

Do we learn the art of judging through osmosis or judicial education?

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Abstract

It has been argued by some that the art of Judging cannot be taught. Such a proposition causes one to conclude that this specialized area in the adjudication of matters in a court is only available for a select few based on educational background and professional experience without a need for any other additional training. However, today jurisdictions such as the United Kingdom through its judiciary in collaboration with professional bodies have created a pre-application judicial education program in an effort to ensure that judges are recruited from a wider pool of talent. Such an initiative may demonstrate the relevance and need for judicial education to facilitate effective judging as those recruited to serve on the bench will be learning the art of judging in a structured education program.

Preamble

Prior to the 1950s Judicial Education was almost non-existent. Kirby¹ indicates that traditionally Judges were not given formal training upon appointment given they had significant courtroom experience as a practicing lawyer and in the majority of cases it was effective. It was anticipated that once appointed to the bench a Judge had all of the knowledge, skills and experience to

¹ Kirby, M. (199). 'MODES OF APPOINTMENT AND TRAINING OF JUDGES : A COMMON LAW PERSPECTIVE.' *Journal of the Indian Law Institute*, vol. 41, no. 2, 1999, pp. 147–59. *JSTOR*, <http://www.jstor.org/stable/43951712>. Accessed 7 Aug. 2022.

function in the role. Rightly or wrongly the qualifications that enables the appointment to the bench does not always translate into the reality of a competent judge. In this regard, it is argued by Bone² that judicial education through either face-to-face training is beneficial for judges to engage in learning that adds value to their capacity to adjudicate matters. There are others who subscribe to the view that the success of a judge is dependent on his or her experience through judging and that should suffice to enable learning to adequately take place thereby perfecting the art of judging.

Lord Hailsham³ posited that the ability to be a judge happens while practicing law and disapproved of judicial training which in his view could cause the perception of judges to be ‘assessors or expert witnesses rather than judges of fact and law’. However, Archie⁴ connects rule of law with judicial education.

In Papua New Guinea, the Judiciary led by the Chief Justice Sir Gibuma Gibbs Salika has accepted and endorsed the view that judicial education is necessary for judicial officers and court staff. This is evidenced by the reality that the Papua New Guinea Centre for Judicial Excellence which was established in 2010 continues to grow and develop to meet the needs of judges through the provision of judicial education and training to advance a competent, skilled and experienced cadre of Judges who are efficient and effective in the judiciary as they ensure there is access to justice in Papua New Guinea.

According to Ginsberg⁵ the learning needs of Judges are peculiar and specific in nature. Judicial education fills in the gaps between perfecting the art of judging and qualifying to become a judge. If Judges ought to act in a way that promotes public confidence in the judiciary, then performing poorly in judging takes away from such proposition and potentially erodes public trust.

² Bone, R. (2015). ‘Judging as Judgment: Tying Judicial Education to Adjudication Theory’, *J. Disp. Resol*

³ Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (London: Stevens & Sons, 1983) pp 50 - 51

⁴ Chief Justice Ivor Archie (2013). ‘Judicial Training and the Rule of Law, 1 *Jud. Educ. & Training: J. Int’l Org. For Judicial Training* 15.

⁵ Ginsberg, R. (2011). ‘Judicial Independence: the situation of the US Federal Judiciary’, *Neb. L. Rev* 1.

How do we learn the art?

It may be deduced that one gains knowledge through acquiring information. However, one does not learn a skill through simply acquisition of information. In order to develop a skill, one must practice and consistently do so to perfect that skill. As such, it can be argued that judging is a skill and one cannot simply learn that skill of judging through acquisition of information through reading or attending seminars, webinars or face to face learning sessions. Hence the argument that is proffered to oppose judicial education in the context that judicial education alone is not sufficient to enhance judging. In the broader reality, judicial education includes training which has skills as a subset of its curriculum. For example, when doing a Judgement writing workshop, Judges and Judicial Officers are given the background information as to how to write and then provided with opportunities to practice writing judgments which are then critiqued by peers to facilitate a learning environment that improves a skill.

I argue that if one has learned how to do a skill incorrectly, it is likely that one will continue to perfect that skill to a standard that is not acceptable. In this regard, it is possible to learn the art of judging through what may be termed osmosis in the application of this word contextually, however, the end result may not necessarily produce a competent judge which harms the notion of access to justice for the public. It is instructive then that one goes from the Court as a Judge to the Classroom as a student in judicial education in this 21st century. This has become an accepted reality from judiciaries throughout the Commonwealth and beyond. Hick Tin⁶ argues that judicial education is needed because courts handle fairly complex issues which many times go beyond the scope of law and requires judges who have a wider viewpoint.

Judicial Education becomes topical for many judiciaries when concerns about case backlog is raised. This is because of the role of education in reform strategies. Finley⁷ further posits that it was as a result of judicial education that judicial officers could be influenced to consider new management techniques to reduce case backlog.

⁶ Hick Tin, C. (2018). 'The education and training of judges and the implications of the development of the ASEAN-China free trade area' address by Judge of Appeal Chao Hick Tin, Supreme Court of Singapore

⁷ Finley, R. (1965). 'Judicial Administration: What is This Thing called Legal Reform?', Colum. L. Rev. 569, 571

Oldfather⁸ suggests that adjudicating is dependent on procedures that are relative to the reality of individual judging. It follows that this reflects on a skill set that based on observation is learnt from practicing the activity in a controlled setting such as in a judicial education course or in the court room in real time.

Judges and learning

Oberoi⁹ indicates that not all Judges are exposed to different divisions of law and therefore judicial education should expose judges to these intersections so as to fill the gap ensuring that the connection between these aspects of law is linked. Until a lawyer becomes a Judge it is likely he or she has never written a judgment. The art of judging is reflected in documents called judgments which are the reduction of the verbal to written form for the benefit of all court users.

Buhai¹⁰ has stated that we need a structured legal education-oriented program of training for judges. Whether such a proposition is supported more by senior judges and judicial officers or mid-level career judges or entry level judges there is universal acceptance that some form of judicial education and training provides value to the judiciary. Yet, the main responsibility of a judge is to resolve matters in the adjudication process¹¹.

As Judges and Judicial Officers progress through their careers it is easy to become complacent and believe in the fallacy of being all knowing and supremely wise. Moreover, this thought can inform as to the non-essential judicial education course that may have been extended to a Judge

⁸ Oldfather, C.M. (2015). 'Of Judges, Law and the River: Tacit Knowledge and the Judicial Role', *Journal of Dispute Resolution* 155, 156

⁹ Oberoi, G. (2022). 'Why Judicial Education Institutions (JEI) must Focus Vulnerabilities faced on Account of Age, Economic Status, Sexual Orientation and Participation in Civil Society Movements?', *Athens Journal of Law*, 8:1-9

¹⁰ Buhai, S. and others. (2011). 'The role of law schools in education judges to increase access to justice.', 24 *Pac McGeorge Global Bus & Dec LJ* 161 at 172

¹¹ Monahan, P and Shaw, B. (2011). 'The Impact of Extra-Judicial Service on the Canadian Judiciary: The Need for Reform' *Comparative Perspective*, 428

to attend. Oberoi¹² further argues that mid-level judges who have been on the bench for a decade or more need to undergo social justice courses because of the level of judicial arrogance which can become easily ingrained in Judges by the simple fact of time.

A commitment to learning is a requirement to learning the art of judging. Structured judicial education and training with a curriculum that is bespoke to the needs of the judge is also an important aspect in improving access to justice. For instance, a judge appointed from day one to year 5 may require certain types of judicial education and training programs that are different from a judge in years 6 to 11 on the bench who would likely have different educational needs than a judge who has served on the bench for 12 years or more. Judicial education is an evolving area of adult education.

Armytage¹³ suggests that judicial education is primarily based on need. Need in the world of education involves proper assessment to determine real needs versus perceived needs.

Conclusion

Through experience as a Judge and judicial education with colleagues the art of judging is cultured¹⁴. Nadeau¹⁵ states that demonstrating ‘patience, tolerance and understanding’ are indicative of what it means to be a judge. Goldbach¹⁶ argues that scholars have the tendency to want to explain contradictions.

Davis¹⁷ suggests that judicial capacity has to be developed and this is done through continuing education, exposure at the international level, cross-country dialogue and exchange of

¹² See Oberoi supra 5

¹³ Armytage, L. (2015). *Education Judges: Towards Improving Justice*. Brill:Nijhoff

¹⁴ Judge Neil Edward Axel, District Court of Maryland (retired). (2016). ‘The Art and Craft of Judging: More than Just Calling Balls and Strikes’ www.judges.org/news-and-info/art-craft-judging-just-calling-balls-strikes/

¹⁵ Nadeau, J.P. (2000). ‘What It Means to Be a Judge’, *The Judges’ Journal* 34, 35 (American Bar Association Judicial Division)

¹⁶ Goldbach, T.S. (2016). ‘From the Court to the Classroom: Judges’ Work in International Judicial Education’ *Cornell International Law Journal*, Vol. 49, 6-17

¹⁷ Davis, B (2013). ‘Keynote address at the 5th Asia-Pacific judicial reform (APJRF) meeting’, Singapore

information. In this discussion it is evident that the development process of being a judge is rather complex and bespoke to circumstance and individual. The ability of an individual to be an effective and efficient judge is measurable and this is based on statistics which can be seen through case management system information such as number of reserve judgements, number of appeals against decisions, case backlog attributable judicial delay and not procedural delay and number of days sitting in court. These are not exhaustive of the measurability of the efficacy of a judge but connect to whether the art of judging has improved due to judicial education or not.

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