

The Role of Judicial Education

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Abstract

In this article, the author attempts to discover the wide range of activities undertaken by institutes providing Judicial Education, the breadth of which defies all attempts to give a universal definition to the term Judicial Education. The reasons for engaging in a discourse of Judicial Education are not exhaustive. On one hand, identifying these reasons helps to fix the elasticity limits of the concept of Judicial Education so it cannot be stretched any further. Whilst on the other hand, these reasons point out all the possible objectives that should be realized during the education process of judges, which in turn strengthens the argument for increased state investment in Judicial Education.

1. Meaning

So far, dictionaries have not defined the term *Judicial Education* or *Judicial Training*. However, it has been defined in the World Bank technical paper No. 528¹ as:

“a term used to include collegial meetings to discuss education topics [international, national, regional and local] and all professional information received by the judge, be it print, audio, video, computer link, online or electronic. It includes distance learning – electronic and print, self study, mentoring, and feedback programs. It has two divisions – [1] pre-service or orientation programs and [2] continuing Judicial Education and professional growth training.”

2. Judicial Education for Educators in India

Prof. N.R. Madhava Menon, the first Director of the National Judicial Academy (hereafter NJA), India defines *Judicial Education* in terms of its purpose, i.e. the *only method available to achieve judicial excellence*². In a working paper³, he has made the distinction between *Judicial Education* and *Judicial Training* as follows:

“Judicial education denotes the acquisition through systematic instruction of the intellectual, moral and professional qualities and qualifications required to assume the role of a judge. Judicial training signifies the process of learning by practice the skills necessary to discharge the functions of a judge. Both, education and training are required in the making of a judge; the former imparts the knowledge of jurisprudence, the latter enables the person to apply the knowledge in delivery of justice. What is important is the understanding that the two concepts are different with distinct goals and programmes. More importantly, the instructional methods are different. While

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¹ “Furthering *Judicial Education*” (compiled by Waleed Haider Malik), page 76.

² *Address to participants in Juvenile Justice Refresher Course* (10th to 14th October 2004).

³ Paper by Prof. N.R. Madhava Menon distributed on the occasion of the inauguration of NUJS Campus at Salt Lake City, Kolkata and during Judges’ Seminar on *Judicial Education* and Training on 26th October 2002, available in NJA, Bhopal Library.

judicial education is relatively easy to impart, training requires greater inputs, higher cost, longer time and special expertise. Training is more about influencing attitudes and behavioral changes which in the case of an adult trainee is a complex, and, often times, individualized process.”

Prof. Mohan Gopal, has differentiated between the two terms *Judicial Education* and *Judicial Training*. According to him, training “restricts creativity of mind; one is asked to follow the other like compartments of a train. There is therefore no freedom of thinking.” On the other hand “education creates ideas and sets mind free from herd mentality and leads to innovation, creative thinking and emergence of new ideas.”⁴

Justice Arjun Sikri, defines *Judicial Education* as “an opportunity to exchange, share, and seek knowledge between different judges, explore problems that arise in day to day judging work and seek solution from fellow judges or senior judges.”⁵

3. The Possibility of a Literal Meaning for Judicial Education?

Probing beyond definitions, and entering into practice of this discourse, one senses inappropriateness of the literal meaning to be given to the phrase Judicial Education or Judicial Training. The activities go far beyond mere preaching/teaching /knowledge sharing. Judicial Education institutes are emerging as think tanks for apex courts, developing judicial policies to strengthen and systemize the administration of justice, serving as links between the three pillars of democracy: the judiciary executive and legislature. Take for instance, the case of the NJA in India, which has been asked by the Supreme Court and the High Courts to get involved in (i) developing delay and arrear reduction plans for all courts in the country; (ii) computerization of all courts; and (iii) selection of magistrates and junior division civil judges. Therefore, the role of Judicial Education institutes is stretching beyond the boundaries of their traditional roles⁶ that includes:

- (i) prepare newly appointed judges for their duties;
- (ii) guarantee greater uniformity and predictability of decisions and to ensure that the seated bench has an adequate command of laws and procedures to carry out their jobs;
- (iii) update judges in new methods, laws, and related areas of knowledge required in their work;
- (iv) in civil code countries, it includes screening candidates for the judiciary;
- (v) building a reform coalition within the judiciary or to overcome resistance to reform;
- (vi) introducing new skills and practices - even without a separate training component;
- (vii) introducing new values, attitudes and perspectives;
- (viii) identifying problems to be resolved by other reform interventions;
- (ix) identifying additional problems to be addressed by training and helping to develop solutions;
- (x) building institutional solidarity and a sense of common purpose.

⁴ After assuming the charge of Director of NJA, he has stopped the usage of word *training* for judges. *Judicial Education* is instead used to describe the activities of the NJA.

⁵ Given during a personal interview recorded on 17 October 2006 at the Delhi High Court.

⁶ Outlined by Linn Hammergren in Carnegie Paper No. 28, June 2002. This study was part of series of papers dealing with practical lessons from USAID's experience with justice reform projects in Latin America. AVAILABLE ONLINE AT: <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1015&prog=zgp&proj=zdr1> (as of December 2, 2008).

The NJA in India has identified five factors for *Judicial Education* discourse in order to achieve sustainable improvements in the administration of justice:

- (1) Role and Responsibility of Judges (including judicial ethics);
- (2) Knowledge (of substantive and procedural law) and Skills of Judges;
- (3) Judicial Method;
- (4) Management of Courts/Cases;
- (5) Organizational Efficacy— including the role of other stakeholders such as the Bar, the executive, litigants and legal educators.

Such objectives for the *Judicial Education* discourse expands the responsibilities of *Judicial Education* institutes from merely arranging conferences, seminars, workshops, retreats, meetings and deliveries of lectures to the policy development arena. This makes it impossible to tie down *Judicial Education* with one set of activities. The problem is further compounded by the attitude of judicial educators who do not view “teaching” as a respectable word to describe the activities that take place in a *Judicial Education* context.⁷

It can be concluded therefore now that *Judicial Education* discourse is being continuously developed to provide a forum for judges to consider a variety of problems they face in the functional domain and to discuss appropriate responses, with the goal to leave them with a framework for analyzing issues and options that may arise in the future.

4. Reasons for Investment in *Judicial Education*

The activities part discussed above in 3.0 shows that *Judicial Education* is a costly venture. It requires huge space, massive investment in infrastructure, maintenance, a lot of money to meet travel expenses for trainees and trainers, funding for food, accommodation, medical care, etc.⁸ The state has to contribute towards all the expenses to run such an institution and it would not be good practice to allow private contributions and donations etc.⁹ The question that logically flows from all this, is why should states invest in this costly affair, which is not going to generate any revenue for it, on the lines of investments made in other sectors? Answering it requires a survey of all the reasons that justify such investments. Some of these reasons are explored below.

⁷ For instance, in her paper presented at the 2nd International Conference on the Training of the Judiciary at Ottawa organized by IOJT, Justice Georgina R. Jackson has defended judicial education processes undertaken by the National Judicial Institute (NJI) of Canada in the following words, “the NJI does not “teach” judicial ethics in the usual sense of that word. Instead, as will be seen, it provides a forum in which issues surrounding judicial ethics may be raised and discussed.”

⁸ NJA, India is provided Rupees 8.60 crores as Revenue Expenditure for the year 2008-9. For the previous year – 2007-8, this grant stood at rupees 6.75 crores – provided by the Department of Justice, Government of India. Whereas Himachal Pradesh State Judicial Academy located at Shimla was allocated a budget of Rupees 45,47,141 for the financial year 2006-2007, by the State Government of Himachal Pradesh out of which it utilized Rupees 39,16,894 for the same year on salary, wages, travel, office expenses, medical reimbursements, motor vehicles, rent-taxes, maintenance and other miscellaneous expenses.

⁹ Experiences in USA - In 2000, members of the Senate proposed the *Judicial Education Reform Act* to regulate the attendance of judges at privately-funded educational seminars. Despite such efforts, not all agree that the seminars are a cause for concern. James Pierson, executive director of an organization that has funded judicial seminars at the Law and Economics Center, has remarked that “judges are perfectly capable of assessing law and economics on their own without being told what to think.” The Kerry – Feingold Bill 2000 led to the *Judicial Education Reform Act* of 2000, (prohibiting judges from accepting “anything of value in connection with a seminar”). See Thomas M. Nickel, *Judges Deserve Access to Educational Opportunities*, 49 FED. LAW. 56, 57-58 (2002) (cataloging educational opportunities for judges). Some complain that these seminars are a plot by conservatives to lure judges into indoctrination sessions at luxurious boondoggles. Senators Feingold and Kerry introduced legislation in 2000 that would have reined in such activities. For discussion of the overall issue, See Bruce Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941 (2002)

4.1 To Clarify the Role of the Judiciary in Governance Structures

Governance provides an institutionalized means to claim rights and seek justice through the justice delivery system.¹⁰ In a democratic framework of governance, the role of the judiciary is to protect the constitution and thereby democracy itself.¹¹ Legal systems with formal constitutions impose this task on judges, but judges have been playing this role even in legal systems with no formal constitution. Israeli judges have regarded it as their role to protect Israeli democracy since the founding of the State, even before the adoption of a formal constitution¹² and judges in England, notwithstanding the absence of a written constitution, have protected democratic ideals for centuries.¹³

In India, policy-makers and law-enforcers are perceived as apathetic, if not corrupt, and politicians are perceived as opportunistic demagogues rather than visionary leaders.¹⁴ This places tremendous responsibilities on the courts wherein citizenry view them as the 'last resort for the oppressed and bewildered.'¹⁵ In such a state of affairs it would be dangerous if the judiciary acts as an *agent of the government*,¹⁶ leading to situation in Latin American States where the judiciary has lost equal footing among the three branches of representative democracy (judiciary, executive, and legislative). The courts there continued to enforce the authority of the ruling elite, rather than to equitably interpret the laws of the land. The result was that judges lost the authority to issue legal edicts or interpretations without the fear of reprisal from the executive and legislative branches and from the omnipresent church authority. Instead they were used as a pawn in conflicts between political and economic elites,¹⁷ with judges often the recipients of political favors.¹⁸ The courts began to be filled by political appointments owing their loyalty to individual presidents and political parties. Higher court judges by and large came from the same oligarchic circles, and shared the same economic and class interests.¹⁹ The judiciary was left to its own devices as long as the courts towed the party line. Given the assumption that the higher courts were expected to rubber stamp executive authority and find constitutional justification for executive actions, the courts commanded little respect from citizens or from the other branches. This lack of judicial will to interfere with executive actions left Latin American countries at the mercy of capricious lawmaking by executives. What is worse, the judiciary became a victim of its own tendencies for self-preservation. The infrastructure languished to the degree that it

¹⁰ *Citizens' Report on Governance & Development*, 2004 (Social Watch India).

¹¹ See Aharon Barak, *THE JUDGE IN A DEMOCRACY* 20 (Princeton University Press, USA, 2006).

¹² In 1999, the Supreme Court of Israel in a judgment concerning the legality of the General Security Services' interrogation methods, delivered on 6 September 1999, reproduced in *International Legal Materials*, Vol. 38 (1999), 1471 – gave a unanimous landmark ruling that prohibited the Israeli Security Services from using physical abuse of suspected terrorists during interrogation. "This is the destiny of democracy", wrote Chief Justice Barak, "as not all means are acceptable to it, and not all practices employed by its enemies are open before it." The Court noted the absolute prohibition on torture and cruel, inhuman and degrading treatment in international law; there were no exceptions and "there is no room for balancing".

¹³ *R. v. Secy of State for Home Affairs ex parte Leech*, 1994 Q.B. 198 (Eng. C.A.); *R. v. Secy of State for Home Affairs ex parte Simms*, 3 W.L.R. 328, 340 (A.C.) 1999.

¹⁴ U Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geography of (In)justice in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH*, 156; 157 (SK Verma and Kusum eds, OUP, New Delhi 2000).

¹⁵ *State of Rajasthan v Union of India* (1979) 3 SCC 634, 670 (per Goswami J.).

¹⁶ In the agency model, the judge is an agent of the Legislature. He must act according to its instructions, just as a junior officer is bound to carry out the orders of his superior officer. Aharon Barak completely disagrees with this kind of conception of the judicial role. See Aharon Barak, *supra* note 11, p. 16.

¹⁷ According to Hammergren, historically, the fluctuations in the Latin American judiciary's political role often had been at the micro level. Traditional concerns were with parties or which individuals dominated institutions and so influenced specific decisions and actions. In India, the chief of SP. Party – political outfit – gave an interview on 13th July 2008 to NDTV stating that the opponent political outfit – which is running government in Uttar Pradesh - has appointed the recently retired Supreme Court judge H.K. Sema as Uttar Pradesh Human Rights Commission Chairman as he gave just before his retirement three judgments in favour of the Chief Minister of Uttar Pradesh – Mayawati.

¹⁸ See *Inter-American Development Bank, Would You Trust This Court?*, <http://www.iadb.org/exr.htm> (as of Nov. 30, 1999).

¹⁹ There are few, if any, minority groups that are represented in the ranks of Latin America's high courts.

failed to assert itself as an equal branch of government. In Venezuela, President Hugo Chavez took a highly aggressive stance on reforming the judiciary by removing hundreds of judges during the summer of 1999. This shake-up was in reaction to atrocious conditions in a court system in which “[t]hree-fourths of Venezuela’s inmates have never had their day in court,” and “[h]igh-power law firms wrote verdicts themselves and bribed judges to sign them.”²⁰

Before the fall of Communism in the Soviet Union and its satellites, “telephone justice” prevailed.²¹ It was not monetary bribes that tainted justice. It was instructions given to members of the judiciary by Communist Party officials. If a case was considered by the Party to be significant, the judge got a phone call from a Party leader with instructions on how to decide the case. The Party was the supreme source of authority and judges were rubber stamps who would carry out Party instructions.²²

It is no coincidence that stronger democracies have emerged in nations with stronger judiciaries. Judiciaries in the UK, USA, South Africa and Israel have created many precedents to protect democratic values. In the US after 9/11 and by December 2004, more than 600 detainees were held at Guantanamo Bay. Until the US Supreme Court intervened to declare their right to access to US federal courts, for more than two and a half years they had no access to legal representation, nor to any court of law or tribunal.²³ Lord Steyn, a serving judge in Britain’s highest court, the House of Lords, described detention under these conditions as a ‘stain on American justice’, wholly contrary to international law.²⁴ In South Africa, the racist separation at the base of apartheid was grounded in a statute. The Appellate Division of South Africa held that the statute was unconstitutional because it contradicted legislation of a higher normative level.²⁵ To overcome this decision, the legislature enacted a second statute that provided an appeal to the Parliament. The Appellate Division reviewed this second statute that again instituted racism again and declared this decision unconstitutional on the ground that it infringed upon the authority of the courts to exercise judicial review.²⁶ In Israel, the Supreme Court invalidated an agreement between two political parties that had provisions saying that if the status quo on religious issue was violated by the judiciary, the same would be nullified by appropriate legislation.²⁷

A majority of judges in India view themselves as simply an agency of the political branch of government and think that fidelity to political views, whether conservative or liberal, is an important part of their role. For instance, after 2000, despite the diverse grounds on which the challenges have been made against large infrastructure projects, the general response of the courts to such litigation has been conservative. So much so that in no case so far the court ordered the scrapping of any project or even any significant restructuring of a project in the face of such challenges. The courts have largely taken the view that considerations of environmental impacts of a project or economic and financial considerations raise technical issues and policy matters that are best left with the expert authorities of the executive.²⁸ Also, even though judges have

²⁰ Luz Estella Nagle, *The Cinderella Of Government: Judicial Reform In Latin America*, 30 CALIFORNIA WESTERN INT’L LJ 345 (Spring 2000).

²¹ David K. Shieler, *Perspectives: Four Futures for Russia*, THE GUARDIAN (May 1, 1993) at 18.

²² Jane R. Roth, *Judging in New Born Democracies*, 54 OHIO STATE LAW JOURNAL 1109 (1993).

²³ On 28 June 2004, the US Supreme Court handed down its landmark ruling in *Rasul et al. v. Bush*. By six votes to three, the court decided that US federal courts did have jurisdiction to determine the legality of the executive’s potentially indefinite detention of individuals held at Guantanamo who claimed to be wholly innocent of wrongdoing. The majority applied the historical principles of habeas corpus from English law.

²⁴ Philippe Sands, *Lawless World: America And The Making And Breaking Of Global Rules*, 2 (Allen Lane: Penguin Books, England, 2005).

²⁵ *Harris v. The Minister of Interior* 1951 (2) S.A. 428 (A).

²⁶ *Minister of Interior v. Harris* 1952 (4) S.A. 769.

²⁷ H.C. 5364/94, *Velner v. Chairman of Israeli Labor Party*, 49(1) P.D. 758, 791.

²⁸ Citizens’ Report on Governance & Development, *supra* note 10.

tremendous power, particularly in Public Interest Litigation, to design innovative solutions, direct policy changes, catalyze law-making, reprimand officials and enforce orders, of late, the courts have started reducing their powers.²⁹ This has been in accordance with the conservative trend of the courts that suits other branches of the Government. In 1988, based on a Full Court meeting, the Supreme Court of India devised guidelines to deal with PIL. These guidelines aim at ensuring that PIL is: widely representative, broadly equitable, effective, sustainable and consistent.³⁰

This constrained approach by the courts is compatible with an overall “logic of the state”, in which the higher judiciary plays its appointed role as an instrument of governance much more than its traditional role as an institution of justice. This notion of “judicial governance” imposes inherent limitations on the extent to which the court can be expected to be an active part of social movement struggles for the realization of those rights that are sought to be exercised in conflict with statist and developmentalist ideologies.³¹

It is the duty of a judge to protect the individual from abusive state action and to contribute to the meaning of citizenship and civil entitlement. In performing this duty, the court must inevitably be in conflict with the other branches. This is especially so in modern times where more and more political questions present themselves as legal questions, and are brought to be adjudicated before the courts, and especially so where the scope of judicial review over the other branches is wider than in the past. A wider judicial review carries with it a wider interest in the courts, and widening tension between the court and the other branches of government. If there will be no conflict and no tension, according to Aharon Barak, the court will not be fulfilling its constitutional role.³²

Judicial Education therefore becomes necessary to acquaint judges with judging trends from the world over; to help them realize that powerful democracies are so because of strong, independent and fearless judiciaries which have shown courage in the worst times of crisis;³³ and to make them understand their role in the governance structure of a democracy so that Latin American experiences of disreputable judiciaries are not repeated.

4.2 To Uphold the Necessity of Courts in a Democracy

Democracy works when citizens and the most marginalized people have the capacity to ask questions, seek accountability from the state and participate in the process of governance. Democracy becomes meaningful when people can shape the state and the state in turn, creates enabling social, political, economic and legal conditions wherein people can exercise their rights and achieve freedom from fear and want. Democracy is not merely elections or universal adult franchise. Democracy involves dignity, diversity, dissent and development. Unless the last person can celebrate his or her sense of dignity, exercise democratic dissent and involve

²⁹ *Sachidanand Pandey v. State of West Bengal* (1987) 2 SCC 295, 334.

³⁰ <http://www.supremecourtindia.nic.in/pilguidelines.pdf> [as of 20th July 2008].

³¹ See Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 166 HUMAN RIGHTS REVIEW (April-June 2007).

³² Aharon Barak, *Viewpoint*, 88 JUDICATURE 199 (April 2005).

³³ In *Abbassi v. Secretary of State for Foreign and Commonwealth Affairs* 42 International Legal Materials 358 (2003); – a case was instituted on behalf of Ferroz Abbassi challenging the failure of Britain’s Foreign Office to take adequate steps to protect the basic human rights of Ferroz Abbassi – a British citizen detained at Guantanamo Bay. The British Government defended the English court proceedings with its usual vigour and thoroughness. It succeeded in getting the case thrown out at the first instance on the grounds that the case would require the court to enter the ‘forbidden domain’ of foreign relations. But in July 2002, the Court of Appeal gave Abbassi’s lawyers permission to challenge the Government’s inaction. The case was fast-tracked. The Foreign Office argued that America’s actions were simply not justiciable before the English courts. It would be wrong, they argued, for the courts of one country to express a view on the behaviour of another. The Court of Appeal rejected the Government’s defence. It ruled that it was ‘free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.

themselves in the process of governance and development, democracy becomes empty rhetoric. Democracy dies when discrimination begins and the politics of exclusion takes root.³⁴

A key historical lesson of the Holocaust is that the people through their representatives can destroy democracy and human rights. Since the Holocaust, all of us have learned that human rights are the core of substantive democracy, the protection of which cannot be left only in the hands of the legislature and the executive, which by their nature reflect majority opinion. Consequently, the question of the role of the judicial branch in a democracy arises.³⁵

The judge in a democracy is charged with two simultaneous jobs - she/he has to bridge the gap between law and society and also, she/he has to give expression to modern developments that are occurring³⁶ like development of different theories that change legal conceptions of things, developments at international level where treaties and conventions are slowly ousting the jurisdiction of domestic courts in a number of important matters.

Judicial Education should create an understanding about the higher role of the judiciary in a democracy and do away with Austinian presumptions of law as the command of the sovereign which does not fit the legal world today. Judges are and society expects them to take an active interest in the affairs of the society relating to various dimensions.³⁷ Judges will always be attacked by politicians and the sectors of public that are unhappy with the court's decisions. *Judicial Education* should help them swallow such attacks and carry out their role as the protector of human rights in a free and democratic society without becoming defensive in the face of counter-majority arguments.

4.3 To Clarify the Relationship between the Judge and the Law

There are two opposing and equally strong schools of thought on this point. Whereas formalism views a judge as merely a living 'oracle of law', the 'speaking law' or the 'mouth that pronounces the law' and that the office of the judge was 'to declare and interpret and not to make law'. Formalism found support from authorities like Coke, Bacon and Blackstone. Their logic was that the judges invent law no more than Columbus invented America.³⁸ The contrary view was taken by realist schools that judges unquestionably make law and therefore it recognized the creative role of the judiciary.

Judge Aharon Barak is of the view that:

*"Legal rules and principles together constitute a system of law whose different parts are tightly linked. The judge is a partner in creating this system of law. The extent of this partnership varies with the type of law being created. In creating common law, the judge is a senior partner. In creating enacted law, the judge is a junior partner. Nonetheless, he or she is a partner, and not merely an agent who carries out the orders of his or her principal."*³⁹

Therefore, it is still not very clear as to what are the limits placed on judges. These opinions are never threadbare discussed and debated in law schools as the young minds are not

³⁴ Citizens' Report on Governance & Development, *supra* note 10.

³⁵ See Ahron Barak *supra* note 11, p. x.

³⁶ *Id.*

³⁷ This becomes clear when we go through the case law in the UK. In *A. and Others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department*, Appellate Committee of the House of Lords, 16 December 2004, Britain had passed its own anti-terror law requiring it to derogate from the European Convention on Human Rights to authorize the indefinite detention without charge or trial of non-nationals who could not be deported. In December 2004 the judges of the House of Lords ruled by an overwhelming majority that the law – Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was discriminatory and in violation of Britain's international legal obligations. Lord Hoffmann observed – "The real threat to the life of the nation, comes not from terrorism, but from laws such as these." Lord Scott described the law's power to allow indefinite imprisonment on the basis of a denunciation on grounds that are not disclosed, and made by a person whose identity cannot be disclosed as "the stuff of nightmares". See Phillippe Sands *supra* note 24, p.232.

³⁸ See Gobind Das, *JUSTICE IN INDIA*, 67 (Shangon & Shangon, India, 1976).

³⁹ See Ahron Barak, *supra* note 11, p. xviii.

ready for this higher platform debate and secondly, they will find such debates unrelated and meaningless to their profession. Only when a small percentage of them assume judgeship later on in their life do they face problems about their role.⁴⁰ At that point of life they are curious to know and to read all the literature, so that they can reflect on their role.

To fill this curiosity, orientation courses are designed in India and in other countries judges to clarify their role in democracy; the shift in that role after attaining independence; and the shift after another turning period in the nation's history (the emergency period in India and the enactment of the Human Rights Act in UK).

4.4 To Move Courts Beyond their Colonial Past

The Indian legal system during the British days functioned without the native spirit, as a corpse of law was handed down to India without life and vitality. The only goal was the stability and continuation of the British Empire. Today, six decades since independence - judges tend to forget that laws were transported from the land of the Thames along with the clothes that the East India Company brought to India to sell. Therefore, the independence of the country and the enactment of the Constitution should make a big difference in the lives of people. But this common difference is buried and not reflected upon. Be it the legislature, executive or the judiciary, all continue to sport the same lenses that were worn by the East India Company manager when he ruled over India. Unfortunately, India is still governed today by essentially the same codes, the same rules of interpretation that were valid in the era of The East India Company.⁴¹ In its mode, method of work, designations, language, approach and method of resolving disputes, the judiciary continues to have all the trappings of the system established by the foreign rulers. On the attainment of independence, this system was expected to be an effective instrument capable of ushering in a social revolution and adapting itself to facilitate the transformation of Indian society and to become an effective instrument for carrying out the mandate of Article 38 of the Constitution of India. It had the added responsibility of becoming a guardian angel for the protection of the fundamental rights of the citizens. Thus, for a purely colonial institution operating more or less as a wing of the law and order enforcement machinery, it has become a sentinel on the *qui vive*.⁴² However, very few judges since independence have met the expectations envisaged in the Constitution. Only some names can be counted and remembered (Krishna Iyer and Bhagwati for sure) who did pioneering work and gave relief from the callousness of the legislature and the executive.

4.5 To Help Courts Respond to Changed Circumstances

Changing social and political tensions presents new challenges to age-old issues. Perhaps, one of the greatest tensions facing today's judiciary deals with ethical issues and the public's expectations of what judges should or should not do. The public has the opportunity to observe TV judges, movie judges, and live court presentations with commentary by different media outlets, and they have access to studies sponsored by organizations having interests in courts. All of this "information and entertainment"⁴³ creates confusion and unrealistic expectations of judges.

Also, many a time, courts fail to respond to major political, economic and social upheavals that upset and unsettle thousands through no fault of theirs. These are special moments in history

⁴⁰ See Ahron Barak, *supra* note 11, p. x.

⁴¹ See Gobind Das, *supra* note 38.

⁴² 117th Report on Training of Judicial Officers, LAW COMMISSION OF INDIA, November 1986.

⁴³ Note: Transcript Of Panel Discussions-Centennial Reflections On Roscoe Pound's The Causes Of Popular Dissatisfaction With The Administration Of Justice, 48 SOUTH TEXAS LAW REVIEW 1079 (Summer 2007).

when bold steps are required and the judiciary is perceived as not responsive enough. In fact, some jurists see the judiciary as totally incompetent to redress such issues. For instance, Prof. Upendra Baxi has suggested that India should have its own variety of an effective truth and reconciliation commission to redress grievances of those who are violated by political violence. This suggestion came after observing that since independence courts have rarely provided a successful forum for those who have suffered from political violence.⁴⁴

There comes a time when the court should lead; and be a crusader for a new consensus. The illustration of the famous case of *Marbury v. Madison*⁴⁵ and the role of Chief Justice Marshall is a prime example. This judgment established the principle that the Supreme Court could declare an Act of Congress unconstitutional, therefore void, thus making the court and not the Congress the last authority on the validity of the law. At that time, no court anywhere in the world claimed such authority. It was thought, if any court claimed the right to nullify a law, it would make itself part of the legislative power. However Marshall tried the impossible, succeeded and it became the cardinal principle of the Rule of Law. Similarly, after the 1973 decision in *Roe v. Wade*,⁴⁶ the argument that the word “liberty” in the Fourteenth Amendment includes a woman’s right to have an abortion was no longer “off the wall.” Nor was the argument that the viability of the fetus should be the line that determines the scope of that right. Such claims simply became plausible for the well-trained lawyer, even if she was not ultimately convinced by them. After *Reynolds v. Sims*⁴⁷ and *Baker v. Carr*,⁴⁸ the argument that the Court should intervene in the political processes of the states became more thinkable.⁴⁹ For seventeen long years, the Indian Supreme Court recognized the parliament’s amendatory power as plenary. In 1969, it sought to immunize Part III granting fundamental rights from the virus of amending power. In 1973, in *Keshavanand Bharti*’s case, it modified this approach subjecting this plenary power to the discipline of a doctrine of the basic structure of the Constitution justifying it on the logic of the preservation of essential features like “democracy”, “rule of law” and “the republican character of the Indian Constitution” etc.⁵⁰

Marbury, Brown, Roe, Keshavanand Bharti, etc. serve as good examples. A court cannot continue to sustain public confidence if it pronounces such historic judgments every week. Yet, a court will not maintain public confidence if it misses the special moments that require *Marbury, Brown, Roe, Keshavanand Bharti, etc.*

To make the judiciary responsive to all types of changes that may occur in society, judges have to be engaged in the very best educational conferences – wherein diverse sections of the judiciary are invited to analyze the situation, the causes of upheaval, and the possible solutions to arrest suffering of any section of society. Such participation helps guarantee a robust and healthy judiciary in the free marketplace of ideas.⁵¹ It helps the judiciary to analyze and reflect on changes occurring within the judicial system itself.⁵²

⁴⁴ U.Baxi, THE SECOND GUJARAT CATASTROPHE, May 27, 2002 *Economic and Political Weekly* 11, pp 3519- 3531; also placed on the Website of the American Council of Social Sciences, New York.

⁴⁵ 5 U.S. 137 (1803).

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ 377 U.S. 533 (1964).

⁴⁸ 369 U.S. 186 (1962).

⁴⁹ Jack M. Balkin, *Bush V. Gore And The Boundary Between Law And Politics*, 110 YALE L.J. 1407 (2001).

⁵⁰ See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

⁵¹ Thomas M. Nickel, *Judges Deserve Access To Educational Opportunities*, 49 FEDERAL LAWYER 56 (2002).

⁵² Court procedures are behind the times, prisons are filling faster, civil dockets are declining, big cases are going to arbitration. And not just the big ones but leases and consumer agreements also provide for arbitration. Many retired judges are now making more money arbitrating. One needs to investigate why courts are no more the chosen forum. Judicial educators need to keep judges up to date on changes in technology, law, and community expectations.

4.6 To Equip Courts to Meet Challenges Unleashed by Developments in Science and Technology

The current generation of judges is confronting legal issues arising in a complex world that require a more thorough understanding of advances in science and technology. Furthermore, new legal issues that turn on questions of science and technology are intermingled with far-reaching policy concerns. Such issues often reach the courts before either the science or the policy has been fully developed. For example, the fields of electronic information and DNA-based biology raise familiar issues of intellectual property and privacy, but these issues take on fresh contours in these previously unexplored contexts. The new capabilities of science and technology raise new concerns for constitutional, personal and commercial rights. If judges are to respond to these concerns, to find the truth in adjudications, they have to sufficiently understand the science and technology.⁵³ For instance, we are in the midst of a great national debate about genetically modified (GM) foods. Are they going to be harmful to the health of those who eat them? Will they damage the environment? Are they going to destroy our precious wildlife? Are they going to sabotage the purity of growing organic crops? Will they help to reduce Third World poverty? Every day the press carries stories on the subject with claims that one group of scientists contends that there is nothing to worry about while another says that there must be a moratorium and a third says that the methodology used by the first group is flawed. The politicians then give their advice. The public is supposed to make up their minds on the basis of a combination of scary stories, half digested science and conclusions stated without a legitimate basis. Members of the public may raise this sort of issue before the courts. It is not difficult to envisage a product liability or negligence claim on the basis that ingestion of GM food has caused injury to health or a nuisance claim by an organic farmer that the purity and so the value of his crops has been damaged by pollen from a nearby field of GM crops. The courts would then have to appraise the scientific evidence of causation which would be crucial to the outcome of the claim.⁵⁴

Apart from such claims in today's complex and technologically-oriented society, scientific evidence surfaces in nearly every kind of litigation: product liability, medical malpractice, patents, criminal prosecution, and antitrust, just to name a few. Also, litigants use experts to prove causation, establish the standard of care, link suspects to (or exclude suspects from) crime scenes and assess damages.⁵⁵

However, judges face a conundrum. They are remarkably ill-positioned to make the decision. Primarily trained in legal analysis, they are usually unfamiliar with the specialized information presented and they lack the background necessary to assess its reliability.⁵⁶ An assessment of toxic tort and product liability claims may require knowledge of toxicology and epidemiology. An assessment of antitrust claims requires knowledge of sophisticated statistical

⁵³ See Pauline Newman, *Law And Science: The Testing Of Justice*, 57 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 419 (2000).

⁵⁴ Elizabeth Melville, John Melville Williams, *Science, Judges, Experts And The New Rules*, 183 - 192 JOURNAL OF PERSONAL INJURY LITIGATION, (SEP 1999).

⁵⁵ Edward K. Cheng, *Independent Judicial Research In The Daubert Age*, 56 DUKE L.J. 1263 (March, 2007).

⁵⁶ See *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) (describing a trial court that admitted expert testimony because it "concluded that it lacked sufficient knowledge on the scientific subject matter"); Craig Lee Montz, *Trial Judges as Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?*, 33 UWLA L. REV. 87, 110 (2001) (describing survey data showing that judges have little background in science).

analysis. Judges certainly lack familiarity with the methodologies of toxicology and epidemiology. Getting past the scientific terminology and other idiosyncrasies of the scientific disciplines that find their way into litigation is a daunting task for a judge. At the same time, the experts, who are pre-screened and hired by the parties, invariably conflict with each other, offering the judge little help. Often, one expert steadfastly maintains that toxicological studies on mice are a well-accepted method for determining carcinogenicity in humans, and the other expert flatly disagrees.⁵⁷ This is known as the 'battle of the experts'.

Judicial Education is required to focus on scientific principles only as far as they arise in litigation. Judicial educators will have to give courts access to information about emerging technologies and their potential to violate individuals' rights. Judges need to have access to enough available information to fully understand the technologies and how they are being used or could be used, to violate the law.⁵⁸ For instance, if judges were better educated with respect to how the Internet operates as a whole, it certainly would improve the development of the common law as it is concerned with spyware and other internet data-mining technologies.⁵⁹ Such *Judicial Education* programs are a sound step towards improving the ability of judges to handle scientific evidence. They expose judges to scientific concepts and issues and they make judges more critical of expert testimonies.

Better scientific decisions will arise not from finely calibrated doctrinal tests or the use of external experts, but from a more sophisticated and well-informed judiciary.⁶⁰ Unlike external solutions, like taking the help of experts etc. educative solutions keep decision making power firmly entrenched with the judge and allows the admissibility standard to remain flexible by shifting some of the burden to the judge's own understanding of science.⁶¹

The work done by the Federal Judicial Center of USA in strengthening judges' ability to deal with issues of science and technology is commendable. In 1994, the Center published the first edition of its *Reference Manual on Scientific Evidence* to provide judges with a ready reference to information on areas of science that often find their way into litigation. The Center also included presentations on scientific evidence in its orientation programs for newly appointed judges and magistrates. In addition, the Center sends one or more faculty members to courts on request for "in-court" seminars, which deal with the social issues presented by developments in genetics, statistical inferences and scientific methodology.⁶² The Center has also given a number of distance-learning broadcasts on specific topics of science, delivered over the Federal Judicial Television Network [FJTN]. The FJTN is a network of satellite downlinks that the Administrative Office of the United States Courts has installed in some 300 courthouses around the country. It allows the judges to receive distance learning and informational programming from the studios that the Center operates in the Thurgood Marshall Federal Judiciary Building. A series of six programs on "Science in the Courtroom" includes lectures by scientists on topics such as epidemiology, toxicology, recombinant DNA and gene cloning and microbiology. These programs

⁵⁷ See e.g., Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 74, 75 (1998) (emphasizing the "continued need for appellate supervision and increased judicial education").

⁵⁸ C. R. Nesson, *Online privacy* (2001), <http://cyber.law.harvard.edu/ilaw/Privacy> (as of January 24, 2006); C. Nesson, A. Marino, and R. Kent, *Privacy (2005)*, http://cyber.law.harvard.edu/ilaw/harvard_2005_module_3_privacy (as of January 24, 2006).

⁵⁹ Daniel B. Garrie, Rebecca Wong, *International Spyware: A Global Privacy Concern*, 61 CONSUMER FINANCE LAW QUARTERLY REPORT 125 (Spring, 2007).

⁶⁰ As Ron Allen and Joseph Miller note, the common law has generally favored educating juries rather than having them "defer to the judgment of others," an observation that somewhat parallels the educative versus external approaches described here. Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1133 (1993).

⁶¹ See Edward K. Cheng, *supra* note 55.

⁶² Information obtained from Director, FJC, USA via e-mail.

also include advice by judges on managing specific problems of expert testimony that arise in toxic tort litigation and patent litigation. Other distance education programs focus on the neurobiology and psychopharmacology of drug addiction. Recently, the Federal Judicial Center and the National Center for State Courts have collaborated with the Brooklyn Law School Center for Health, Science and Public Policy in a series of programs that examine evolving scientific issues, in order to assist judges in handling litigation in their courtrooms. The Center is also developing a new series of education programs, in collaboration with the American Association for the Advancement of Science and the National Center for State Courts, on emerging issues in neurobiology and law.

In India, SJAs and the NJA are providing *Judicial Education* on science related issues, though the quality and content lags far behind those provided by judicial educators in the US and the UK. Yet, it is expected that in the coming years it will catch up.⁶³

4.7 To Overcome Structural Deficiencies in the Judicial System

There are numerous intangible, but nevertheless strongly-felt limitations that constrain the judges of today.⁶⁴ Judges are checked by institutional realities; the dynamics of the judicial decision-making process; judicial collegiality including “unremitting criticism” by one judge of another’s perceptions, premises, logic, and values; judges’ own commitment, professionalism, and integrity; judges’ desire to earn the respect of sibling judges, the Bar and the public; and the authority of appellate courts to reverse decisions.⁶⁵

Having a hierarchy of administration in the judiciary creates an additional peril. When the route of an appeal follows the structure of management, the system risks the possibility of independent judgments at each level of the judicial structure. When judges spend their time worrying about the consequences of their decisions on their careers, courts become just another department of the executive government.⁶⁶

The financial dependence of the judiciary on the executive weakens the independence of the judicial branch. Only a judge’s salary comes from an independent fund. The rest of the funding for infrastructure, cars, housing, staff, office stationary, laptops and desktops, telephone bills, mobile services and travel are allocated by the state governments. After retirement, the executive decides, which judges are to be made a member or chairman of commissions, tribunals, committees, inquiry committees or even ambassadorial postings etc. The prospect for the future, coupled with the strain of the present, may cause conduct by judges not commensurate with the high office that society has chosen for them. Many firm feet are likely to falter.

There is yet another angle in the structural set up of Indian courts that places excessive burdens on them. This would be clear if we concern ourselves with the difference between the courts of two different countries: USA and India.

⁶³ In the NJA, since it became operational in the year 2004, out of a total of 167 programmes – held till May 2008, on this issue, a total of 8 programmes were devoted to the theme of “Science and Law”. Another 9 programmes dealt with some issues concerning this theme. This also includes the Summer Retreat for Supreme Court Justices held in July 2005 – in which one whole day was devoted to science related issues- doctors, scientists, engineers were called to discuss wide ranging issues. According to the Annual Report of Himachal Pradesh State Judicial Academy 2006-7, it has for the period May 2006-March 2007, conducted 75 three day advanced courses and 3 induction trainings for judicial officers and ministerial staff of the courts in the State that were attended by a total of 1187 participants. Out of these, 10 programmes on Computer Usage and other IT dimensions were for accounts clerks and another 9 for Civil Judges; 3 five day programmes on forensic sciences application were conducted for judges.

⁶⁴ Shirley S. Abrahamson, *Judging In The Quiet Of The Storm*, 24 SAINT MARY’S LAW JOURNAL 965 (1993).

⁶⁵ See Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND.L.J. 1, 9-10 (1983) (maintaining that decision is principled if grounds for the decision can be stated truthfully); Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U.I.L.L.REV. 917, 919-36 (discussing various elements of judicial processes).

⁶⁶ See *Transcript of Panel Discussions*, supra note 43.

The Supreme Court of USA decides 80 or 90 cases a year. All those cases are fully briefed, sometimes with many amicus briefs and almost all cases are orally argued. All nine justices work on all 80 or 90 cases. So what you have then, is a high degree of accountability to each other. You have justices appointed for many years over many different administrations and with many different points of view. And you have an environment in which, first and foremost, these judges are accountable to one another. So any judge tempted to avoid dealing fairly with the record or the law is faced with the sure and certain knowledge that he/she will be reminded of his/her failure in this respect by one or more of the other justices. Often this reminder will be in writing. So the results of their efforts are detailed in careful opinions that are subject to intense scrutiny, first by all the other justices who may be their toughest critics, and then by academics and interest groups and the public at large. Therefore, judges have a high level of accountability to the citizenry.⁶⁷ Contrast the US with what happens in the Indian Supreme Court. The Indian Supreme Court had 26 judges⁶⁸ and 61,839 cases for the year 2006 and 53,066 cases instituted for year 2007 (up to 30th September). Mostly judges sit in panels of two or three, sometimes they constitute themselves in a 5-bench panel (known as a *constitution bench*) and in rare circumstances they form a 9-bench Constitution Panel.⁶⁹ Rarely in its history has a full bench sat except for the occasional *en banc* case where all the judges sit.⁷⁰ So, only two or three judges look at almost all the cases. So then the question comes, how carefully do they look at these cases, given the fact that 26 judges are to deal with 61,839 matters. This means that each judge has to take responsibility of at least 2378 matters!⁷¹

Again, take the case of Federal Courts in the USA. On average, a Judge of the Federal Court writes between 200 and 250 opinions a year. Mostly they constitute themselves in panels of two or three, which means they look at 700 fully briefed cases a year. Not to mention several hundred other cases looked at for motions, jurisdictional dismissals etc.⁷² Compare this with the burden imposed on High Court Judges in India. A Judge in the Nagpur Bench of High Court⁷³ writes between 500 and 800 opinions a year. Nagpur High Court Judges mostly constitute themselves in a panel of one or two, decide 800 fully briefed cases in a year, and take up to 2000 cases for motions and jurisdictional dismissals. Whereas judges of the Delhi High Court write about 400 opinions in a year; mostly constitute themselves in panels of one or two; decide 600 fully briefed cases; take up to 1000 cases for motions, jurisdictional dismissals and take up to 1000 cases for oral arguments in one year.⁷⁴

So the sheer volume means that the individual cases in India cannot get the same amount of attention from the courts as any case gets from courts in the US. Add to this fact that the briefing doesn't even compare in quality or quantity with the kind of briefing you get at the courts in US.

Coming to the subordinate court level in India, the scenario becomes somewhat worse. Most of their cases are not published. The academics don't pay much attention, and the public at

⁶⁷ *Id.*

⁶⁸ Though this strength is expected to increase to 31.

⁶⁹ In the year 2006-2007, a five judge Constitution Bench sat for 44 days to hear 292 matters and a nine judge Constitution Bench held sittings for 5 days to hear 33 connected matters. See SC Annual Report 2006-2007.

⁷⁰ *Keshavanand Bharati* case 1973 (4) SCC 225.

⁷¹ Judges of Supreme Court of India have a relatively short shelf-life; they retire at the age of 65 and the average tenure of three years denies them the longevity of their American counterparts. They are moved to tears of envy when they hear about the "unconscionable" case load of American Supreme Court Justices. See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence* 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

⁷² See *Transcript Of Panel Discussions*, *supra* note 43.

⁷³ Justice R.C. Chavan, Judge High Court of Bombay, Nagpur Bench in response to a Questionnaire.

⁷⁴ Justice Madan B. Lokur, Judge High Court of Delhi in response to a questionnaire.

large pays even less. So only the parties really know what happens in an individual case. Appellate procedure is often really not an effective check on what's happening. So there is little accountability on the part of judges at the lower level.

For various reasons, the current situation is that adequate judge numbers and infrastructure facilities are not provided to courts in India to cope up with the inflow of litigation. This causes a great backlog of cases. The estimated backlog in subordinate courts as on 01/07/07 was 25 million cases. Similarly, 37.12 lakhs cases were pending in the various High Courts around the country as at 30/06/07. The pendency of cases in the Supreme Court has also slightly increased over the last few years and as at 30/09/07, 44,819 cases were pending for disposal.⁷⁵

Judicial Education offers a forum for discussion of such issues that are otherwise kept under the carpet. Not only does *Judicial Education* provide a forum for discussion and debate, but it is also an institute that develops broad guidelines, resolutions and best practices with the consensus of all to bring solutions that can remove these hiccups. Many issues are debated by judges and deliberated over a period of time, which result in solutions that are forwarded by the apex court to the Prime Minister in CJ-CM conferences.⁷⁶ The Government takes action on these solutions and provides support to implement the solutions devised by the judiciary itself to improve the administration of justice. Therefore *Judicial Education* can indirectly help in providing some solutions to the structural problems of the judiciary.

4.8 To Overcome the Dysfunctions of Bureaucratization

Bureaucratization acts as a screen that impairs the responsiveness of officials. However, with the judiciary, the impact of bureaucratization is felt in another domain altogether. Bureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy. By signing his/her name to a judgment or opinion, the judge assures the parties that he/she has thoroughly participated in the process and assumes individual responsibility for the decision. Yet, bureaucratization raises the specter that the judge's signature is but a sham and that the judge is exercising power without genuinely engaging in the dialogue from which his/her authority flows.⁷⁷ This may happen in number of matters that are decided by the registry of the High Court and the Supreme Court of India. Rather than having a judiciary deciding matters, many important matters have now as a matter of procedure been given to the administrative registrars to settle.⁷⁸

The proliferation of registries and the delegation of power to them weakens judges' individual sense of responsibility. The judge acts on the assumption that his/her work is the product of "many hands"⁷⁹ from the complicated network of relationships that exists among the individuals in his/her organization. The decision or opinion is not wholly his/her own.⁸⁰ The use of the Office of the Registrar or the Commissioner⁸¹ insulates the judge from the presentation of the facts and the law on that particular issue, thus accentuating the judge's incompleteness of perspective, and it relieves the judge of some of the obligations to explain and justify.⁸²

⁷⁵ Chief Justice of India, *SC Annual Report 2006-2007*, p. 8.

⁷⁶ *Resolutions of Chief Justices' Conference (17-18 April 2008)*.

⁷⁷ Owen M. Fiss, *The Bureaucratization Of The Judiciary*, 92 YALE L.J. 1442 (July, 1983).

⁷⁸ The Courts of Registrars have been established in the Supreme Court of India under the new amendments in the Rules. At present 2 Registrar's Courts are working on 250 matters everyday. *Supreme Court Annual Report 2006-7*, p. 73 (para 15).

⁷⁹ Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905 (1980).

⁸⁰ Owen M. Fiss, *supra* note 77.

⁸¹ Order 18 Rule 4 of the Code of Civil Procedure (2002).

⁸² *Morgan v. United States*, 298 U.S. 468, 481 (1936).

Judicial Education affords scope to correct such dysfunctions of bureaucratization and to devise institutional arrangements that might contain or at least alleviate the dangers to the judicial process presented by this inescapable development of delegation.

4.9 To Improve Court Operations in Rural Areas

A court in a rural area operates more in accordance with personality factors than its urban counterpart and is frequently composed of one or two judges, a clerk's office and a small support staff.⁸³ The personality of the judge, clerk or court reporter is far more likely to set the tone and pace of the court than it would in a larger operation. Due to the increased number of judges and staff in urban courts, individuals subordinate their personalities to that of the group. Finally, a smaller staff and large distances between courts often create feelings of isolation.⁸⁴ A large court setting provides colleagues with an opportunity to lunch together or hold impromptu conferences in the office. However, rural judges and clerks find it more difficult to interact informally with colleagues. In addition, a newly selected judge in a rural area has fewer role models to follow.

In the US, technology is used to deal with the isolation problem of rural courts. The telephone is used to enhance rural jury management by apprising jurors of changes in their schedule and for approving search warrants. Thus the problem of distance in those instances in which a law enforcement officer is not conveniently near a judge or magistrate is overcome⁸⁵. Videotaping and closed-circuit television also contribute to minimizing the effects of distance and isolation. Videotaped depositions overcome the problem of unavailable witnesses that results from the great distances in rural areas. The use of closed-circuit television makes it possible to conduct hearings or pretrial conferences with an attorney or judge physically separated from the other participants.⁸⁶

In India, judges posted in rural areas face more constraints. A lack of basic infrastructure, rampant power cuts, absence of sanitation and hygienic conditions in the courts, a lack of drinking water and a good chair for sitting in for the whole day are only some of the many problems which are well recognized. The incorporation of advanced technology into the courts occurs only in the largest cities, leaving courts in small towns in the dark ages. Even today, it is not unusual for lower court judges to buy supplies from their own salaries, to work on dilapidated manual typewriters, and to work under candlelight during the all too frequent power outages. Carbon paper is still in general use and there is little, if any, modern case management apparatus available outside the courts of major cities. Therefore judges posted in such areas consider their posting as punishment posting, which they get, if they have failed in their protocol duties, pleasing of higher authorities or buttering of the inflated egos of their administrative judge etc. There is yet another aspect to which no one pays attention. An absence of good schools, colleges and lucrative jobs in rural areas separates judicial families. The judges proceed to their place of posting without their family, thus creating tensions within families. Some get frustrated after certain periods and resign, some go for deputation to perform administrative works, some go to

⁸³ Pennington, *The Nonnets*, 4 JUDGES J. 74 (1974).

⁸⁴ *Remarks of Ernest C. Friesen, Dean, California Western School of Law, at staff meeting on Rural Courts Project, National Center for State Courts* (Jan. 1976). As a result of their isolation, court personnel lack a sense of participation in a broader system. This further enhances the feeling of isolation.

⁸⁵ See Beechen, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691 (1973).

⁸⁶ See e.g., L. Berkson, S. Hays & J. Carbon, *MANAGING THE STATE COURTS* 296-305 (1977).

departments not concerned with judicial work and some who get to do neither of these, become frustrated and their frustration and anger begins to effect the poor litigants.

Therefore rural courts are in need of more *Judicial Education* than their counterparts in metropolitan areas. A different kind of *Judicial Education* programme has to be designed for these judges which can assist them to acquaint themselves with the use of technology for their own benefit in order to benefit justice.

4.10 To Develop Human Resources Involved in the System

Human resources constitute a critical element of any organization. The quality and quantity of human resources significantly influences the level of effectiveness as well as the efficiency of the organization. The critical importance of human resources is reflected in the often repeated adage that any organization (its structure and systems included) is only as good as the people who operate it. If the human resources of an organization thus form a very important part of an organization, it is undeniable that it must remain up-to-date with regard to; the changes in the hopes and aspirations of the people; the demands from the justice system; the contemporary needs of society; research in the field of law; new and revised methods of resolving disputes in society; the concept of equality in a society consisting of unequals; and the goals of the Constitution.

However, the statement of Chief Justice Warren Burger while addressing the American Bar Association *mutatis mutandis* applies to the present day Indian justice delivery system. He said, "*In the final third of the century, we are still trying to operate courts with fundamentally the same basic methods, the same procedures, and the same machinery, Roscoe Pound said, were not good enough in 1906.*"⁸⁷ What Lord Devlin said for British justice system has equal validity for our system. He said, "*If our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back.*"

Therefore, the need for raising the competency of judicial officers for better performance of the judicial system was highlighted by several reports of the Law Commission of India beginning with the 14th Report - the Setalvad Commission report: "...

Not only has the volume and variety of the work increased but the pace at which a munsiff has to perform his duties has quickened. Unless a young officer is given the proper training, he is likely to acquire by reason of his inexperience, un-businesslike habits which he may find it difficult to shed later on and which may prevent him from becoming an efficient judge. A certain amount of training in the administrative work of a court is also essential to a fresh entrant into the service from the Bar, if he is not to be at the mercy of his office clerks."⁸⁸

The 54th Report of the Law Commission in 1973 further emphasized the subject and recommended the immediate setting up of a national academy for judicial training. It said: "*Even at the cost of repetition, we wish to emphasize that the success of any system, and particularly the judicial system depends on the men who work the system...Successful completion of the training should be a condition precedent to confirmation of appointment in the judiciary*". The

⁸⁷ Address of Chief Justice Warren Burger to the American Bar Association (1970).

⁸⁸ p.178.

117th Report⁸⁹ of the Law Commission devoted entirely to the subject of training of judicial officers observed that “*updating of the knowledge and skills can hardly be left to the voluntary effort of individual judges*”⁹⁰ *E*[*T*]raining is all the more required for a judicial officer because the sociology of law is acquiring new and added significance in the development of the society”.⁹⁰ The First National Judicial Pay Commission in 1999 prescribes a one year compulsory induction programme for newly appointed judges to improve the human resource component of the judicial system.

The need for *Judicial Education* is even recognized by the courts in many cases. For instance in, *Patel Narshi Thakershi and Ors. v. Shri Pradyumansinghji Arjunsinghji*,⁹¹ the Supreme Court recognized that the case illustrates the consequence of entrusting judicial work to those who had no judicial training. A simple question whether the family of the respondent was divided or undivided was kept pending for about 20 years in this case. The Patna High Court in *Abdul Rahim v. Tata Engineering and Locomotive Co. Ltd.*⁹² clarified that the Labour Court has to be presided over by an independent person having sufficient amount of judicial training and experience so as to act impartially as is required of a person holding a court in the strict sense of the term. In *All India Judges' Association v. Union of India and others*,⁹³ the Supreme Court took judicial notice of the prevailing factual situation regarding judicial training at that time. The court noted that “*there is not yet any definite system of judicial training in most of the States and Union Territories. A judicial officer with his first posting or until he acquires adequate experience requires guidance. It should ultimately be the obligation of the district judge to provide the same.*” The Court directed the Government of India to set up a service institute within one year at the Central and State or Union Territory level. In *L. Narasegowda v. Hutchappa*⁹⁴, the Karnataka High Court noted that judicial work has also become specialized and requires special knowledge, training and a unique judicial approach. The Supreme Court in *P.K. Dave v. Peoples Union of Civil Liberties (Delhi) and others*,⁹⁵ and the Bombay High Court *S.T. Bhingardive v. Punamchand Kashyalal Agarwal and others*,⁹⁶ held that judicial training is necessary to train judges to avoid harsh words, intemperate language and a lack of self-restraint. In *Siddhartha Kumar and others v. Upper Civil Judge, Senior Division, Ghazipur and others*,⁹⁷ the Allahabad High Court held that,

“to equip the Judicial Officers to properly discharge their responsibilities and to enable them to meet the challenging situations, it is essential that there should be intermittent training courses for the Judicial Officers in phases. There is a well established Judicial Training and Research Institute in the State. Fortunately, it is walking with long steps. The training facilities available at the Institute must be fully exploited to the full advantage of Judicial Officers. The Director of the Institute should devote his energies more on the practical aspects of the problems which arise in day-to-day working in the battling courts rather than the academic aspects of law. The training schedule should include courses to find out the ways and means to meet and encounter the court room problems—a reality to which now no one can afford to shut his

⁸⁹ November 1986.

⁹⁰ p2

⁹¹ AIR 1970 SC 1273.

⁹² (1995) III LLJ 248 Pat

⁹³ (1992) 1 SCC 119.

⁹⁴ ILR 1994 KAR 3543.

⁹⁵ 1996 (4) SCALE 652.

⁹⁶ 1998 (3) BomCR 690.

⁹⁷ 1998 (1) AWC 593.

eyes. In the training syllabi-a new horizon about the emphasis on eliminating the delays and prompt disposal of cases should also be projected."

The court further made the case for the training of the court staff in following words, "The staff is an integral part of the courts. Unless they are well equipped and trained in the work which is assigned to them. Presiding Officers would not be able to work effectively and efficiently. The ministerial wing of the High Court also has a major role to play in the governance of the subordinate courts. It is, therefore, considered necessary that the staff of the subordinate courts as well as High Court, particularly gazetted ministerial staff (those who are rankers) should also be imparted training, at intervals."

In *Mata Prasad Mishra v. State of U.P. and others*,⁹⁸ the Allahabad High Court directed the Executive Government of the State of Uttar Pradesh to use the judicial training facilities available in the State to train its officers who conduct enquiries, as it was found they lack legal knowledge regarding the relevant rules and the manner in which an enquiry is conducted. Due to this failing, the delinquents who commit an act of gross misconduct resulting in a loss of public exchequer are exonerated from the charges either by the departmental disciplinary authority or appellate authority itself and the writ petition the delinquent filed is allowed. In *Net Singh v. Labour Secretary, U.P. Shasan and Ors. and Ramesh Kumar Singh v. State of U.P. and Ors.*,⁹⁹ the Allahabad High Court took note of the fact that judicial officers in the state of U.P, though well trained for judicial work, have no knowledge of court management. It asked the Judicial Training Institute of the State to introduce court management as a compulsory part of judicial officer training. The court further directed that "No one may be appointed, or promoted unless he has gone through training in court management. Mere training is not sufficient. It is to be constantly practiced."

4.11 To Enhance the Capacities of Judges

There are accusations and denials that the courts take too long to issue decisions; that opinions are turgid and murky; that judges write too many concurrences and dissents, leaving no clear idea of what the law is; and that judges are delegating too much responsibility to callow clerks.¹⁰⁰ Thus, the need for imparting training to the members of the judiciary at every level with a view to improving performance and efficiency cannot be over-emphasized.

Judicial Education in India is helping judges to increase their efficiency and work performance. For instance, from 2006 to 2008 at the NJA, a total of 14 regional conferences and 20 national conferences were held to raise awareness of the problem of delay in courts and to develop techniques and tools for timely and responsive justice. Enough solutions emerged in these conferences to help judicial officers in tackling the problems of delay. Some best practices emerged and these have been distributed to all. A great amount of introspection (behind closed doors) was carried out to improve the system.

⁹⁸ 1999 (4) AWC3600.

⁹⁹ (2001) 1 UPLBEC 757.

¹⁰⁰ See Barone, *Our Overworked Justices Should Fire Some Law Clerks*, WASHINGTON POST, (Nov. 24, 1982), at A17, col. 1.

Another target for improving efficiency is establishing techniques for communication among judges in areas of the law in which the court does not speak with one voice, or where fuller explanation is needed. *Judicial Education* offers a platform for judges to establish communication with each other and for judges to learn about each others views. The purpose of sharing views on such topics would not be to establish a fixed agenda for action and definitely not to decide abstract issues. Rather, its purpose would be to make judges more sensitive to their colleagues' interests and views, and to perhaps establish a general aura of agreement on their responsibility as a court to identify and to elucidate particular subjects. High Court conferences held every month in the judicial year 2007-2008 at the NJA were originally designed for such purposes.

4.12 To Make Judges Understand the Differences between Law and Justice

According to Gobind Das, "If one subjected to the legal process is satisfied, the same order must be just. Justice may probably be said to consist of the x-ness in the system that satisfies those that are subject to the process."¹⁰¹ The former Chief Justice of India J.S. Verma and the Director of NJA, Prof. Mohan Gopal have revised this x-ness taken from the thesis of Gobind Das and devised a new equation: $L+X = J$. In this L stands for law, J stands for justice and X is the power of interpretation vested with the judge. Therefore law itself may not give justice. Only when a judge interprets law in a reasonable, rational manner that justice may be restored. The X factor that provides for Justice necessarily involves the use of compassion for humanity in applying the laws that may exist. A compassionate understanding is a component of fairness. The lone dissenter in *Plessy v. Ferguson*¹⁰² was Justice John Harlan. Because of his compassion for those subjected to racial segregation, he was able to see, and to give, a truer understanding of reality whilst adjudicating. The *Plessy* case illustrates that compassion [that is, the ability to understand the suffering of others, or the ability to listen to the litigant's description of their plight] can help a judge see a more complete picture of the case at hand, including the applicable law and its purpose.¹⁰³

X, the power of a judge to interpret a statute can be used to bridge the gap between law and life's changing reality. As an example, in 1986, the United States Supreme Court held that a statute criminalizing consensual homosexual relations between adults was constitutional.¹⁰⁴ Eighteen years thereafter, the United States Supreme Court overturned its prior holding and stated that the Constitution bars legislation criminalizing consensual sexual relations between adults.¹⁰⁵ The difference between these two decisions is not due to change in the Constitution but due to the change that occurred in American society regarding homosexuality.¹⁰⁶ Similarly, the Indian Supreme Court in 1950, in the *A.K. Gopalan* case had refused to incorporate the *due process* doctrine, twenty six years later in *Maneka Gandhi's* case in 1976, it treated it as part of the basic structure of the Constitution. Similar changes in attitudes have taken place in Israel too.¹⁰⁷

This implies that X plays a major role in order for justice to be rendered. One of the roles of *Judicial Education* is to stress on the content of variable X and develop different values that

¹⁰¹ Gobind Das, *supra* note 38, p. 96-97.

¹⁰² 163 U.S. 537 (1896).

¹⁰³ Justice Joyce Kennard, *Why Justice Is More Than Law*, 83 WOMEN LAW JOURNAL 10 (1997).

¹⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰⁵ *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

¹⁰⁶ Robert Post, *Foreword: Fashioning The Legal Constitution: Culture, Courts, And Law*, 117 HARVARD LAW REVIEW 4 (2003).

¹⁰⁷ See cases cited at <http://www.court.gov.il>.

can enrich variable X. In the academic year 2007-2008, the NJA developed Freedom, Equality, Dignity, Equity and Fairness (FEDEF)¹⁰⁸ as appropriate values to be given to variable X in suitable cases.

4.13 To Help Judges in their Managerial Duties

Today, many managerial responsibilities are put on judges.¹⁰⁹ District judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion.¹¹⁰ Judges have described their new tasks as ‘case management’, ‘court management’, ‘docket management’, ‘time management’.¹¹¹ With these managerial responsibilities, judges have to learn more about cases much earlier than they did in the past.¹¹² They negotiate with parties about the course, timing, and scope of both pre-trial and post-trial litigation. These managerial responsibilities give judges greater power. Yet, the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.¹¹³

This new managerial role has been approved by the legislatures in various amendments to the civil procedure and criminal procedure codes. Judges too, are not complaining and have shown interest in learning new management principles for reducing their burden. Trial judges have accepted the new assignment to become mediators, negotiators, and planners. Partly because of their new oversight role and partly because of increasing case loads, many judges have become concerned with the volume of their work. To reduce the pressure, judges have turned to efficiency experts who promise ‘calendar control.’ Under the experts’ guidance, judges have begun to experiment with schemes for speeding up the resolution of cases and for persuading litigants to settle rather than try cases whenever possible¹¹⁴. During the past decade, enthusiasm for the “managerial movement” has become widespread; what began as an experiment is likely soon to become obligatory.¹¹⁵

Judicial Education has to prepare judges for their new managerial role. The NJA in India, National Center, the American Bar Association in US,¹¹⁶ JSB in UK and all other *Judicial Education* providers in other nations who have studied the issue of cost and delay have encouraged judges to become more actively involved in case management. This has been based on a belief that the courts have the responsibility to preserve fairness to the parties in the litigation process and

¹⁰⁸ all enshrined in the Constitution Of India. See generally, Barbara Kennedy, JUST LAW, 2004.

¹⁰⁹ Management of Cases (Conference) Rules 2007, GN No. 197 of 2007, Government Gazette of Mauritius No. 111 of 24 November 2007 available at [http://supremecourt.intnet.mu/entry/cjei/doc/No.%20197MANAGEMENT%20OF%20CASES%20\(CONFERENCE\)%20RULES%202007.doc](http://supremecourt.intnet.mu/entry/cjei/doc/No.%20197MANAGEMENT%20OF%20CASES%20(CONFERENCE)%20RULES%202007.doc).

¹¹⁰ See Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770 (1981); Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 JUST. SYSS. J. 135 (1978); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

¹¹¹ Constantino, *Judges as Case Managers*, TRIAL 56, 57-60 (Mar. 1981).

¹¹² There is a present trend of the judges occupying highest posts in various countries to encourage via speeches management in courts. For instance, in India on 29 March 2008, at a Conference organized by the Delhi High Court, Lord Chief Justice of England and Wales, Lord Phillips in his speech available at http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf pointed out how in his 46 years career – ADR has helped the courts to manage litigation in a number of ways.

¹¹³ Judith Resnik, *Managerial Judges*, 96 HARVARD LAW REVIEW 374 (December, 1982).

¹¹⁴ See e.g., M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964); Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247 (1968); Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference* (pt. 2): *From Pure Pre-Trial to Compulsory Settlement Conferences*, 10 U. CHI. L. REVV. 453 (1943); Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 420 (1953).

¹¹⁵ *Salem Bar Association, Tamil Nadu v. Union of India* AIR 2005 SC 3353

¹¹⁶ *Transcript Of Panel Discussions, supra* note 43.

that court management is integral to fairness and the elimination of cost and delay. Judges are therefore given training in various management principles that will allow the courts to respond responsibly, appropriately and efficiently.

For instance, the NJA took the initiative in 2007-2008 to develop concrete proposals for strengthening judicial systems management. In a National Conference of High Court Justices on Strengthening Judicial Systems Management, the NJA came up with a number of suggestions. An informal group of High Court Justices was formed after the Conference to guide the NJA's work in this regard. This informal group met several times under the guidance of Justice S.B. Sinha of the Supreme Court. Several specific suggestions were considered. The NJA also held discussions with national level management and IT experts. These discussions resulted in a framework for strengthening the judicial system in the country by establishing a set of performance standards and targets for courts. It also called for the establishment of a planning and management system for the judiciary, which was endorsed by the Chief Justice of India in his speech on February 24, 2008. Based on the speech of the CJI and these discussions, the NJA developed a proposed "Planning and Management System for Timely Justice" (PMTJ). The PMTJ has two main elements. Firstly, a system of "court-level plans for timely justice" (CPTJ) under which a five year plan will be developed for every court in the country. These five year plans will identify for every court a detailed road map on how the performance standards and targets established by the CJI will be achieved by that court. The plans will identify the resources needed for that court to achieve these targets. The plans, once approved by High Courts will be monitored.

Secondly, an "Information Management System for the Administration of Justice" (IMSAJ) will be established. Eventually, IMSAJ will be an enabled network that will connect all elements of the justice administration system: police, prosecution, courts and jails. The IMSAJ will minimize inefficiency, injustice and corruption arising from the current administration based on multiple and mostly manual, information systems. In the first phase, IMSAJ will develop a central data repository into which court data may be uploaded from courts across the country through the internet. The data depository will be a stand alone "special purpose vehicle" under the control of the judiciary and located in the Supreme Court. It will provide a repository for court data from across the country in a professional and systematic manner. The IMSAJ will also provide support functions such as scheduling and timetables for every case entered into the system. The IMSAJ will aim to eliminate manual/ledger based systems from courts and replace them with digital systems. In the second phase, IMSAJ will provide for uploading all documents relating to every case into the system. In the third phase the IMSAJ will envisage networking with the non-judicial systems involved in the administration of justice.

Through the *Planned Approach to Delay and Arrears Reduction: Court-Based Planning for Timely Justice (CPTJ)*, the goal of timely justice will be achieved through the incorporation of *three sets of common minimum national standards; and a planning and management system*. The three sets of common minimum national standards are for (i) court performance; (ii) human resource management; and (iii) judicial infrastructure. The planning system will provide a framework for implementing these standards as well as addressing other needs of the judiciary in a systematic manner.

4.14 To Reduce the Influence of Various Ideologies

Judge Posner, writing most recently in the Harvard Law Review, observed,

"It is no longer open to debate that ideology [intermediary between a host of personal factors, such as upbringing, temperament, experience, and emotion—even including petty resentments toward one's colleagues—and the casting of a vote in a legally indeterminate case, the ideology being the product of the personal factors] plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused. It must play an even larger role in the Supreme Court, where the issues are more uncertain and more emotional and the judging less constrained."¹¹⁷

Few judges can entirely escape from these pressures themselves or lose habits and modes of thinking acquired from their background and environment. To think of judges differently will be tantamount to looking at them through rosy spectacles. Conflicting views between judges do not materialize from thin air. In addition to different historical and cultural perspectives which play a role, judges also have divergent opinions concerning social values. This has nothing to do with prejudice or bias. This is a mixture of moral, legal, philosophical, and political convictions, and it includes an individual's understanding of the world that we live in. The judge's religious views and wider beliefs about family and society may also influence his opinions and lead him to give new meanings to concepts which do not accommodate these views. The Jewish origins of a number of leading American justices have thus been frequently analyzed in an attempt to judge their work and understand their professional behaviour.¹¹⁸

Judicial Education can be used to inculcate similar thoughts in judges belonging to different groups. Judges can be made aware of their personal conceptions. Such presentations have a tremendous impact on the thinking process and it can help to make them conscious in the future about displaying their likes and dislikes.

4.15 To Help Judges to Identify Their Biases in Order to Overcome Them

Slowly there is recognition by the judiciary itself that the phenomenon of bias does exist.¹¹⁹ Many eminent jurists, legal thinkers, writers, political and social scientists in India have pointed out that the Court's decisions are increasingly characterized by an urban and elitist bias against the poor and the countryside. In a range of cases involving conflicts between protection of the environment and workers' rights/tribal rights/housing rights, the Court has chosen the former, without bothering much to balance the two objectives.¹²⁰

¹¹⁷ Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 48-49 (2005).

¹¹⁸ Sir Basil Markesinis, *Judicial Mentality: Mental Disposition Or Outlook As A Factor Impeding Recourse To Foreign Law*, 80 TULANE LAW REVIEW 1325 (March, 2006).

¹¹⁹ In *G.X. Francis vs. Banke Bihari Singh*, A.I.R. 1958 SC 209 the Supreme Court was deciding a transfer petition filed under section 527 of the Cr.P.C. 1898 for the transfer of a criminal case from Jashpuranagar, in the State of Madhya Pradesh, to some other State, preferably New Delhi or Orissa. The complainant in the case was a member of the royal family of Jashpur, who used to reside at Jashpurnagar. All the seven accused, except one, were Roman Catholics and the other one was a Jacobite Christian. One of the grounds for asking for the transfer of the case was that there was bitterness among the communities of the accused and the complainants i.e. Christians and Hindus, in the area of Jashpurnagar. In view of the unanimity of testimony from both sides about the nature of the charged tension in Jashpurnagar, the Supreme Court ordered the transfer of the case from Jashpuranagar to the State of Orissa, for fair trial. In *Davis vs. Alaska* (1974) 415 US 308 it was held that restrictions on cross-examination were unconstitutional even if they did not cause prejudice. In the same case, the Supreme Court referred to the importance of confrontation and cross-examination for the purpose of knowing the bias of crucial identification witnesses.

¹²⁰ See e.g., *M.C. Mehta v. Union of India* (1997) 11 SCC 227; *F.B. Taraporawala v. Bayer India Ltd.* (1996) 6 SCC 58; *M.C. Mehta v. Union of India* 1996 (1) SCALE SP-22; *Pradeep Krishen v. Union of India* (1996) 8 SCC 599; *Animal Environmental Legal Defence Fund v. Union of India* (1997) 3 SCC 549.

When the Court orders polluting industries to be closed, the workers and their families who are directly affected are rarely heard before orders are issued. The Court's remarks often display much attention to the environmental issues that are of importance to urban dwellers, such as pollution, while showing relatively little attention to rural livelihoods, which are often intricately tied to the land and forests.

The Supreme Court of India in *Narmada Bachao Andolan v. Union of India*¹²¹ opined that:

"(i) displacement of the tribals and other persons would not per se result in violation of their fundamental or other rights; (ii) on their rehabilitation at new locations they would be better off than what they were; (iii) at the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets; and (iv) the gradual assimilation in the mainstream of the society would lead to betterment and progress."

Implicit in this is the notion that rural and tribal livelihoods are inferior and bound to be displaced through urbanization and modernization.

Further courts show less sensitivity towards apprehensions of vulnerable parties who are fighting their battles against influential persons.¹²² For instance, in *Jitendra Singh v. Bhanu Kumari and Ors.*¹²³ the petitioner Bhanu Kumari in her transfer petition filed before the Rajasthan High Court stated that the respondent Jitendra Pratap Singh is an influential person and MLA of Alwar City and he has created such a situation that there is a strong likelihood of the matter pending before the District Judge being decided ex-parte against her and other members. The High Court allowed the transfer but disagreed with her apprehension, terming it as "baseless. The Courts are not influenced by politicians and influential persons. The petitioner should repose full confidence upon the court of justice. If an ex-parte order was passed by the District Judge and the petitioner was aggrieved by it, she ought to have assailed it legally. Passing of an ex-parte order by the Presiding Officer of the court cannot be a reasonable ground for transferring the case." The transfer was allowed due to the fact that on January 8, 2006 the respondent Jitendra Singh had lodged a complaint with the Police Station in Kotwali Alwar against the petitioner and considering the overall view of the nature of the case and convenience of the parties and in the interest of justice, the Court deemed it reasonable to directly transfer the suit from the court of Additional District Judge Alwar to the Court of District Judge, Jaipur City. The Supreme Court however nullified this transfer saying a reasonable opportunity to a hearing was not given to Jitendra Singh.

The latest report of PUCL and Amnesty International India on the death penalty, as well as many other writers have shown that the social philosophy of the individual judges often determines the outcomes of cases in India (as elsewhere), where the Court does not sit en banc as in the USA, but rather constitutes itself in two and three judge benches. Nor are these benches constant as judges retire very often, often as the cases drag on for years. This may mean that a

¹²¹ (2000) 10 SCC 664.

¹²² If a litigant alleges that the order of the court is not free from malice, he may have to face contempt proceedings as happened in *Ram Narain Shukla and Anr. v. J.O. Gyanpur and Anr.* 1965 Cri LJ 268. However, the Division Bench of the Allahabad High Court held that the statement by "Hon'ble Justice S. K. Verma is prejudiced against the applicant" cannot be regarded in any way as amounting to contempt of Court. Whenever a litigant states that he apprehends that a particular Judge is prejudiced against him the Court has only to consider whether his apprehension is justified or not. If it comes to the conclusion that it is, the Judge will release the case; on the other hand if he thinks that the apprehensions are baseless, he will take no notice of the allegation of prejudice against him. But no question of contempt arises when a litigant expresses his apprehension that he will not get justice from a particular Judge on the ground that he is prejudiced against him. A litigant has a right to state his apprehensions provided they are expressed in proper language. Therefore though it is manifest that the allegation of prejudice is without any basis, we do not think it constitutes contempt.

¹²³ 2008 (6) SCALE 594.

single case may see several judges deciding different aspects. As a result, the individual ideology of judges becomes extraordinarily important.¹²⁴

The reasons why the judge predetermines the outcome of a case, bases a decision on the way a party looks, or looks beyond the facts presented by the parties, are all encompassed in a single explanation: the judge has stopped evaluating information while making a decision. Accordingly, the common solution to all variations of judicial bias is to provide judges with methods that permit them to consider a greater number of alternatives when doing their jobs.¹²⁵ Empirical work suggests that judges can improve their judgments if they are conscious of cognitive biases.¹²⁶ Judges can only avoid biases that are known to them.¹²⁷ Even when they desire to render a “fair” decision, subconscious influences can cloud their decisions and impede their legal reasoning.¹²⁸ Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses. If the judge feels as though the present dispute is not the type of case that motivated him to become a judge, this negative disposition may cause automatic thoughts and other unintended reactions.¹²⁹

Despite numerous and inconsistent definitions of bias, court systems have agreed that education is the best approach to eliminate bias.¹³⁰ Accordingly, *Judicial Education* programs are being developed to present judges with lists of specific outcomes in cases as indicators of the presence of bias.¹³¹ These programmes are designed to challenge the perspective that judges are infallible and to make judges aware of their belief systems. Sessions are designed to focus on sensitivity training, limited group brainstorming, as well as to provide the legal definitions of different types of judicial bias. In one seminar at the National Judicial College in the US, psychologist Andrew Watson explained the realist approach in context as he imparted to judges the importance of mastering a behavioral approach in the discharge of their duties.¹³²

4.16 To Remove Gender Bias from the Judicial System

Judicial gender bias is experienced at three different levels: (i) during the selection of judges; (ii) during decision making on issues relating to women; (iii) and professional harassment of women who reach courts either to work there as lawyers, clerks, judges or as parties involved in litigation.

¹²⁴ Balakrishnan Rajagopal, *supra* note 31.

¹²⁵ Evan R. Seamone, *Understanding The Person Beneath The Robe: Practical Methods For Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE LAW REVIEW 1 (2006).

¹²⁶ Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (analyzing data showing the United States Magistrate Judges display cognitive biases and collecting studies showing biases in auditors, psychologists, physicians, option traders, soldiers and real estate agents).

¹²⁷ See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119, 130 (1994) (explaining that awareness of unwanted mental processes is necessary before one can eliminate them).

¹²⁸ See Jerome Frank, *Justice And Emotions*, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 53, 55 (George H. Williams & Kathleen M. Sampson eds., 1984) (describing behavioral impulses that impede a judge's decision-making, including “unconscious sympathies for or antipathies to some of the witnesses, lawyers or parties in a case before him”).

¹²⁹ Such reactions are very common. For instance, many judges complain in various seminars about frivolous litigation. Research is required to evaluate what makes judge complain about this.

¹³⁰ JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE CALIFORNIA COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS* 403 (July 1996) (final report).

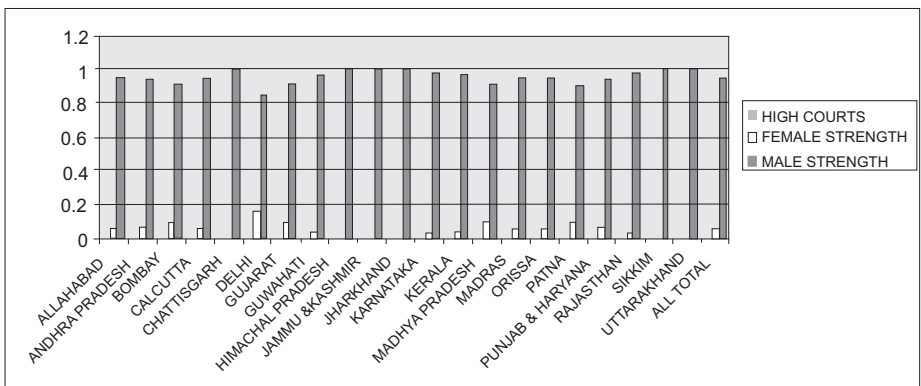
¹³¹ At one programme on “appreciation of evidence” delivered in the month of October 2006, one such exercise was taken up. One laptop was placed by the Director of NJA on the centre table and while the session was going on, one of the people who does not usually attend to duties for the judges – was told to take the laptop away. After about half an hour – the Director raised an alarm of theft of the laptop. All participant judges to the programme were then asked to jot down on paper a description of persons whom they saw taking the laptop away from the conference hall. The NJA used this evidence to base their search for the miscreant and lodging of an FIR. Everyone submitted a different description of the person. After one hour the same person came back with the laptop and the judges were made to realize how much they can rely on evidence of an eye witness. Such exercises are very useful for clearing cognitive biases.

¹³² Evan R. Seamone, *supra* note 125.

4.16.1 Selection of Women for Judging Work

In the complex imbroglio of society in India, the burden of translating justice will be heavy, if not crushing, for the shoulder of any single agency. The proper process may require the burden to be shared amongst many to create a pluralist system of administration of justice, through various countervailing institutions in society with the judiciary as the fulcrum.¹³³ Involving women in the administration of justice will give plural character to the judiciary. Whether we take the case of India or its neighbours - Pakistan, Nepal, Bangladesh, Sri Lanka and Afghanistan, or if we take examples from the West - confidence is not reposed in women and seldom do they rise to the highest position in the judiciary. For instance, while women judges do serve in Afghanistan's lower courts¹³⁴ and head both the Family and Juvenile Courts,¹³⁵ female judges are infrequently found outside of Kabul¹³⁶ and are largely "confined to lower levels." Not a single woman has secured a position at the judiciary's highest level, the Scholar Council of the Supreme Court. A 2003 Amnesty International report revealed that the biases of many male judges pose a primary obstacle to increasing female representation on the bench.¹³⁷

From the year of establishment of the Supreme Court of India in 1950, only 3 women have made it to the Supreme Court; implying in last 58 years that only 3 women could qualify for the top job! There are 21 High Courts in the country and on 8th March 2008, 6 High Courts had no women on the Bench (Jammu & Kashmir, Himachal Pradesh, Uttarakhand, Sikkim, Jharkhand and Chattisgarh). Even in other High Courts the picture is dismal. No High Court bench in India is composed of more than 15% women. The table below demonstrates these appalling facts.



¹³³ Gobind Das, *supra* note 38, p.49.

¹³⁴ http://www.unifem.org/gender_issues/voices_from_the_field/story.php (as of Nov. 1, 2006).

¹³⁵ While the 1976 Afghan Code of Civil Procedure sets forth that every district in Afghanistan shall have a specific family court, only one family court in Kabul has been established.

¹³⁶ Women Failed by Progress in Afghanistan (2004), <http://web.amnesty.org/library/pdf/ASA110152004ENGLISH>. [as of 12/12/2006].

¹³⁷ Nusrat Choudhury, *Constrained Spaces For Islamic Feminism: Women's Rights And The 2004 Constitution Of Afghanistan*, 19 *JOURNAL OF LAW AND FEMINISM* 155 (2007).

HIGH COURT	TOTAL STRENGTH	FEMALE JUDGES	% OF FEMALE JUDGES	% OF MALE JUSTICES
ALLAHABAD	69	4	5%	95%
ANDHRA PRADESH	27	2	7%	93%
BOMBAY	50	5	9%	91%
CALCUTTA	41	2	5%	95%
CHATTISGARH	7	0	0%	100%
DELHI	32	6	16%	84%
GUJARAT	30	3	9%	91%
GUWAHATI	22	1	4%	96%
HIMACHAL PRADESH	9	0	0%	100%
JAMMU & KASHMIR	10	0	0%	100%
JHARKHAND	9	0	0%	100%
KARNATAKA	36	1	3%	97%
KERALA	25	1	4%	96%
MADHYA PRADESH	42	4	9%	91%
MADRAS	45	3	6%	94%
ORISSA	19	1	5%	95%
PATNA	27	3	10%	90%
PUNJAB & HARYANA	43	3	7%	93%
RAJASTHAN	34	1	3%	97%
SIKKIM	2	0	0%	100%
UTTARAKHAND	8	0	0%	100%
ALL TOTAL	587	40	6%	94%

Therefore, women continue to face discrimination. For example, in 1953, when Supreme Court Justice Sandra Day O'Connor graduated third in her Stanford Law School class (Chief Justice Rehnquist was first), having been a member of the Stanford Law Review and having been elected Order of the Coif, her only job offer was the position of legal secretary in a law firm.¹³⁸ Apart from this, if we take a look at the table below¹³⁹ about UK statistics of women judges, another interesting fact emerges. The more powerful and higher in the hierarchy is the post, the chance of women assuming that post shrinks. Till now, gender justice in appointments has been proved by giving women low key affairs post. Therefore as we come down in the hierarchy, up goes the number of women for that post.

¹³⁸ Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983). Ironically, one of the partners at the firm who offered Justice O'Connor the legal secretary position was former U.S. Attorney General William French Smith.

¹³⁹ <http://www.judiciary.gov.uk/keyfacts/statistics/women.htm> [as of 20 June 2008]

Post		Former Barristers	Former Solicitors	Total
Lord of Appeal in Ordinary	Women	1	0	1
	Men	11	0	11
	Total	12	0	12
	% Women	8.33	0	8.33
Heads of Division	Women	0	0	0
	Men	5	0	5
	Total	5	0	5
	% Women	0	0	0
Lord Justice of Appeal	Women	3	0	3
	Men	33	1	34
	Total	36	1	37
	% Women	8.33	0	8.11
High Court Judge	Women	11	0	11
	Men	98	1	99
	Total	109	1	110
	% Women	10.09	0	10.00
Circuit Judge	Women	72	15	87
	Men	492	74	566
	Total	564	89	653
	% Women	12.77	16.85	13.32
Recorder	Women	168	26	194
	Men	1028	83	1111
	Total	1196	109	1305
	% Women	14.05	23.85	14.87
Judge Advocates	Women	0	0	0
	Men	9	0	9
	Total	9	0	9
	% Women	0	0	0
Deputy Judge Advocates	Women	1	0	1
	Men	10	1	11
	Total	11	1	12
	% Women	9.09	0	8.33
District Judge	Women	13	85	98
	Men	25	315	340
	Total	38	400	438
	% Women	34.21	21.25	22.37
Deputy District Judge	Women	177	34	211
	Men	494	68	562
	Total	671	102	773
	% Women	26.38	33.33	27.3
District Judge (Magistrates' Courts)	Women	13	18	31
	Men	34	71	105
	Total	47	89	136
	% Women	27.66	20.22	22.79
Deputy District Judge (Magistrates' Crt)	Women	18	22	40
	Men	53	74	127
	Total	71	96	167
	% Women	25.35	22.92	23.95
Masters, Registrars, Costs Judges and DJ (PRFD)	Women	6	5	11
	Men	23	14	37
	Total	29	19	48
	% Women	20.69	26.32	22.92
Deputy Masters, Registrars, Deputy Costs Judges and DJ (PRFD)	Women	27	12	39
	Men	28	48	76
	Total	55	60	115
	% Women	49.09	20	33.91

4.16.2 Decision Making on Issues Related to Women

The kind of decisions that will be churned out by a gender insensitive judiciary can be garnered from the Afghani experience. Mawlawi Fazl Hadi Shinwari, Afghanistan's first Chief Justice under the current internationally-backed regime of Hamid Karzai, started the country's Supreme Court off on a noticeably reactionary and politicized path. Only ten days after the close of the Constitutional Loya Jirga, the new Supreme Court made a troubling and controversial decision when it declared "the first broadcast of a female vocalist on Afghan State television in twelve years as "un-Islamic."¹⁴⁰ The Supreme Court denounced the performance despite the fact that pop star Salma covered her hair with a headscarf while singing.¹⁴¹ While Article 121 of the Constitution of Afghanistan permits the Supreme Court to engage in the review and interpretation of laws, legislative decrees, and international treaties "[a]t the request of the Government or Courts,"¹⁴² the Court made this decision without any case before it and based on no existing law or referral of the issue by the Government. The Supreme Court's Deputy Chief Justice Fazl Ahmad Manawi offered an explanation for the decision that alludes to the Court's bias: "We are opposed to women singing and dancing as a whole [A]nd it has to be stopped."¹⁴³

Women in US courts too have had bad experiences with judges who used to trivialize violence against them. The Colorado Judiciary came under siege after a local Judge gave a minimal sentence to be served on weekends to a man who killed his wife when she tried to flee their abusive marriage.¹⁴⁴ The defendant tracked his wife and shot her five times in the face. The Judge said she provoked her husband by not telling him she was leaving.¹⁴⁵ In 1993, a New Hampshire Judge sentenced a man to twenty-eight days to be served on the weekends for assaulting his wife from whom he had been estranged for a year. The defendant stalked his wife on a camping trip and found her in a tent with another man. Another 1993 case involved an Ohio man who entered his estranged wife's home, beat her with a crowbar, then knocked out some of her daughter's teeth when she tried to call 911.¹⁴⁶ The defendant had a record for murder, rape, and armed robbery. The Judge imposed the state-required sentence of three to fifteen years, then released the defendant after he served seven months. The Judge said, "The guy walked into his house with his wife in his bed with another guy. It's enough to blow any guy's cool if he's any kind of man."¹⁴⁷ Baltimore County Circuit Judge, Thomas J. Bollinger, was disciplined in 1993 for his remarks in a rape case in which he sentenced to probation a forty-four-year old man who raped his eighteen-year-old employee while she was unconscious from drinking.¹⁴⁸ Part of the discipline the Judge received included attendance at a program to sensitize him to rape cases. He refused to attend and has suffered no consequence as a result.¹⁴⁹

For India, the *Mathura* case is cited as classic instance of a gender insensitive court. The *Mathura* case created a major nationwide campaign on the issue of custodial rape, following the open letter written in September 1979 by four legal academics – Upendra Baxi, Lotika Sarkar, Vasudha Dhagamwar and Raghunath Kelkar to the Chief Justice of India. The open letter questioned

¹⁴⁰ J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan*, available at http://iisdb.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf. [as of 3rd December 2006].

¹⁴¹ Afghan TV U-Turn on Women Singers, BBC News, (Jan. 16, 2004), <http://news.bbc.co.uk>. [as of 3rd December 2006].

¹⁴² Const. Of The Islamic Republic Of Afg. (2004), Art. 121.

¹⁴³ *Woman Singer Angers Afghan Judges*, BBC News, (Jan. 14, 2004), <http://news.bbc.co.uk>. [as of 24th August 2008].

¹⁴⁴ *Judge Upheld on Remark About Slain Woman*, N.Y. Times, (July 17, 1984), at A22.

¹⁴⁵ The sentence was ultimately vacated as illegal and the defendant was sentenced by a new judge to 10 years of imprisonment.

¹⁴⁶ Sheila Weller, MORE OF AMERICA'S MOST SEXIST JUDGES, 88, 90, 91. (Redbook, Dec. 1994).

¹⁴⁷ Lynn Hecht Schafran, *There's No Accounting For Judges*, 58 ALBANY LAW REVIEW 1063 (1995).

¹⁴⁸ Judge Bollinger stated that finding a woman in such a state was "the dream come true for a lot of males."

¹⁴⁹ Lynn Hecht Schafran, *supra* note 147.

the validity of a judgment passed by the apex court, and described the *Mathura* judgment as 'an extraordinary decision sacrificing human rights of women under the law and the Constitution'. The authors enumerated their reservations on the judgment, stating that: a young girl could not be expected to successfully raise an alarm for help when trapped by two police men inside a police station; the absence of marks or injury on her body need not imply absence of resistance; and that there is a clear difference in law and common sense between submission and consent. This letter placed debates on rape within the rhetoric of human rights violations. *Mathura's* culprits went unpunished and therefore she failed to get justice but the debate led to legislative amendments, which shifted the onus onto the accused in custodial rape cases.

However, even after the 1983 amendment to provisions punishing rape in the penal code, a study of cases¹⁵⁰ shows that the focus of the judicial interpretations remained centred on a question of the 'character' of the complainant, rather than the crime committed by the perpetrator. This therefore reduced to a token gesture, the legal proviso of shifting the onus of proof to the accused in cases of custodial rape.

A study conducted by PUDR (a Delhi based civil liberties group) in 1995, looked at ten cases of rape by police personnel and it revealed that in most cases, the victim was a working class woman. In almost all the cases, the accused has been acquitted and some have even been reinstated in their old posts. The Sessions Court, Jaipur on 5th November 1995 acquitted five men who committed gang rape on Bhanwari Devi after she reported cases of child marriage to the police. The judgment based its acquittal on two planks, including a romanticisation of Indian culture and the lack of forensic evidence. The judge, Justice Jaspal Singh stated that it was impossible in India, that members of the same community would commit rape together. Conversely, it was argued that the 5 accused were of different castes and therefore it was impossible that they would have worked together, as according to the Judge, rural gangs are not multi caste.

There have been other instances, such as the *Gita Hariharan* case where the Judge refused to strike down a personal law that made women only secondary guardians of their children. In *Batra v Batra*¹⁵¹ the court watered down what the legislature intended to do; namely give women the protection of a home, irrespective of the nature of ownership, from which they cannot be dispossessed except by a procedure established by law.¹⁵²

The US, Indian and Afghanistan experience shows that the absence of gender as a topic in legal jurisprudential education, coupled with the absence of any judicial gender training leads to a double impact on women.

The solution lies in mandating judicial gender education. Court rules for *Judicial Education* should require participation in domestic violence education. Judges must be selected, trained, evaluated, and if need be, disciplined with a focus on the fact that domestic violence is a major national problem with profound implications for the safety, physical and mental health and poverty of women and children. More importantly, it is a crime. Batterers must be held accountable for their violence. Judges must be held accountable for their role in combating it.¹⁵³

¹⁵⁰ Geetanjali Gangoli *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA* (Ashgate Publishing Ltd, 2007).

¹⁵¹ *S.R. Batra and Anr. v. Smt. Taruna Batra* (2007) 3 SCC 169.

¹⁵² Indira Jaising, *Of crying hoarse, not wolf!* available at <http://www.lawyerscollective.org/content/crying-hoarse%2C-not-wolf%21-indira-jaising>

¹⁵³ Lynn Hecht Schafran, *supra* note 147.

4.16.3 Professional Harassment of Women in the Courts

Women face a subtle type of gender bias in courts. For example, although judges often give male attorneys their full attention, they may shuffle papers or look at the clock when female attorneys speak.¹⁵⁴ A female attorney with a complaint about a particular judge may hesitate to file it formally or to even voice it, if she is likely to appear before that judge again in the future. She may also fear that voicing such a complaint will gain her the reputation of a troublemaker throughout the legal community.¹⁵⁵ Several years ago a male trial judge in US refused to hire a female court reporter, claiming his wife did not want him traveling with a woman. Many male judges supported his decision despite state laws that prohibited sexual discrimination in hiring. Unfortunately, many of these male judges viewed court personnel as their personal employees, to be hired on the basis of their personal whims. In this instance, the woman filed a law suit for sexual discrimination and successfully recovered monetary damages.¹⁵⁶ In 1988, a male Federal Judge in Pennsylvania threatened to send a lawyer to jail when she objected to being addressed by her husband's surname in court. The Judge also objected to another attorney addressing a witness as 'Ms.' instead of 'Mrs.' The Judge later apologized. He said he always referred to married women by their married names, but he declared that "any person who appears in my courtroom may be addressed in any manner in which he or she sees fit."¹⁵⁷

The world over, there has been instances of sexual harassment of women in courts and these instances are widely reported and debated. In India,

*"unfortunately for women, there are many in the rank and file of judiciary who consider women as an instrument of man's comfort and pleasure. They cannot accept anything contrary. So when they see a woman filing a petition for maintenance or seeking shelter from a husband who batters her, he immediately becomes hostile to her. If a woman's organization is seen as supporting her case, the anger of the member of the judiciary rises more and the resentment to the complainant woman's very action of reaching out to a court not only becomes obvious, it permeates all the pronouncements from the dais so that the men in court smile and sneer while women are made to feel belittled and harassed. In such atmosphere, legal proceedings continue to be prolonged..."*¹⁵⁸

Women lawyers are also affected by gender bias in court rules. One such issue in the courts is decorum and dress. The drafters of these rules either forgot about women lawyers and women court personnel or expect women to dress like men. In India, Delhi High Court rules made for advocates do not envisage that a female can be an advocate at all! There are rules only for male advocates. Therefore, women can easily observe exemption from these Rules!¹⁵⁹

¹⁵⁴ Deborah Ruble Round, *Gender Bias In The Judicial System*, 61 SOUTHERN CALIFORNIA LAW REVIEW 2193 (1988).

¹⁵⁵ See Weber, *'Still in Good Standing': The Crisis in Attorney Discipline*, 73 A.B.A. J. 58, 61 (Nov. 1987).

¹⁵⁶ Shirley S. Abrahamson, *Toward A Courtroom Of One's Own: An Appellate Court Judge Looks At Gender Bias*, 61 UNIVERSITY OF CINCINNATI LAW REVIEW 1209 (1993).

¹⁵⁷ Debra C. Moss, *Judge Mrs. the Point*, A.B.A.J., 25 (1 Sept, 1988).

¹⁵⁸ Ila Pathak, *Ahmedabad Women's Action Group*, (30 March 1996) – quoted by Ann Stewart, *Judicial Attitudes To Gender Justice In India: The Contribution Of Judicial Training*, 2001(1) LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT JOURNAL available at <http://elj.warwick.ac.uk/global/issue/2001-1/stewart.html>.

¹⁵⁹ accessible at <http://delhihighcourt.nic.in/history.htm>.

4.16.4 The Role of Courts and Judicial Educators

Since the 1980s, women judges and advocates in the USA and other Western countries have fought to bring the reality of gender discrimination from obscurity to prominence. These fights have been successful and resulted in the formation of gender task forces in most of the courts over in the US.¹⁶⁰ Moreover, a number of State Judicial Review Boards have publicly censured judges and attorneys for exhibiting biased conduct in the courtroom.¹⁶¹

Reformers in a number of Common Law jurisdictions have viewed judicial training in gender issues as one way of developing a legal culture based on gender justice.¹⁶² In 1980, the National Association for Women Judges and the National Organization of the Women's Legal Defense and Education Fund formed an umbrella group, the National *Judicial Education Program* (NJEP) to Promote Equality for Women and Men in the Courts. The new group was created to help judges understand how stereotypical thinking about women and men affects true impartiality and also to assist in the formation of State task forces composed of lawyers, judges, and members of the public to investigate and report on gender bias in the State's judicial system.¹⁶³ The NJEP began placing an emphasis on developing very State-specific *Judicial Education*. This then became the catalyst for the national gender bias task force movement beginning in the 1980's. Since that time, both State and Circuit Courts have been reporting their results to the NJEP.¹⁶⁴ In 1982, New Jersey was the first State to establish such a task force, and New York followed in 1984.¹⁶⁵ In Rhode Island, a judicially appointed committee examined the gender bias issue by conducting the first empirical study into the treatment women receive in the courtroom.¹⁶⁶ In California, former Chief Justice Rose Bird appointed a special judicial council committee to determine whether the recommendations of the New Jersey and New York gender bias task forces could be applied to the Californian judicial system.¹⁶⁷ Similar studies have also been undertaken in Arizona, Massachusetts, Illinois, and Florida.¹⁶⁸

However, in India, no High Court has taken the initiative to set up a task force of this kind to study gender bias. There is nothing comparable in India to hear complaints of harassment in courts, which gives an impression that all is well in the courts of India and there is no discrimination of women. Neither lawyers, nor academics, nor judges in any substantial number have indulged in this area. Even the general public and the media keep away from such issues most of the time, as they fear the contempt powers of the courts.¹⁶⁹ One very negligible development though is the formation of committees in some of the High Courts,¹⁷⁰ pursuant to the famous *Vishaka* case.¹⁷¹

¹⁶⁰ See *Women Attorneys Face Discrimination, 'Put-Downs'*, 14 CRIM. JUST. NEWSLETTER, 6 (Sept. 26, 1983); *About the New Program*, 64 JUDICATURE, 208 (Nov. 1980).

¹⁶¹ See e.g., *In Re Kirby*, 354 N.W.2d 410, 414 (Minn. 1984) (disciplined judge for calling female attorneys 'lawyerettes' and questioning their failure to wear neckties); *In Re Stevens*, 28 Cal. 3d 873, 625 P.2d 219, 172 Cal. Rptr. 676 (1981) (Superior Court Judge publicly censured for initiating conversations with a married couple employed by legislature in which he discussed sexual fantasies and proposed to the couple to engage in certain sexual conduct); *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973) (Municipal Court Judge removed from office for repeated acts of crude behavior and vulgar conduct toward court employees, including brandishing a dildo in chambers), *cert. denied*, 417 U.S. 932 (1974) (admonished judge for his practice of referring to the appearance and physical attributes of female attorneys); *State of New York Commission on Judicial Conduct: Matter of Jordan*, N.Y.L.J., Mar. 2, 1983, at 12, col. 5 (publicly censured judge for calling female attorney 'little girl' and saying to her 'I will tell you what, little girl, you lose').

¹⁶² Stewart *supra* note 158.

¹⁶³ Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, 28 (Feb. 1990).

¹⁶⁴ Leah M. Perkins, *Public Hearings Underway To Examine Bias In The Judicial System*, 2 Lawyers Journal 6 (2001).

¹⁶⁵ See Schmalz, *New York Courts Cited on Sex Bias*, N.Y. Times, (April 20, 1986), at 1, col. 1.

¹⁶⁶ Breton, *Empirical Study Finds Gender Bias in Rhode Island Courts*, NAT'L L.J., 13 (Feb. 17, 1986).

¹⁶⁷ *Announcements: Women in the Courts Update*, 9 WOMEN'S RTS. L. REP. 99 (1986).

¹⁶⁸ See Marcotte, *Virginia Bars Create Panel on Women, Minorities*, 12 B. LEADER 29 (1986) (independent commission created to promote the involvement of women and minorities in the legal profession in Virginia).

¹⁶⁹ *Shri Surya Prakash Khatri & Anr. v. Madhu Trehan and Ors.* 2001 Cr.LJ 3476 – survey done by media group on judges – Delhi HC held media group guilty under the Contempt of Court Act.

¹⁷⁰ Delhi, Bombay, Madras.

¹⁷¹ 1997 (6) SCC 24.

The general public has no knowledge about the existence of such committees. A High Court Judge is made in-charge of the committee and it is difficult to get any information from this committee regarding the kinds of complaints filed. In fact, some High Courts are of the view that the guidelines laid down by statute or the Supreme Court in the *Vishakha* case do not apply to them.¹⁷²

Another step taken in this direction includes the setting up of specialized judicial institutions for women in the Family Court. It is intended to be different from the usual processes of the civil courts. Judges are empowered by statutes to deliver gender justice, often through affirmative action that is unique to such institutions.

Apart from this, State Judicial Academies and the NJA at Bhopal are fulfilling the need for gender sensitization of judicial personnel. They are equipping future judges to deal with women's issues with sensitivity, as well as with a commitment to equality and human dignity. In every educational programme judges are sensitized to deal fairly without pre-conceived notions of female rape victims. These sessions are intended to remind judges of their responsibility to intervene when gender-biased conduct occurs and to instruct judges on techniques of intervention.¹⁷³

Also, with the support of the British Council of India and with the approval of the Chief Justice of India, the School of Law at the University of Warwick in association with the National Law School of India initiated a series of gender sensitization courses in 1995 for judicial officers. Several batches of District Judges nominated by their High Courts underwent three-month long courses. Importantly, nearly two months were spent in England attending classes and visiting courts and training centres. The "Gender and the Law" course was based on a needs assessment survey and was designed to provide sophisticated training. The success of this project, has led to it being continued for a second term of two years.¹⁷⁴

The UK and Australia have both developed equal treatment benchbooks to provide guidance to their judicial officers so they can afford equality to women and avoid gender bias. Taking lessons from these countries, the NJA in India has collaborated with the Lawyer's Collective (advocacy organization) for the preparation of a Benchbook on Domestic Violence.

4.17 To Help Judges Become More Professional

A literature review on the concept of professions¹⁷⁵ reveals that professionalism is chiefly characterized by a willingness to put respect for the law and the interests of the public above personal interest. It is because of this tradition of professionalism that the public is willing to entrust the administration of justice to courts. Therefore judges need to be educated – not in the law but in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionalists¹⁷⁶ or whatever to meet and discuss problems of many different kinds; and secondly, to keep them in touch with developments in disciplines other than law which impinge upon and may influence the administration of justice.

¹⁷² Chief Justice of Madras High Court was of this view. However, the full court had taken a contrary view – Justice K. Chandru.

¹⁷³ During the judicial year 2007-8, around 30 conferences were held covering 3000 judges. A simulation exercise on date rape cases was done to make judges move from process based analysis of rape which they usually did by offering reasons like – "girl accompanies her boyfriend, because she drinks and acts in manner inappropriate under traditional notions of Indian women's identity, she is raped" to victim based analysis of rape – where not consenting to sexual activity by woman is given importance in delivering judgment.

¹⁷⁴ Chapter 13, para 13.6.20, FNJPC Report, 1999.

¹⁷⁵ SM Grabowski, *How Educators and Trainers can Ensure on-the-job Performance* in NEW DIRECTIONS FOR CONTINUING EDUCATION: STRENGTHENING CONNECTION BETWEEN EDUCATION AND PERFORMANCE "6 (SM Grabowski ed, Jossey-Bass, San Francisco, 1993); G. Samuels, "Judicial Competency: How it can be Maintained?" 54 ALJ 587 (1980).

¹⁷⁶ P. McGuiness, "No case for judgment by the Instant Lynch Mob" (1993) *The Australian* (20 January 1993) and reprinted in 67 ALJ 324-5.

To this end Sir Ivor Richardson, has observed that,
*“we can no longer depend almost entirely on self education by the individual judge, supplemented by informal discussions with judicial colleagues. A more systemic and professional approach is needed. Formal education programs are the most effective means of gaining information and insights; of stimulating awareness of changing social and economic perspectives and values; and generally enabling us to keep abreast of all those facets of our work in changing times.”*¹⁷⁷

Livingston Armytage, has further identified the following professional needs which needs to be supplemented by education:¹⁷⁸

- (a) a 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;
- (b) a need to facilitate the ongoing professional development of judicial officers.

4.18 To Allow Judges to Master the Art, Craft and Science of Judging

The content of *Judicial Education* programs has historically focused on substantive law. Increasingly, taking cue from professional management training courses, there has been a realization that training in theoretical framework alone would not bring better professionalism to the bench. This led to an interest in the art, craft and science of judging. Soon judicial educators began to concentrate their energies towards the judging aspect and this compartmentalization of various aspects led to the coining of the phrase – *art, craft and science of judging*. Thus, the curriculum has moved toward a more interdisciplinary content, challenging judicial educators to reach beyond traditional topics.¹⁷⁹

It has become imperative to strengthen the art, science and craft of judging to move judges forward in the Information Age of the 21st Century. Such training would transform judges by moving their decisions from personal morality and rationality to constitutional morality and constitutional rationality. Such transformation would help in strengthening the administration of justice.

4.18.1 The Art of Judging

The art of judging is used because every art has a soul. Through the judge, the conscience of society speaks. Conscience can be used as a check on wrong doing. When courts speak as the conscience of society it becomes a great piece of art. For an Indian Judge, the art of judging must be based on constitutional morality. Therefore the art of judging implies advancing constitutional values like FEDEF in all the judgments.

4.18.2 The Craft of Judging

The craft of judging includes a judge’s abilities in the appreciation of facts, statutory interpretation, judgment writing, court and case management, time management, treatment/protection of witnesses/victims, language and communication, analysis and decision making, general administration skills and supervision of lower courts.

¹⁷⁷ “Changing Needs for Judicial Decision Making” 1 *Journal of Judicial Administration* 61 (1991).

¹⁷⁸ “The Need for Continuing *Judicial Education*”, 16 UNSW LJ 536 (1993).

¹⁷⁹ Patricia H. Murrell, *Competence And Character: The Heart Of CLE (Clinical Legal Education) For The Profession’s Gatekeepers*, 40 VALPARAISO UNIVERSITY LAW REVIEW 485 (Spring, 2006).

4.18.3 The Science of Judging

The science of judging implies the use of rationality as a means to justify reasoning that is based on objective criteria and not on the subjectivity of the judge alone. *Judicial Education* institutions have developed exercises to enable judges to strengthen their scientific faculties with the help of cognition experts.

4.19 To Make Justice for the Poor a Reality

With some notable exceptions, such as a judgment dealing with the right to education, the record of courts in India in enforcing internationally recognized economic, social, and cultural rights is patchy and is getting worse. The courts failure is significant when compared to the heyday of its activism when Justices such as Krishna Iyer and Chinnappa Reddy were on the bench.¹⁸⁰

Indeed, a judgment that reflects the current judicial trend is the Court's decision in the *T.K. Rangarajan*¹⁸¹ case, declaring that the Tamil Nadu Government's employees had no legal, moral, or equitable right to strike. While individual judges in the past have shown a great deal of sympathy to labor, such as Justices Desai and Krishna Iyer, the more recent generation of judges appear to display much less sympathy. This change in the attitude of the judges towards labor rights cannot be divorced from the broader socioeconomic context of liberalization, privatization, and the World Bank's and International Monetary Fund's (IMF) demands for the reform of labor laws since 1991.¹⁸²

The Court is perceived as consisting of middle class intellectuals. Therefore, it is believed that it is more receptive to others of their ilk, to their certain social and value preferences (for instance, the right to a clean environment rather than the right to livelihood), and to certain modes of argumentation over others (technical rather than social). This perception of the Court is in itself deeply restrictive of participation. The courts are unlikely to be moved by or on behalf of 'urban poverty'¹⁸³ or 'livelihood'¹⁸⁴ issues. These outcomes are predictable and unfavourable to the suffering citizens. The approach of the Court to the issue of slums is a case on point. In the *Almitra Patel v Union of India* case¹⁸⁵, the Judge dealt with the issue of slums. He believed that slums, amongst other factors, were responsible for the solid waste problem in cities.¹⁸⁶ A connection that is not readily self-evident as waste generation per capita per day in Delhi is 420g for those in the high income group, 240g for those in the middle income group, 150g for those in the lower middle income group, and only 80g for those in the slums.¹⁸⁷ The Judge expressed himself with 'unblinking disfavour'¹⁸⁸ on the issue of slums:

"The establishment or creation of slums, it seems, appears to be good business and is well organised. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this

¹⁸⁰ See Balakrishnan Rajagopal, *supra* note 31.

¹⁸¹ *T.K. Rangarajan v. Government of Tamil Nadu and Others*, 2003 SOL Case No. 429.

¹⁸² Balakrishnan Rajagopal, *supra* note 31.

¹⁸³ R Agarwal, Toxics Link, in a discussion with the author, Delhi, 15 September 2004 and 5 January 2007.

¹⁸⁴ B Chaturvedi, *Chintan Environmental Action and Research Group*, in an electronic discussion with the author, 26 October 2004 and 20 February 2007.

¹⁸⁵ Writ Petition Number 888 of 1996.

¹⁸⁶ Order dated 15/02/2000.

¹⁸⁷ COWI & Kadam Environmental Consultants, *Feasibility Study and Master Plan for Optimal Waste Treatment and Disposal for the Entire State of Delhi based on Public Private Partnership Solutions* (April 2004) (Executive Summary).

¹⁸⁸ U Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE WORKING PAPER 6 (2004).

way, are usurped for private use free of cost The promise of free land, at the taxpayers' cost, in place of a jhuggi, is a proposal which attracts more landgrabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket."

This opinion has been characterized as a 'disdainful dismissal of any legitimacy to the claims of the city's poor to housing'.¹⁸⁹ Yet, these words have been quoted approvingly by judges in lower courts.¹⁹⁰ The perception of the judiciary as middle class intellectuals with middle class preferences for fewer slums, cleaner air and garbage-free streets, at any cost (to others), has in itself silenced certain voices.

The courts opened its doors and liberalised *locus standi* in the late 1970s to address the 'problems of the poor'. Today, four decades on, the poor, and those who represent them, are unlikely to approach the Court with their concerns, as they are likely to be left the poorer for it.¹⁹¹

Through *Judicial Education*, judges need to be sensitized about their fear of and indifference to the poor, by reflecting on their judgments in various training programmes and analyzing the criticisms of their judgments. A platform can be provided for hearing the voices of the persons affected by the decision, their humanity acknowledged, their suffering understood and their claims considered. For instance, in a judicial seminar on Justice and Poverty held in August 2007 at the NJA, Bhopal, participants were shown a documentary made on women who were employed as daily wage labourers to cut grass.¹⁹² The purpose of the documentary was to sensitize them about the growing phenomenon of the 'feminization of poverty', to enable the judges to develop new approaches to the issue.

4.20 To Avoid Bad Judgments

Judgments can be bad because: (i) they are decided on wrong principles of law; (ii) they are not based on sound and rational reasoning supported by relevant laws; (iii) they do not conform to constitutional standards; (iv) or they reflect a judge's personal ideology and preferences. Over a period of time, such judgments become food for thought for those investing their time and energy to study judicial institutions. They are then cited by all in support of examples to substantiate the evidence of bad judging.

The study of the judiciary in every country on the globe reveals a set of unholy precedents. There are enough cases in India, USA and UK to prove the point of bad judging. These precedents are the main menu in the judicial education discourse, as trainers like to caution judges as to what should not be repeated. For the US, the watershed cases are: *Plessy v.*

¹⁸⁹ *Id.*

¹⁹⁰ See e.g. *Wazirpur Barton Nirmata Sangh v Union of India*, MANU/DE/2140/2002 (C.W. No. 2112 of 2002, Order dated 29/11/2002). The Delhi High Court noted that, '[o]ne cannot but use the expression as stated in the said judgment' and quashed a Union of India policy providing alternate sites for JJ dwellers. *Id.*, para 44.

¹⁹¹ See Lavanya Rajamani, *Public Interest Environmental Litigation In India: Exploring Issues Of Access, Participation, Equity, Effectiveness And Sustainability*, 19 JOURNAL OF ENVIRONMENTAL LAW 293 (2007).

¹⁹² Documentary made by law associates, placed in NJA Library.

Ferguson,¹⁹³ *Dredd Scott*¹⁹⁴ and *Bush v. Gore*.¹⁹⁵ For India, the majority opinions in *ADM Jabalpur*¹⁹⁶, *NBA*¹⁹⁷, *A.K. Gopalan*¹⁹⁸, *Mathura*¹⁹⁹, *Balco*²⁰⁰, *Bhopal Gas Leak*²⁰¹, *Gita Hariharan*²⁰² are some of the famous cases that are bracketed into the category of bad precedents. Therefore, all over the world, judiciaries have supported excesses to be committed on its citizens, treated itself to be part of the governance structure and therefore supported rigid regimes.

One of the important reasons for poor judging that has emerged in the Indian context is the tendency of the courts to act as the umpire dictating the ceasefire line: 'thus far and no further'. This tendency emerges from their misunderstanding of their role and the constitutional and democratic framework. Most judges believe that they are presiding over courts of law and not court of justice. This understanding makes them pronounce that 'This is law and therefore I am bound by it, and can say no more': whereas if they were the court of justice they would have said, 'This is just and if it cannot be because of the law, then the law should be struck down'.

The lay man may ask the court: "look, I came to you for justice, and what did you do? You told that the District Magistrate, if he is satisfied that I am at fault and therefore shall be detained,

¹⁹³ The United States Supreme Court's 1896 decision in *Plessy v. Ferguson* upheld the legality of racial segregation. In that case, the court denied Homer Plessy, who was black, the freedom to sit in a railway car reserved for whites. In reaching its decision, the court made the following assertion: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

¹⁹⁴ *Dred Scott v. Sandford*, [1] 60 U.S. (19 How.) 393 (1856) also known as the "Dred Scott Case" or "Dred Scott Decision", was a lawsuit, pivotal in the history of the United States, decided by the United States Supreme Court in 1857 that ruled that people of African descent, whether or not they were slaves, could never be citizens of the United States, and that Congress had no authority to prohibit slavery in federal territories. It was also ruled that slaves could not sue in court, and that slaves were private property, and, being private property, could not be taken away from their owners without due process. The decision for the court was written by Chief Justice Roger Taney. The parts of this decision dealing with the citizenship and rights of African-Americans were explicitly nullified by the Thirteenth and Fourteenth Amendments to the Constitution.

¹⁹⁵ *Bush v. Gore* was troubling because the five conservatives appeared to use the power of judicial review to secure control of another branch of government that would, in turn, help keep their constitutional revolution going. Quite apart from the internal problems of legal reasoning in the opinion, *Bush v. Gore* seems troubling because of the way the Court performed its institutional role. The Court's intervention was not particularly necessary, despite the Court's insistence to the contrary. *Bush v. Gore* presents a very different type of conflict. Although all of the Justices faced the same type of conflict of interest, it pointed in different directions for different Justices. The conservatives appeared to have reasons to appoint Bush as President; the liberals Gore. The situation is perhaps closest to a lawsuit between two corporations where five Justices own stock in the petitioner and four own stock in the respondents, and the case is decided for the petitioner 5-4. [See Jack M. Balkin, *Bush V. Gore And The Boundary Between Law And Politics*, 110 YALE L.J. 1407 (2001)].

¹⁹⁶ *ADM Jabalpur v. Shirakant Shukla* 1976 Supp SCR 132.

¹⁹⁷ *Narmada Bachao Andolan v. Union of India and Ors.*, (2000) 10 SCC 664. In this case the Supreme Court put its seal of approval on the largest Court-sanctioned forced eviction in the world, although abundant international legal materials existed to show that the raising of the height of the Sardar Sarover dam was contrary to current legal standards. Although counsel in that case argued that the forced eviction of tribal people was a violation of right to life under Article 21 read with International Labour Organization (ILO) Convention 108, to which India is a party, the Court rejected the argument.

¹⁹⁸ *A.K. Gopalan v. State of Madras* AIR 1950 SC 27.

¹⁹⁹ Officially, the case is *Tukaram v. State of Maharashtra* (1979) 2 SCC 143, facts of which are In March of 1972, a sixteen year old girl named Mathura was taken to the neighbourhood police station by her brother and some other members of her family. They were concerned because she was underage and attempting to elope with her boyfriend. They wanted abduction charges brought against him. The two policemen in the station asked to talk to Mathura alone while they took her statement. The two officers then raped her while her family waited outside. More than two years later, a sessions judge acquitted the two accused on the grounds that Mathura was a 'shocking liar' who was already 'habituated to sexual intercourse,' and so could not prove that she did not give consent. On appeal, the Bombay High Court reversed the previous order, and sentenced the two officers each to six years in prison. And finally in 1979, the Supreme Court overturned the High Court's decision, saying that she had not struggled enough or caused enough of a commotion, and so could not prove that she did not consent. The evidence for the case had been collected through the police station in which the crime had been committed. The outcome of the case caused an uproar in India. A slew of protests helped raise demands for more stringent rape laws, and caused the Government of India to enact the Criminal Law Amendment of 1983, which significantly amended the rape section of the Indian Penal Code. More importantly, the furor surrounding the case ruling helped to create the Indian anti-rape campaign, which has been the most influential movement for women's rights in India.

²⁰⁰ *Balco Employees' Union (Regd.) v. Union of India* (2002) 2 SCC 333.

²⁰¹ In this case, the Supreme Court of India while holding corporations engaged in ultrahazardous processes, manufacturing or industry absolutely liable – validated the state's assumption of *parens patriae* status, superseding its prior victim standing, even when it extends to state endorsement of a settlement without consultation with the victim before the Court. The Court justified the denial of due process thus entailed by invoking Macbeth: to do a great right a little wrong is justified! See Upendra Baxi, *A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 557 (October 2003).

²⁰² *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

you cannot interfere.²⁰³ If I lose my property due to the negligence of the Police Officer, I cannot get back my property or even receive damages.²⁰⁴ I did not approach you for knowing what the law is; I wanted justice.”²⁰⁵

Again there is a misunderstanding about the idea of *fairness* in justice. Fairness requires the judge to be neutral and detached, but not so detached so as to be indifferent to the parties and their concerns. Instead, the judge must have an attentive and empathetic engagement or connection that allows him or her to understand the point of view of each of the parties, their histories that led them into conflict, and their goals in resolving this conflict. Law, in the sense of rules and legal principles, is the raw material of a judge’s work. The law is the compass of the judge. Guided by the law, judges seek to do justice. To do justice, a judge should consider not only the law but also the facts, including the experiences and suffering of the parties that lie at the roots of the dispute. To disregard the human aspect would turn judges into robots, applying sterile rules in a mechanical fashion.²⁰⁶

Judicial Education therefore can step in to acquaint judges with bad precedents so that reliance on them is minimized. A wrong understanding will lead to bad precedents that in the future may ruin the whole machinery built for the administration of justice. If judges lose the respect of the people, it will lead to the overlooking of the whole institution and machinery created for securing the rule of law in the country. Consequently, there will be more and more incidents of people taking law into their own hands, settling their scores with each other or the State apparatus by violent means.²⁰⁷

4.21 To Help Judges Function in the Absence of a Jury System

Juries are an essential part of the court system in the US, UK, Australia, etc. Furthermore, the right to jury trial in the United States Constitution predates the Bill of Rights.²⁰⁸ The strengths of the jury system are commonly said to include:

- Jurors come to each case free from the biases and hardened attitudes that can too easily develop among professionals from the cumulative effect of hearing numerous similar cases;

²⁰³ For instance take the case of *Sadhu Singh v. Delhi Administration* (AIR 1966 SC 91). Sadhu Singh was detained under Rule 30(1)(b) of the Defence of India Rules. The District Magistrate swore an affidavit that he was satisfied that Sadhu Singh was indulging in anti-social activities and the activities of the petitioner was prejudicial to the maintenance of public order and that it was necessary to detain him. The petitioner challenged the facts and the jurisdiction. The Supreme Court held that making of an order under Rule 30(1)(b) proceeds upon the subjective satisfaction of the prescribed authority relating to matters enumerated in the said Rule. The satisfaction of the authority is not subject to judicial review, for the order of detention is pre-eminently an executive act. Once the subjective satisfaction of the detaining authority, a condition of the making of the order, is shown to exist, the courts cannot inquire into the sufficiency of materials on which the order is made or into the propriety or expediency of the order. What is determinative of the validity is the satisfaction of the prescribed authority.

²⁰⁴ In *Kasturi Lal v. State of U.P.* (AIR 1965 SC 1039) the plaintiff was arrested by the police officer in Uttar Pradesh on suspicion of possessing stolen property and in a search of his person a large quantity of gold was seized under the provisions of Code of Criminal Procedure. Ultimately he was released but the gold seized could not be returned as the head constable in-charge of the Malkhana had absconded with valuable property including the gold seized from the plaintiff. The plaintiff brought a suit against the State of U.P. for the return of the gold or in the alternative a claim for damages for the loss caused to him. The Supreme Court found that the evidence disclosed that the police officers had not followed the provisions of U.P. Police Regulations in taking care of the gold seized, the act of negligence was committed by the police officer while dealing with the property of the plaintiff. But the Supreme Court held that powers to arrest a person, to search him, to seize his property can be characterized as sovereign powers and therefore the claim for damages against sovereign powers cannot be sustained.

²⁰⁵ Gobind Das, *supra* note 38.

²⁰⁶ Justice Joyce Kennard, *Why Justice Is More Than Law*, 83 WOMEN LAW JOURNAL, 10 (1997).

²⁰⁷ This is exactly what happened in the 90’s in most Latin American and Caribbean countries, where the judicial pillar was fractured, weak and incapable of supporting the weight of its constitutional responsibilities. See Luz Estrella Nagle, *The Cinderella Of Government: Judicial Reform In Latin America*, 30 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 345 (Spring 2000).

²⁰⁸ Article III, section 2 of the United States Constitution provides: “The trial of all crimes, except in cases of impeachment, shall be by jury.” U.S. Const. art III, §2, cl. 3; The Sixth and Seventh Amendments respectively guarantee the right to jury trial in criminal and civil cases. U.S. Const. amends. VI, VII.

- The jury has the benefit of the perspectives and opinions of a number of people who have all heard the same evidence;
- The jury hears only the evidence that the judge rules admissible, while a judge in a bench trial often hears inadmissible evidence and must attempt the difficult task of ignoring that evidence;
- Jurors do not speak directly to lawyers so that any animosity that might develop between the Bench and Bar in the trial of a case will not prejudice the jury's fact finding;
- A jury selected from a cross-section of the community is likely to have members whose biases neutralize each other, while there is nothing to offset those of a judge;
- A representative jury offers the possibility that at least some of its members will be from a social group that the litigants can view as a peer group, fostering greater acceptance of the jury's verdict; and
- Jury service gives citizens important lessons in civic virtues and in the law itself.²⁰⁹

India does not have a jury system and therefore judges have to perform the part of jury. *Judicial Education* has to help them in their juror role so they arrive at true facts.

4.22 To Help Judges Reduce Their Subjectivity in Decision Making

The judge holds neither a purse nor a sword and therefore s/he has no control over executive power,²¹⁰ yet she/he is the only government official whose authority is supposed to be explained by reasons²¹¹ and their opinions are used for teaching much of the law. It becomes therefore necessary that their decisions attain the qualities of reasonableness, objectivity, rationality and delete any kind of subjectivity.

Reasonableness is not a physical or metaphysical concept. Instead it is a normative concept. The meaning of reasonableness is the discovery of relevant considerations and the balance between them according to their weight. Reasonableness is a process of assessment. Unreasonableness consists in ignoring some relevant factor or in treating something as relevant which instead ought to be ignored. The world over, much literature has been developed that can help a judge in adhering to reasonableness. For instance, in German legal literature, the doctrine of *Topoi* has been developed. According to *Topoi*, the various options are listed, the advantages and disadvantages of each options are weighed, and through discussion and the exchange of opinions, the optimal solution is reached.²¹² Judicial educators can acquaint judges with such doctrines that are developed all over the world and thereby increase their powers of reason. This will take away much freedom from judges and restrict them to only relevant values for the resolution of the issue before them.

Objectivity and impartiality are two other tools that can help judges in a democracy to discover their role.²¹³ Judicial educators need to equip judges with these two tools. Impartiality will help a judge to treat the parties before him/her equally, providing them with an equal opportunity to make their respective cases. Objectivity, on the other hand, will help a judge to make judicial decisions on the basis of considerations that are external and that may even conflict

²⁰⁹ Steven A. Saltzburg, IMPROVING THE QUALITY OF JURY DECISION MAKING, VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341 (R. Litan ed, 1993).

²¹⁰ Edward S. Corwin, TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 6, (New Haven Yale Univ. Press, 1934).

²¹¹ Charles Fried, *Scholars And Judges: Reason And Power*, 23 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 807 (Summer 2000).

²¹² Aharon Barak, *supra* note 11.

²¹³ *Id.*, p. 101-104.

with his/her personal view.²¹⁴ Objectivity makes strenuous demands on a judge, requiring the judge to undergo a difficult process of self-discovery. Various exercises by clinical psychiatrists and social scientists in *Judicial Education* programmes can help judges to look beyond their own conceptions on various issues.

Judges all over the world have become very frank about what goes on in the decision making process and thereby admitted that complete objectivity is unattainable. For instance, Cardozo admitted that,

“the decisions of the judges are a consideration of social policy. He is influenced by inherited instincts, traditional beliefs, acquired convictions, conception of social needs.” Jerome Frank asserted that *“Judicial judgments like other judgments, doubtless in most cases, are worked out backwards from conclusions tentatively formulated. A judge being a human being merely adopts the process of normal reasoning of anybody of his kind which starts with a conclusion and afterwards tries to find premises which will be substantiated.”*

Therefore some subjectivity, no matter how much training is imparted at a higher level, will remain and judges' hunches will continue to make the law. The factors likely to influence the judicial decisions are: judges' education; their family and personal associations; wealth and social position; their legal and political experience; their political affiliations and opinions; and their intellectual and temperamental traits. The Judges of Hitler's Germany and Mussolini's Italy were the implementers of oppression. In the Union of South Africa and in the United States, there are some judges who read the law through bifocal spectacles, with the upper lens being reserved for men of the white race. Moreover, nobody has heard of a Soviet Judge resisting an arbitrary execution action.²¹⁵

It is the awareness of the judge that he/she is not using his/her intellect as a cold-logic engine that is the prime safeguard. According to Justice Holmes,

*“Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious – to learn to transcend our convictions and to leave room for much that we hold dear, to be done away with short of revolution by the orderly change of law.”*²¹⁶

In India, judges need to be made aware of their subjectivity of which there are many proofs, the latest being the 2008 Joint Report of Amnesty International India and PUCL about death penalty cases. The report stated:

“This report has referred to a large number of cases that place it beyond doubt that whether an accused is ultimately sentenced to death or not is an arbitrary matter, a decision reliant on a number of extremely variable and often subjective factors – ranging from the competence of legal representation [in particular at the trial court stage] to the interest of the state in the case [whether to appeal or not], to the personal views and even idiosyncrasies of the judges who sit on the various benches hearing the case...”

²¹⁴ See Aharon Barak, *Justice Matthew O. Tobriner Memorial Lecture: The Role of A Supreme Court In A Democracy*, 53 HASTINGS LAW JOURNAL 1205 (2002); Jules L. Coleman, *Truth And Objectivity In Law*, 1 LEGAL THEORY 33 (1995); Brian Leiter, *Objectivity And The Problem Of Jurisprudence*, 72 TEXAS LAW REVIEW 187 (1993).

²¹⁵ Gobind Das, *supra* note 38.

²¹⁶ Edward K. Cheng, *supra* note 55, p.7.

Furthermore, the report shows that contrary to the majority Bench's views and intentions in the Bachan Singh Case, errors and arbitrariness have not been checked by the safeguards in place, and no small role has been played by judges themselves who have rarely adhered to the requirements laid down in the Bachan Singh case, making it clear that it is commonly the judge's subjective discretion that eventually decides the fate of the accused-appellant...

The arbitrariness is fatal, but it is also selective and discriminatory. The randomness of the lethal lottery that is the death penalty in India is perhaps not so random. It goes without saying that the less wealth and influence a person has, the more likely they are to be sentenced to death."

Judicial educators need to bring it to the notice of judges that their activity of judging is not merely a job but as suggested by Aharon Barak:

*"a way of life, that does not include the pursuit of material wealth or publicity; it is way of life based on spiritual wealth; it is a way of life that includes an objective and impartial search for truth. It is not fiat but reason; not mastery but modesty; not strength but compassion; not riches but reputation; not an attempt to please everyone but a firm insistence on values and principles; not to surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values."*²¹⁷

4.23 To Induce the Element of Life-Long Learning

Competence and character are shaped and reshaped across the life span. Therefore, by the use of different pedagogical techniques, a transformation in personality is possible. For instance, literature has long been accepted and utilized as a vehicle for the transmission of values in our culture and as a means of engaging with larger issues and universal concerns. The use of literature in *Judicial Education* therefore offers a means to explore how various life experiences shape our moral and ethical character at different stages of our lives. This active engagement with the narrative and the characters can assist judges in moving toward a greater understanding for and appreciation of the complexity of the human condition. It can enlarge one's system of values, provide a greater capacity for ethical behavior and help to ensure a more effective judicial system.²¹⁸ *Judicial Education* itself seems to be a generative activity. By providing professional development activities in "how to teach," the court system encourages and nurtures generative behavior.²¹⁹

Because development is never "finished," judicial educators have the opportunity to contribute repeatedly to the attempted resolution of the issues that judges confront as they face major transitions and move through the life-cycle. The individual energy involved in working through these developmental imperatives is enormous and educators, who can channel that

²¹⁷ Aharon Barak, *supra* note 11, p. 110.

²¹⁸ Patricia H. Murrell, *supra* note 179.

²¹⁹ Don S. Browning, *GENERATIVE MAN: PSYCHOANALYTIC PERSPECTIVES*, 21-24, 145-228 (Westminster Press 1973).

energy into learning, stand to make substantial gains. Using identity, intimacy and generation capacity as powerful motivators, a curriculum can be developed that encourages the movement from simplistic to more complex ways of thinking and making meaning. Judges are thus encouraged to become life-long learners and recognize that learning is the process by which they master the tasks necessary for the resolution of life-cycle issues and become capable of more complex thinking.²²⁰

4.24 To Compensate for Poor Legal Education

The judge is a converted lawyer. They are interchangeable, inter-dependent and equi-potentials. One of the vital tests of the synchronization of law and society is the awareness of a lawyer of the tasks to be performed and the judge's ability and preparation for these tasks. In this context, legal education or society's capacity to develop a profession specialized in the administration of justice is crucial. In the West, as the depth and pace of social change have increased, they have come to look upon law as one form of social architecture with increasing awareness and self-assurance. Western law and legal education have increasingly proceeded on the premise that the legal order can and should make a significant contribution to the effective harnessing of human energy and talent available to society. What is true for the West is more urgent for India. But at present, this quest for judicial professionalism is defeated because the composition of the teaching staff is weighed down by its inherent tendency to stifle and discourage talented juniors. An Indian law teacher's conception of law is typically a static one. Their approach to legal education is usually through the lecture method with little attention paid to the politics that underlies the rules. Legal education merely imparts information by rigid recognition of *stare decisis* and the modes of analysis and exposition are non-functional.²²¹

Using the present method and technique in the law schools, one can build a mere secretariat or a factory or at the most a research institute, but what is really needed is a cathedral. Building a factory is merely constructive, building a cathedral is creative; with construction you make a civilization, with creativity you build a culture and in India law should be an instrument of building culture.²²²

Adding to the problem of poor legal education is the poor reading habits of legal professionals in India. Although no survey has been done so far, sitting High Court Justices who have been called to provide their inputs into judgment writing sessions have admitted before an audience of more than 100 judicial officers that they have not as yet gone through the full text of judgment pronounced in the *Keshavananda Bharti* case! Most of the university students, including those of reputed well established universities do law and then earn an LL.B. degree without referring/reading basic text materials. They do not have to as they get good percentages by just copying the styles dictated by teachers in these universities and which is more often than not found similar to those printed in short series of books sold by local book shops. This makes a case for mandatory *Judicial Education* in India.

Poor legal education has produced a legal profession that lacks the understanding how to use the law as an instrument of economic and social architecture. The lawyer tends to be looked upon as a kind of manipulator or fixer, who in many ways fails to represent society's basic values and attitudes.²²³ *Judicial Education* promises to rectify the mistakes committed at the law schools, at least for those who have taken up a judgeship.

²²⁰ Patricia H. Murrell, *supra* note 179.

²²¹ Gobind Das, *supra* note 38.

²²² *Id.*

²²³ *Id.*

4.25 To Compensate for a Lack of Expertise in Complicated Issues

While the judicial system is designed to be reactive to the conflicts presented, a more thorough understanding of the dynamics and effects of conflicts can empower judges to become more creative and proactive in implementing constructive changes in court procedures. The lack of information about which bail conditions would be the most appropriate in a given circumstance, combined with the previously noted lack of *Judicial Education* regarding mental illness, can hamper sound judicial discretion when a judge is selecting bail conditions. The experts are not available at the courthouse and judges have no choice but to use training and experience by default. Judicial training therefore has to compensate for an absence of expert evidence. Therefore, judges need the knowledge about the characteristics of mental disorders, the dynamics of substance abuse and domestic violence, an overview of treatment methods and the applicability of various therapies.²²⁴

With the possible exception of the newest judges, all judges undergo some training either at the SJA or at the NJA. Nonetheless, the group training opportunities for judges are limited, with many topics fighting for consideration. Without training, no common background exists among judges regarding mental health disorders or the efficacy of alternative treatment plans.²²⁵ After enough professionals have said the same thing about a given disorder, or about best practices in some problems, the information becomes part of the judge's background knowledge - a form of on-the-job training.²²⁶

4.26 To Cultivate a Multi-Disciplinary Approach to Judging

The present generation of judges and those who will be assuming judgeship in the future will face very different kinds of issues and challenges than those faced by their predecessors. These new challenges may not be appropriately answered by confining education and judicial knowledge to legal principles. Many issues may not have a correct legal solution. In such a situation, a judge will have to board flights to other disciplines to make inquiries.

Issues related to trafficking, illegal migration, climate change, health concerns, man-made or natural disasters, ethnic conflict are all challenges that require a multi-disciplinary approach to find a just legal solution. Some basic knowledge has to be gained in anthropology, geology, biology, social science, history, psychology, political science etc. To improve judgments in emerging areas of litigation.²²⁷

Judges need to have some grasp of the role of the various professionals and experts mentioned in the statutes such as: psychiatrists, medical doctors; psychologists and psychological examiners; substance abuse counselors, including alcohol and drug counseling aides, certified drug and alcohol counselors, licensed alcohol and drug counselors; social workers and professional counselors. Not all may qualify as "experts" all of the time under the statutes, and judges need to be informed on which experts can be of help in what kinds of cases.²²⁸

²²⁴ Honorable Jessie B. Gunther, *Reflections On The Challenging Proliferation Of Mental Health Issues In The District Court And The Need For Judicial Education*, 57 MAINE LAW REVIEW 541(2005).

²²⁵ In all the five juvenile justice programmes held for five different batches of Juvenile Court Magistrates in India, judges continue to raise the same concerns regarding the raising of the age of juvenility. Therefore medical /clinical psychiatrists are called as resource persons/faculty to make judges understand that cognitive faculties are different for different age groups and to reasons therefore for including age group 0 to 18 in the definition of child.

²²⁶ Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models And Trends 4-7* (Report by National Center for State Courts, 2003); The Honorable Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57 (2005).

²²⁷ See Eric K. Yamamoto, Sandra Hye Yun Kim, Abigail M. Holden, *American Reparations Theory And Practice At The Crossroads*, 44 CALIFORNIA WESTERN LAW REVIEW 1 (Fall 2007).

²²⁸ Honorable Jessie B. Gunther, *supra* note 221.

Also, as experienced by Barak,
*“a philosophy of life and a philosophy of law can help the judge in understanding his role and in executing that role. It is important that the judge has an understanding of the philosophical discourse. Through it, he can participate in the search for truth, while understanding the limitations of human mind and the complexities of humankind. With the help of a good philosophy, he will better understand the role of the law in a society and the task of the judge within the law. One cannot accomplish much with a good philosophy alone, yet one cannot accomplish anything without it.”*²²⁹

4.27 To Prepare Judges for Specialisation

What we call our NDPS Courts, Family Courts, JJBs, Mahila Courts, Lok Adalats and other special courts are actually calendars (the same court personnel take on different tasks on different dates), created within the unified court. We are able to move judges around as needed from specialized courts to general courts and vice versa. This defeats the whole purpose of the statute under which special courts are established. Tension is created by moving judges into courts dealing with matters in which they have no experience.

In the Annual Lecture 2001 organised by the Judicial Studies Board of the UK, Lord Woolf referred to a questionnaire circulated among the members of the senior judiciary in the UK calling for information about the nature of a judge's current work on the Bench and its relationship with the judge's previous experience as a lawyer. He said: *“The survey indicates that there is, in the case of some judges, a substantial distinction between their previous expertise and the work which they now perform as judges.”*²³⁰

In India, several judges both in the subordinate courts and in the superior courts deal with jurisdiction in which they have had no experience while they were at the Bar. The lack of appropriate knowledge in the subject of their jurisdiction leads to delays in the hearing of the case, frustrations for the lawyer and it may even lead to the wrong exercise of discretion or a wrong decision not warranted by the facts or the law applicable. There is every need for exposure to subjects with which a judicial officer or judge has not been familiar while at the Bar in India, as judicial officers are often transferred and posted in different places and in different jurisdictions within the state, and Judges of the High Court often have to sit in various jurisdictions in the High Court.²³¹

If a judge is not familiar with a subject, there are greater chances of the litigant suffering injustice. A lawyer can take undue advantage of a judge's lack of knowledge or experience in a subject and his opponent on the other side will find it difficult to persuade the judge to accept even obvious points which, before a judge with adequate knowledge, would have taken no effort at all.²³²

No judge, however brilliant, can boast of knowledge or experience in all the subjects that come before him/her. Mandatory *Judicial Education* programs to train judges in areas of the law with which they are not as familiar is the call of the day, since all such judges must be available to try any type of case.²³³

²²⁹ Aharon Barak, *supra* note 11, p. 120.

²³⁰ 48% of Judges had this experience - Justice M.J. Rao, *Lecture delivered at the British Council Judicial Training In India*, (October 2004), available at <http://www.mjrao.com>.

²³¹ *Id.*

²³² *Id.*

²³³ Larry Brady, J.D. Gingerich, *A Practitioner's Guide To Arkansas's New Judicial Article*, 24 UNIVERSITY OF ARKANSAS AT LITTLE ROCK LAW REVIEW 715 (Spring 2002).

4.28 To Make Judgeships Attractive for Young Talent

In many countries, judicial ineptness is a delicate topic. In fact, one could argue that such attitudes are part of the root of the problems confronting judiciaries in the South Asian Region. Judgeships have often been the jobs no one seeks, unless the individual is either truly committed to social justice, or interested in a venue for acquiring wealth through bribery and corruption. Those who become lower courts judges for the sake of societal good, however, are soon stymied by their corrupt superiors who do not want reformers rocking the boat.²³⁴

Having an excellent system of administering justice depends upon having excellent personnel in the judiciary. The history of our courts is one rich with outstanding individuals serving at all levels of the judicial system. To ensure that this rich tradition continues in the future, when a strong and growing private-sector economy competes with the public service for the best among us, attention must be directed to the qualifications for office, the process of selection, and the conditions of service that will attract and retain highly qualified persons in judicial service. Judges need to be sufficiently supported with legal research tools, legal assistants, clerical staff, educational opportunities, reasonable performance expectations, and compensation/benefits packages that make judgeships successfully competitive with the many other attractive opportunities available to excellent lawyers.²³⁵

4.29 To Help in Dealing with Ever the Growing Body of Laws and Their Complications

Each year, hundreds of new civil and criminal provisions are added to the already bulky legal framework. Hundreds more are amended, repealed or renumbered. Each year, hundreds of eventful court decisions are handed down that affect the Constitution, procedural laws and a multitude of substantive laws. Along with this, each year critical new developments and milestones in many aspects of life have an impact on cases in front of the trial courts. There are developments in finance, accounting, economics, and the way businesses are managed or in today's global turmoil, mismanaged, that impact on decisions. There are developments in technology and communications. There are developments in engineering, biology, and bio-engineering. There are developments in health, philosophy, religion, the arts, government, the sciences, culture, education, and all aspects of the law and legal studies that have a profound effect.

India today has the proud privilege of being one of the largest producers of human babies and statutory enactments. The legislative output is phenomenal. According to the website of the Government of India, as at 26th March 2008, India has 1082 central enactments governing the country in its various aspects.²³⁶ The domain that is sought to be covered is from birth to death and the dimensions vary from six sections in the Contempt of Court Act to six hundred and fifty eight sections in the Companies Act; a few like the Income Tax Act, baffle normal human intelligence. Further, the field of operation of statutes is overlapping and conflicting. 'Good faith' means one thing for the Limitation Act and another for the Penal Code. 'Workman' and 'Child' has as many definitions as there are statutes for them. The meaning of words and expressions are extended and contracted by fictions. The beneficiaries or the victims of the enactments do not

²³⁴ Wendy Vicente, Comment, *Questionable Victory for Coerced Argentine Pharmaceutical Patent Legislation*, 19 U. PA. J. INT'L ECON. L. 1101, 1138 (1998).

²³⁵ Richard W. Creswell, *Georgia Courts In The 21st Century The Report Of The Supreme Court Of Georgia Blue Ribbon Commission On The Judiciary*, 53 MERCER LAW REVIEW 1 (2001).

²³⁶ <http://lawmin.nic.in/alpha.doc> [as of 4th May 2008].

understand the law but they are made to feel the weight of it.²³⁷ *Judicial Education* is continuously required to update judges on the sheer volume of change that takes place on a yearly basis.

4.30 To Expose Judges to Developments Occurring in Foreign Jurisdictions

Judges often hesitate to read, understand and rely on legal developments in foreign jurisdictions. Those who object to the use of foreign law by national courts invoke a series of well-rehearsed arguments in favour of their position. Some are ideological, like those of Justice Scalia of the United States Supreme Court,²³⁸ while other's reservations stem from different factors such as a lack of: time; expertise; materials in their own language; interest to remain up-to-date; and so on.²³⁹

Ideological opposition to foreign legal systems becomes evident in judges' extrajudicial writings and speeches.²⁴⁰ For a judge who believes for good reasons or bad that tort law is running out of control is unlikely to look at foreign law on such a topic, even if it could help dispel his/her fears. A judge who believes that women are misusing legal provisions aimed to protect their life and dignity will avoid even considering empirical evidence that dispels his/her deep-rooted fears.²⁴¹ For him or her, such an exercise will be costly and wasteful, when he or she believes they will be ignoring the "trend of developing authorities" as they have constructed it in their mind.²⁴²

To some extent, the concealment of the foreignness of the source may be justified by realistic considerations. But closing one's mind to foreign ideas altogether must, in intellectual terms at least, be seen as a sign of a closed and not a pragmatic mind. At times, it can even become bizarre, tempting one to search for the hidden motives which may not even be there.²⁴³

Also, as observed by Philippe Sands,²⁴⁴ judges who show no respect to other legal systems also oppose the global rules of international law. The case in point is *Breard v. Commonwealth*.²⁴⁵ This case had reached the fifteen judges of the International Court of Justice in The Hague concerning Virginia's right to execute a Paraguayan man called Angel Breard convicted of raping and murdering Ruth Dickie. He had been given access to defence lawyers, but was not put in contact with Paraguayan Consular Officials, and they were not informed of his arrest. Only after he had been convicted and sentenced did he and his lawyers learn about an obscure international treaty – the 1963 Vienna Convention on Consular Relations that obliged the US to ensure that he was informed immediately of his right to have access to a consular official. However, after sentencing, it was too late. Federal and State Laws meant he could no longer raise procedural rights of consular access in new appeals to the Virginia Courts or to the US Federal Courts. The Clinton Administration admitted that it had violated international rules. But it was not willing to suspend the execution ordered by the Court in Virginia. So, Paraguay

²³⁷ Gobind Das, *supra* note 38.

²³⁸ In fact, it took two years after his appointment in 1986 to the United States Supreme Court before he voiced his disapproval of a practice that began with a plurality opinion thirty years earlier in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, see his dissent in *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting), which, one year later, prevailed in *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), abrogated by Roper, 543 U.S. at 551. See Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

²³⁹ Sir Basil Markesinis, *supra* note 118.

²⁴⁰ *Id.*

²⁴¹ In 1995 Justice M.L. Phendse, acting Chief Justice of Bombay High Court at the valedictory function of a day long seminar on criminology held at Bombay University Department of Law and the Greater Bombay Legal Advice Committee stated that his experience has revealed that in Maharashtra, the section on marital cruelty is misused by women to harass their husbands and in-laws. Cited in Geetanjali Gonguli, *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA*, 116 (Ashgate Publishing, 2007).

²⁴² Sir Basil Markesinis, *supra* note 118.

²⁴³ *Id.*

²⁴⁴ Philippe Sands, *supra* note 24.

²⁴⁵ 513 U.S. 971 (1994).

commenced a case in the International Court. It argued that the US had violated its obligation under the 1963 Convention and that the execution should be suspended. The International Court ordered the US to take steps to ensure that Breard was not executed before the Court had given its final decision in the case.²⁴⁶ But the International Court's order cut no ice with the US Supreme Court. Breard's argument, which stated, he might have run his case differently if he had access to the Paraguayan Consular Officials was held not to be plausible by the Supreme Court. It concluded that this was an area in which Virginia retained full authority, unfettered by the restrictions of the US Constitution or international law.

One can contrast the US Supreme Court's line of approach with the UK approach to rules of international law. In March 1999, the Privy Council in London ordered the execution of two Trinidadians to be suspended until their cases before the Inter-American Commission of Human Rights had been decided.²⁴⁷

Philippe Sands has tried to reason this different approach to international law by American and United Kingdom judges, by tracing the importance given to the subject of international law in the two countries during basic legal education. Most American law schools do not teach international law, and those that do, tend to treat it more as a poor relation of political science, international relations or social theory, with the result that its normative value is diminished.²⁴⁸

If we take the case of legal education in India, as far as teaching of international law in law colleges or schools is concerned, the American teaching pattern is adopted. During the LL.B., it is taught as an optional subject. During masters, there is a specialization in some concepts. However, institutions other than law colleges teach international law, with the major central university²⁴⁹ offering an LL.M. in International Relations. This makes most Indian judges presently occupying the seats ignorant of the developments taking place in international law and their affects on domestic issues. This is the reason why they have never been exposed to the internationalist environment which today's students (and tomorrow's judges) are. This is true, notwithstanding the increase of judicial contacts that seems to have taken place during the last ten or fifteen years. Those who have shown a contrary interest by "learning" foreign law are "bold spirits" rather than "timorous souls."²⁵⁰ By showing this interest, they are going outside the world in which they grew up, prompted by intellectual curiosity. One admires such intellectual restlessness, not least, since those who display it must be aware that, like Lord Denning, they will have to wait a long time before their imagination is rewarded.²⁵¹

In such a scenario, it is necessary to acquaint judges with good practices developed in different countries. Not only that, judges can be asked to experiment and emulate these good practices in their jurisdictions. For instance, in custody disputes involving children, best practices from foreign jurisdictions²⁵² can be adopted. Judges can be asked to learn and draw from some of the most progressive constitutional courts in the world, such as the South African Court.²⁵³ Case law from different countries provided and discussed in seminars is bound to play some role in the decision making of the courts.

²⁴⁶ *Paraguay v. United States*, Order of 9 April 1998 ICJ Reports 1998, p. 248.

²⁴⁷ Privy Council Appeal No. 60 of 1998, judgment delivered on 17 March 1999.

²⁴⁸ Philippe Sands, *supra* note 24.

²⁴⁹ JNU, New Delhi.

²⁵⁰ The expressions come from Lord Denning's judgment in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, 178 (C.A.) (Denning, L.J., dissenting).

²⁵¹ Sir Basil Markesinis, *supra* note 118.

²⁵² See Hon. Peter Boshier, Damien Steel-Baker, *Invisible Parties: Listening To Children*, 45 FAMILY COURT REVIEW 548 (October, 2007).

²⁵³ See Balakrishna Rajagopal, *supra* note 31.

Further, what is striking is that judges know very little of the transformation of international relations that has taken place over the past fifty years. Notions of sovereignty have changed with growing interdependence. To claim that states are as sovereign today as they were fifty years ago is to ignore reality. The extent of interdependence caused by the avalanche of international laws means that states are constrained by international obligations in an increasingly wide range of actions. Every international treaty has a constraining effect.²⁵⁴ *Judicial Education* can play a very important role to overcome such ignorance on the part of the judge and acquaint him/her with the changing orders in international law.

4.31 To Cultivate an Independent Judicial Research Capacity in Judges

Allowing judges to educate themselves during the course of litigation through libraries and other research fills the sizable gap left by *Judicial Education*. Such independent judicial research allows judges to obtain necessary information in a timely manner and at the appropriate level of specificity.²⁵⁵ It supplements the parties' presentation of scientific information, rather than replacing it, so the parties still frame the debate. The judge's inquiry is bounded by the limits set by the parties. Within these bounds, independent research contextualizes the arguments of the parties' experts and helps the judge be more critical about them.²⁵⁶ In addition, written sources also provide stable and citable references, eliminating inaccurate or incomplete recollections from conferences long ago. Independent research is also a more readily available option than educational programs. Although educational programs may be more user-friendly because the materials and speakers are geared toward judicial issues, they are also limited by location, time, and topic. Independent research has none of these restrictions, particularly given that today's networked world makes information incredibly easy to access.²⁵⁷

Judges in India are free to undertake independent legal research unlike their Western counterparts.²⁵⁸ In fact, there are many decisions where judges have engaged in their own research and come to a conclusion, independent of the counsel's submissions. *Judicial Education* can be used to encourage independent judicial research. Judges can be familiarized with the research resources available, ultimately making independent research more productive.

Newly elevated Judges of High Courts refuse to exercise plenary power accorded to them by the legislature, citing no clear precedent available to guide them on use of that power (e.g. section 482 of Cr.P.C. giving inherent jurisdiction). If these Judges are made capable of undertaking independent research, they can come out with all the precedents governing this field and then distinguish them for situations in which they should exercise this power. It is hoped that an independent judicial research capacity will cure many ills and transform judges into a thinking and reflection mode.

4.32 To Carry Out Quality Research to Help the Judicial System

Most of the institutions providing *Judicial Education* heavily invest in their R&D activities. These research activities help judges to reflect upon their judging methodology. For instance, in the US, the 1994 Federal Judicial Center Survey showed that despite having long-standing authority to

²⁵⁴ Philippe Sands, *supra* note 24.

²⁵⁵ Concededly, independent research may not be as effective in this respect as court-appointed experts, because court-appointed experts can be more responsive to specific questions and concerns.

²⁵⁶ Edward K. Cheng, *supra* note 55.

²⁵⁷ Molly McDonough, *In Google We Trust?*, A.B.A. J. 30, (Oct. 2004).

²⁵⁸ In US, there are a number of cases that have approved independent research, either explicitly or implicitly by engaging in it.

appoint experts, 80 percent of Federal District Court Judges had never used one²⁵⁹ and the 1999 National Center for State Courts Survey showed that public trust and confidence in State Courts lagged behind the confidence ratings of other institutions.²⁶⁰ Such surveys provide feedback on the operation of the judicial system.

In 2004 in India, the NJA undertook a research project on *Access to Justice* to investigate the difficulties experienced by poor and disadvantaged people in accessing justice in trial courts, with a view to developing strategies for procedural reforms in six states. It resulted in a list of barriers that poor and disadvantaged people face in getting justice in the courts and suggestions to bring about procedural reforms. In 2007, the NJA prepared a Bench Book on Domestic Violence in collaboration with a litigation firm known for its crusade to implement this progressive law. It also carried out major research on sentencing in rape cases that showed many inconsistent approaches in dealing with those accused of rape and also those victims of rape.

5. Conclusion

The above mentioned, are some of the reasons that I could think of for writing this paper. All of these reasons justify increased investment in *Judicial Education* by the State. The State has to make adequate arrangements for continuing education not just for judges but for *all* personnel in the judicial branch, including administrators, human resource people, computer specialists, secretaries, court reporters and security personnel. The budget must be stretched to provide continuing education and training in many diverse subjects.

Finally, unlike in the civil law systems of France and Germany, where service in the judiciary is viewed as a career path involving extensive educational preparation and possibly an internship with a judge,²⁶¹ Indian judges only need to meet minimal prerequisites for service. Judges are sent on continuing education courses, but the requirements tend to be light and can be avoided. It has been found that the High Court Registry takes the final decisions regarding nomination of judges to various educational programmes. The scientific method is not followed by the Registry in allocating trainees from various cadres to different programmes and judicial officers are not asked about their willingness to join different programmes. Nobody questions this arbitrariness. All lips are sealed for fear of retaliation. Therefore, mandatory *Judicial Education* for each judge remains the only solution.

²⁵⁹ Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 tbl.1 (1994).

²⁶⁰ Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts, Summary of State-Level Court Evaluation Surveys* 82 JUDICATURE 58 (Sept./Oct. 1998).

²⁶¹ In France, for example, judges are selected by a competitive examination, attend a specialized school, and serve as the equivalent of government civil service officers. In Germany, prospective judges must pass two rigorous examinations and must serve a practicum with a judge. Similarly, in Japan, prospective judges must graduate from a law department of a university, pass a national examination, serve two years of training at a national institute, and then serve as an assistant judge before being promoted as a judge with a full ten-year term.