



*The*

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## Judicial Education



# THE PHILJA JUDICIAL JOURNAL

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### JUDICIAL EDUCATION

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### JUDICIAL EDUCATION AND JUDICIAL REFORM

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### THE IMPACT OF JUDICIAL EDUCATION AND DIRECTIONS FOR CHANGE

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

*Livingston Armytage\*\**

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

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- \* Delivered at the *First Judicial Career Enhancement Program*, on May 26, 2000, at PHILJA, Tagaytay City. This paper draws from selected extracts from Armytage L, *Educating Judges*, (Kluwer Law Int., The Hague, London & Boston, 1996), and has been updated since originally presented to the Chief Justices of Southeast Asia at the 10th Biennial LAWASIA Conference, Manila. These remarks draw on the writer's experience directing, and consulting on, programs of judicial education in both common law and civil jurisdictions. These jurisdictions include Australia, the United States, Cambodia, Vietnam, the Philippines, Mongolia, Palestine, Pacific Island Nations and Haiti. Reproduced with permission of the author/copyright owner. Further reproduction prohibited without permission.
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### I. ABSTRACT

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

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

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

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

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

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

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

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

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

## II. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

*b. Focus on procedural knowledge*

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

*c. Individual vs. group learning*

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

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

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

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

### III. SURVEY OF JUDICIAL EDUCATION

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

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

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

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

#### A. Rationale for Judicial Education

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

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

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

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

Second, there is an acknowledged need to facilitate the ongoing professional development of judicial officers and to keep them abreast of change.<sup>4</sup>

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

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

They outline the objectives of judicial education to be:

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

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

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

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

6. *Id.*



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

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

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

### B. History

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

7. Nicholson RD, "Judicial Independence and Accountability: Can They Co-exist?" *Australian Law Journal*, 1993, 67, 404-426 (hereafter, Nicholson, ALJ, 1993), 425.
8. Sallmann PA, "Comparative Judicial Education in a Nutshell," *Journal of Judicial Administration*, 1993, 2, 245-255, (hereafter, Sallmann 1993), 252.

### I. United States

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

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

9. Riches AL, "Judicial Education – A Look at the Overseas Experience," *The Australian Law Journal*, 1990, 64, 189-202, 190.
10. Hudzik JK, "The Continuing Education of Judges and Court Personnel," *Judicial Education Network*, 1989, (hereafter, Hudzik 1989), 5.
11. Burger WE, *School for Judges*, *Federal Rules Decisions*, 1964, 33, 139-150; see also, Li P, "How Our Judicial Schools Compare to the Rest of the World," *The Judges Journal*, Winter 1995, 17-51.
12. McCabe HH, "California's Approach to Judicial Education," *Judicature*, 1967, 51, 2, 58-63.

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

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

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

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

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

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

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

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

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

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

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

## 2. Britain

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

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

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

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

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

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

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

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

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

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

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

### 3. Other Countries

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

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

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

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

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

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

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

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

### 4. Australia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 5. Cambodia

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

### 6. Mongolia

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

### 7. Pacific Island Nations

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

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

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

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

### 8. Palestine

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

### 9. Haiti

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

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

## IV. EDUCATIONAL CONSIDERATIONS: JUDGES AS LEARNERS

### *A. Application of Adult Learning Theory*

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

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

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

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

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

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

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

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

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

to offer to goals of teaching ego, intellectual or moral development.<sup>32</sup>

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

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

### *B. Practice of Professional Learning*

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

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

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

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

34. Houle advances two central propositions: first, that there is commonality between the continuing education of many professions (I4-I5); and second, that professional education is distinctive to adult education (49-73, and I2I); see also, Certero, RM, *Effective Continuing Education for Professionals*, San Francisco: Jossey-Bass, 1988, 15-16; and Grotelueschen AD, "Assessing Professionals' Reasons for Participating in Continuing

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

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

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

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

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

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

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

37. Cervero 1988, 15-16.

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

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

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

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

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

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38. Schon 1987, 32-33.

39. Cross, 193.



properties: "It is specialized, firmly bounded, scientific and standardized."<sup>40</sup>

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

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

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

40. Schon 1983, 23.

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

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

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

### C. *Judicial Disposition*

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

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

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

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

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

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

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

44. Catlin 1981, 125.

45. Catlin 1981, 126.

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

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

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

#### V. JUDGES AS DISTINCTIVE LEARNERS

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

##### A. *Judicial Appointment and Tenure*

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

##### B. *Preferred Learning Styles and Practices*

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

##### C. *Doctrinal Constraints of Judicial Independence*

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

##### D. *Reasons for Participating in Continuing Education*

Judges' reasons for participating in judicial education have been discussed above.<sup>47</sup>

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

## VI. SIX GUIDING PRINCIPLES

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

1. *Judicial ownership* – There is a doctrinal imperative for judicial education to be judge-led and court-owned, if it is to be successful in strengthening an independent and professional judicial system. This is best attained by securing the endorsement and support of the Chief Justice and the Supreme Court from the outset.
2. *Faculty development* – Training of judges should, wherever possible, be by judges themselves to ensure authenticity. This will require an ongoing program of faculty development and train-the-trainer.
3. *Bench-specific focus* – It is educationally most effective that the training should be designed and delivered to meet specific needs of each court wherever economically feasible.
4. *Bottom-up and top-down strategies* – Curricula should be designed to integrate distinct approaches which address the respective training needs of both judges at first instance and superior/appellate judges.
5. *Consolidate judicial identity* – All training endeavour should address the needs of judges and court administrators and, wherever appropriate and feasible,

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

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

## VII. PLANNING MATRIX: CONTENT AND STRUCTURE OF EDUCATION PROGRAMS

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

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

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

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

### PLANNING MATRIX

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

### VIII. FOUNDATIONS FOR A MODEL OF CONTINUING JUDICIAL EDUCATION

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

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