with the various development donors and cooperation agencies who are naturally welcome to join us.

I hope that this article provides a quick overview of the World Bank's interest and activities regarding support for judicial systems, and the philosophy driving our actions, and takes the first steps toward establishing a possible dialogue between our institutions.

# TECHNICAL EXPERTISE FOR JUDICIAL TRAINING AND JUDICIAL REFORM: CHALLENGES AND OPPORTUNITIES

BY GILLES BLANCHI\*

Technical expertise in “legal and judicial technical assistance projects” is often overlooked and perceived as being the private domain of professional consultancy firms and individuals. There is little opportunity for law professionals who have other duties as full-time judges or private practitioners to contribute their expertise. Having had the privilege to manage a number of technical assistance projects focusing on legal and judicial training or judicial reform in a wide range of countries, I would like to dismiss this perception and stress the fact that technical assistance represents a real opportunity to promote best practices, disseminate expertise, and contribute to major challenges of capacity building, which many countries are still facing. The purpose of this article is to introduce some of the challenges associated with this work and to identify some of the opportunities that the provision of “technical assistance” provides for judges and judicial trainers in today’s world.

## THE RISE OF JUDICIAL TRAINING AND TECHNICAL ASSISTANCE

The number of projects that address judicial training, judicial reform, or both has been dramatically increasing over the past three decades. This is partly due to the fact that numerous countries have undergone drastic changes in their political and economic structures, with the logical consequence of significant reform of their legislative framework. Such is the case of the countries of the former Soviet bloc, but also of countries that have removed dictatorships, such as Cambodia in 1979, the Philippines in 1986, or Indonesia in 1998, or countries that embarked in vast reform, such as Việt Nam since 1986.

Simultaneously, a major change was the possibility for donor-funded technical assistance to address the needs of the judiciary. While training on technical aspects of law or skills had been traditionally welcome, this was mostly restricted to commercial- or economic-law matters, with virtually no technical assistance projects venturing in fields of law that were regarded as purely domestic, be they criminal or family law. These fields were generally regarded as sovereign matters where foreign interference or guidance would be inadmissible. Following the same logic, donors traditionally stayed clear of providing technical assistance to the judiciary—with the possible exception of countries that had retained links with their former colonial powers, as in West Africa. Elsewhere, training was offered to lawyers, legal advisors, and government

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officials tasked with legal work, but seldom were judges or prosecutors eligible to benefit from foreign-funded technical assistance.

## CHALLENGES TO THE PROVISION OF TECHNICAL ASSISTANCE

As the emphasis was placed on economic law and international transactions, identifying experts to contribute to these capacity-building efforts was relatively easy. Indeed, lawyers from the developed world saw a potential benefit in terms of networking for their international practices. Until 10 or 15 years ago, recruiting experts nevertheless remained a challenge because few legally trained professionals combined their skills as lawyers with linguistic capabilities. In the case of France, that meant that few experts originating from that country could work in jurisdictions where their counterparts were not French speaking. The need to master a foreign language, predominantly English, persists today, though quite a number of younger judges are capable of teaching in a foreign language.

Over the years, however, what proved a hurdle was that the breadth of issues for which technical assistance was sought widened dramatically and increasingly required a minimum of familiarity with developing-world reality. Indeed, when countries had to re-create a judiciary from the ruins left by regimes that had virtually wiped out all pre-existing expertise (as was the case of Cambodia after the Khmer Rouge), or where practically no legally trained person remained in the country (as was the case of East Timor after the departure of the Indonesians), the provision of adequate technical assistance proved more difficult to design and delicate to staff.

It must be underlined that contribution to capacity-building efforts has some inherent limits. Unless the expert has a thorough understanding and knowledge of the legislative context in which he or she is asked to assist, the contribution will seldom focus on substantive training. Most training assignments focus on training methodologies, where foreign expertise is most appreciated. Rarely will a foreign substantive law be of such relevance that it can be taught. The limits of foreign-law transplants in preceding years have been well documented and need not be elaborated here.

What should be stressed is the critical importance of the climate of trust and the constructive nature of the relationship that must be created between the technical expert and the technical assistance recipients. Such a relationship is facilitated when a project is of sufficient duration to enable confidence to be built by the same expert returning over a series of missions. The importance of personal relationships should never be overestimated; our partners view the fact that an expert returns for another mission in the same country as evidence of commitment. This also promotes sustainability, which is essential to the positive outcome of the effort.

Another challenge facing international experts providing technical assistance is the legitimate emphasis placed on the “ownership” of the technical assistance. The time when consultants would virtually “write their own Terms of Reference” is long gone. This represents a major improvement. Indeed, there used to be instances where

the donor agency would identify the need, identify the consultant, and—often with the consultant—determine what should be the extent and the type of assistance to be provided. This was done with little, if any, actual say by the beneficiary organisation. Today, the process of identification of the need for the assistance involves the beneficiaries very directly and is often totally controlled by them. This may constrain the party providing the support but does ensure that what is offered in terms of assessment, advice, or proposed solutions will correspond to a need that has been confirmed by the party receiving the support. This increases the likelihood that the assistance that was commissioned will be taken into account and used in the country's new policies or legislative reforms. The period where consultants, often displaying a much-resented arrogance, could roam about with the motto "be reasonable, do it my way" is fortunately over.

Today, feasibility studies and needs assessments, which determine the nature of technical assistance project documents, are done with close monitoring and often under the chairmanship of the recipient administration. This "demand-driven" nature of today's technical assistance represented a shift, which has called for adjustments by technical experts, but eventually this has proved most beneficial. We now have the assurance that the results achieved are more likely to correspond to the expectations of the recipients, rather than the expertise or the prior experience of the expert.

The Justice Partnership Programme, implemented in Việt Nam since August 2010, which will continue until June 2015, is a good illustration of such an approach. The Residential Technical Assistance Team is tasked with assisting the Vietnamese counterparts, namely, the Ministry of Justice, the Supreme People's Court, and the Supreme People's Procuracy, in drafting, finalising, and implementing their respective annual work plans, corresponding to the Vietnamese agenda. This agenda is determined by the Central Judicial Reform Steering Committee, and it is on the basis of its priorities that technical assistance activities are identified and experts selected. Ownership of projects by the recipients has thereby been put into operation in a manner likely to promote sustainability.

While the arrogance of foreign experts is gradually becoming something of the past, a somewhat connected characteristic displayed by some of our colleagues may remain. That is their ignorance of the efforts required to ensure the success of their mission and their hassle-free sojourn. Indeed, often those consultants who are "high maintenance" fail to realize how much is required so that their travel, accommodations, and other details of their trip can run smoothly. Appreciation of these efforts goes a long way towards securing positive results, as our counterparts never fail to notice who is thankful and displays such gratitude.

Another constraint, which tends to frustrate the technical experts and is somewhat related to the ownership of the agenda, is the pace of reforms and changes. Quite often, these experts are confronted with issues that have been faced, and sometimes resolved, in other jurisdictions. The tendency is then often to present one's recom-

mendation with some impatience because the proposed solution is known to be technically viable and, indeed, sometimes is the only one that is technically viable. The solution has already been vetted, and the expert is thus in a position to provide tangible evidence that his or her solution should be adopted. This attitude, however, ignores the fact that the process of reform is a gradual progression, with intermediary steps that cannot be overlooked because of prior experience. Eventually, the proposed solution may or will be adopted. But the adaptation of changes must follow a path that may include experimentation and trial and error, which cannot be ignored simply because others have gone through that same path earlier or elsewhere. “Rome was not built in one day,” and justice reform cannot be achieved in a short period, which is the time span of most technical assistance projects. Experts must come prepared with this necessary patience and must not dismiss it as a mere illustration of the innumerable clichés spread around about the “African clocks,” “Asian times,” or “Arab deadlines.” There is legitimacy to a process that gives people the opportunity to gradually change the way they resolve conflicts and call on a justice system that is maturing and progressively adopting standards that for a long time were very foreign to their traditions.

This leads to an ultimate obstacle, which confronts the international expert: the necessary humility one must demonstrate. The tendency of “first-world” experts to dismiss “third-world” practices has been well documented, and many have viewed the term “arrogant consultant” as a redundancy! Here again the context has changed dramatically over the years. The leadership of the tribunals or court administrations with whom the experts are now asked to work have often graduated from the same universities as the expert—with the added difficulty that he or she had to study in a foreign language, which often goes unaccredited. Furthermore, we often label customary law or local traditions for settling disputes as being basic or primitive. In the past, technical experts have been too quick to dismiss these as not adapted to the “modern” world and its modern transactions. This is, however, to dismiss the fact that for centuries, these societies have governed themselves quite harmoniously and managed to thrive with rules and customs perfectly adapted to their environment and to the needs of their societies, sometime with cultures infinitely more sophisticated than those of the “first world” at the time. It is therefore essential to address technical assistance assignments with humility and respect not simply because we are the guests of the judiciary we are asked to train or assist, but also because their jurisprudence (in the American understanding of this terminology, i.e., *Philosophie du Droit*) may be the legacy of centuries of harmonious respect of the rule of law.

As we can see, these challenges are quite easily overcome, and they should not deter anyone contemplating the prospect of responding to calls for technical assistance, especially when the formidable opportunities that judicial training and justice reform technical assistance projects present are taken into account.

## OPPORTUNITIES FOR THOSE ENGAGING IN TECHNICAL ASSISTANCE

Technical assistance projects present exceptional opportunities for law professionals for exposure to different legal cultures, as well as the human experience that these encounters provide. To experience the dire situation of law professionals in many developing jurisdictions is in itself an amazing experience. Judges of many of the countries where technical assistance is provided have hardly any access to not only legal literature but also texts on the law in their own countries. This comes as a revelation for those who have until then only perceived these countries as exotic tourist destinations.

It was, for example, a most gratifying experience to have the opportunity to present judges of Dalanzadgad with manuals on how to conduct trials, the first “bench books” ever published in Mongolia. This was a special experience for those much forgotten judges and court officials in the Umnugovi province, the southern part of the Gobi desert. Fascinating dialogues began, there as elsewhere with other colleagues to whom similar practice manuals were presented later in Laos, the Philippines, Việt Nam, the Maldives, or the Solomon Islands, which have all benefited from bench books produced through foreign technical assistance at one time or another. These dialogues are unique and most enriching for the technical experts asked to contribute to these endeavours.

Along the same lines, the Supreme People’s Procuracy of Việt Nam is today commissioning reports on the roles and the responsibilities of prosecutors in criminal trials and on models of criminal procedure codes in no fewer than 12 countries, ranging from Bulgaria, China, the Czech Republic, France, Hungary, Italy, Japan, Korea, Poland, Russia, Ukraine, and the United States. It is naturally an intellectually stimulating and rewarding experience for these experts to participate in discussions that may shape the future of the Vietnamese procuracy and criminal justice.

The same gratification was felt by the experts who contributed in Indonesia to enhancing the capacity of legal aid offices, to the design of retraining curricula for 1,200 junior judges, or to the delivery of training to 400 court registrars in the country.

I am confident that my friend Amady Ba, who participated in this program in 2002, would concur with me that the training of judges in Mauritania was for him not only an interesting experiment to see how the methodology he was practicing at the time in the Centre for Judicial Training (CFJ) in Senegal could be adapted by his neighbours of the north, but also a gratifying experience to contribute to such south-south technical assistance for fellow judges.

## CONCLUSION—CAPACITY BUILDING AS A DUTY

Finally, I would like to stress that to contribute to efforts of capacity building is also a duty. Many of us have had the privilege of enjoying higher legal education in well-equipped judicial academies. Many of us have also had the enormous privilege of being

educated by the best legal minds of our respective countries. It is accordingly legitimate that we should share the knowledge, skills, and experience that we have gained with our colleagues who have not been granted the same opportunity. Enhancing the competence of the judiciary of countries eligible for legal technical assistance contributes to improving the justice system of these countries, and thus to improving the fate of those seeking justice who do not always have access to the qualified, ethical, and dedicated judges that they deserve.

For these reasons, law professionals, including judges and prosecutors, practicing lawyers, and other actors of the justice system, should take advantage of the opportunities that technical assistance provides. Equally, the justice administrations of first-world countries must encourage this interaction alongside the leadership of countries in development and transition. Such cooperation can only benefit the rule of law and the administration of justice in all nations of the planet.