

# **Presentation at the Commonwealth Magistrates and Judges Association Conference in Brisbane, Australia, 4 September 2018 - What is the Need for Judicial Education?**

## **Abstract**

*The view today of the Judiciary globally at least anecdotally is that there is a need for Judicial Education. In this paper, we examine what is this need and its implication for judicial development and justice. Many are intrigued by the concept of judicial education. Academics certainly have not categorized it as a special subset in education. It is generally lumped into the conceptual view of adult education. This in itself creates a wide scope for which the dynamic of pedagogy has relevance and the extent to which it can be expanded to meet the needs of the adult learner who is a Judicial Officer has not been fully examined.*

*Understanding the need for judicial education provides an opportunity for judicial officers and academics alike to gain greater appreciation for the rigours associated with practice of judging. It is indeed a noble job to adjudicate matters and provide access to justice through the position of being a judicial officer.*

## **What is Judicial Education?**

According to Wallace (2003) judicial education is training for judges in the areas of ‘substantive law, skills, procedures and attitudes’. Judicial Education in the United States and globally was a new concept (Wallace, 2000, p.849). It was developed to promote competence among judges (Armytage, 2015). Education is seen as a significant right (Ryan, 2004). Yet historically, in the context of Judicial Education this was not considered a necessity. Martin (2011) states that judicial education play a key role in supporting the rule of law.

Not much attention is paid to judges’ role on a scholarly level in judicial education and training (Goldbach, 2016). Perhaps judicial education would have stopped the first judge of the Supreme Court of Australia (John Jeffcott) from killing an individual in a duel (Kirby, 2001, p.1). The Judiciary should ensure that it is prepared to handle the rigours of the administration of justice (Smellie, 2003).

Judicial education involves a lot of critical reflection of its participants who are primarily Judges and Magistrates. In a wider scope involving the entire Judiciary and its support team, judicial education engages Judges, Magistrates, Registrars, Court Reporters, Bailiffs, Information Technology Employees and anyone working directly for the Judiciary. The ‘tension between judicial, scientific and democratic decisions’ contribute to the development ‘educational governance’ (Superfine, 2009. p.1). Judicial education engages these realities to

promote improved competency of the judiciary. The Judiciary continues to grapple with determining what the right education for Judges and Magistrates is as there is no standardised curriculum throughout the Commonwealth.

Scholars and judicial educators may argue that the judiciary requires judicial education because court user surveys produce results which indicate gaps. However, the independence of the Judiciary is such that there should not be external factors infringing or impacting in how the courts function. Hence, the reluctance a century ago for Judges to embrace judicial education.

According to Mersel and Weinshall-Margel (2011), having empirical data to support the productivity of the judiciary is important. In developing judicial education and training programs it is highly probable that having this type of information will greatly assist. The Common law has been able to keep the good while getting rid of the 'outdated, the irrelevant and the erroneous' (Kirby, 2000, p.97). As the common law has evolved over the centuries, so too has the view of the judiciary on judicial education.

Rado (2015) suggests that it is very difficult to find a universal meaning of human rights. Similarly, there is no universally accepted definition of judicial education. This indicates that the scope for the development of judicial education is open to interpretation and truly reflects a contextual approach throughout the Commonwealth. Judicial education need not be identical or similar by jurisdiction (Wallace, 2003, p. 355). However, each country should endeavour to put in place some form of judicial education and training to ensure that their judiciary remains relevant and continues to enjoy the confidence of the public. It may be argued that whether the judiciary has the support of the public it has a job to do. However, the extent to which the public has faith that the judiciary is able to deliver justice will inform on the access to justice indicator which can be qualitatively and quantitatively measured without infringing on the independence of the judiciary.

On a practical basis judicial education involves a curriculum which is applied in a jurisdiction to assist judicial officers in their ability to be better at what they do. If it is not achieving this basic objective then the question as to why engage in judicial education becomes a legitimate concern. It is necessary for those engaged in judicial education to have clear plan of action as to what the objective of a judicial education and training program intends to achieve. While this may appear elementary, throughout the Commonwealth there is tremendous interest in judicial education and the rate at which it has become a mantra in judiciaries is fascinating.

Judiciaries should not be embracing judicial education because it appears to be the right thing to do or most judiciaries are pursuing it. It has to be tailor made for the specific judiciary and applicable at a local level. Failure to do this will result in a judicial education and training program which may have good form with little substance.

According to Simon and Poritsky (1987) judges are capable of learning 'trial supervision skills' (p. 433) and it is the obligation of the judiciary to provide judicial education to judges of all experience levels. Judicial education can fill gaps as well as operate as refresher training to veteran judicial officers.

## **Judicial Education as Sub-set of Adult Education**

According to Palis and Quiros (2014) adults have a need to understand why they are pursuing a course of study before engaging in such a program. Judges do courses and workshops because they believe there is a need to do so. Judicial education functions as a continuing professional development subject which addresses the needs of adults who are Judges and Magistrates. Adult education is a 'scientific field' (Rubenson and Elfert, 2015, p.133). It is one of the most discussed subjects in the '21<sup>st</sup> century' (Mussa, 2015, p.54). Most of the scholars at the forefront of 'academic learning facilitation' were trained in the west (p.60). In this regard, there is opportunity for contextualising judicial education and training throughout the Commonwealth as the peoples from the countries in this group are not homogenous.

The change of position of the need for judicial education in the judiciary has been remarkable (Partington,1994, p.10). According to Buhai (2011), academia has suggested that persons aspiring to be judges should be trained before they are appointed, however, there has not been much response from the judiciary in this regard. 'Experiential learning techniques' have been applied for a while (Sankoff, 2017, p.210). Using these type of techniques in delivering judicial education and training are beneficial for improving the adult education experience of judges and magistrates.

Adult learners have been described as self-directed individuals. As such, judicial officers are capable of engaging in self-directed learning to improve their knowledge, skills or social awareness. Thomas (2006) suggests that in order to widen the types of persons appointed to the judiciary (i.e. other than practicing lawyers), the demand for judicial education and training programs will continue.

As a continuing professional development category, judicial education is a subset of adult education. However, its level of sophistication and intricate mandate of its audience is such that it is unique. This author projects that within the next twenty years, academia will embrace judicial education as an academic discipline which requires specialized training to hold oneself out to be a judicial educator.

It is remarkable that in the 21<sup>st</sup> century and after over 50 years of development, judicial education still has a considerable developmental path for academic acceptance in the Commonwealth.

## **Reflective Learning**

Critical thinking enables the individual to recognize what informs on the belief system (Brookfield, 1987). Judicial education facilitates critical thinking. It is this ability to critically analyse and reflect which contributes to the success of a judicial education program. According to Brookfield (1987), reflective learning is related to critical thinking. Judges and Magistrates benefit significantly in education and training programs through reflective learning. This is why in workshops having a recap or reflective learning component on a daily basis is helpful in positively contributing to the learning experience of the learner.

The Reflective learning process is an active learning concept that is not abstract or a theoretical educational exercise. Critical thinkers challenge the status quo and seek to gain more knowledge and understanding. In the realm of judicial education, a judiciary that is increasing in knowledge, skills and contextual awareness will be a more confident and successful judiciary.

Reflection plays a significant role in fostering pioneering thinking (Leering, 2017). Learning on the job by observation is not an option for ‘many judges’ (Dawson, 2015, p. 177). Using tools such as power point presentations, use of film, group discussions, lectures, literature and movie making are methods that are currently used in judicial education and training.

With the advances in technology the use of online learning allows dissemination of information instantly and judicial education and training programs can harness this tool. Online learning fosters active learning and promotes reflective learning and critical thinking. Judicial officers have a commitment to adjudicating matters in compliance with procedural fairness and according to the rule of law. This calls for reflective thinking and therefore the mindset of a judicial officer readily avails the concepts that would engage in the use of judicial education through a reflective thought process approach.

## **Developing Judicial Officers**

A Judicial officer is not an individual who was born with such a position or title. As such, people who function as Judicial Officers develop into such a role over time. Buhai (2011) argues that judicial education should be a part of the law degree programs in Universities. If it is anticipated that judicial education should be more readily accepted in academia then it makes sense to start with the foundation of the development of judicial officers which is in their training to become lawyers.

According to Brittain and Chandler (2009) diversity benefits the judiciary. Judicial education provides an avenue to expose judicial officers to the concepts of diversity and its importance in judicial making. Moreover, it positions the judiciary to facilitate mentoring which is important as judicial officers are appointed to the bench. ‘Mentors are important for all judicial candidates’ (p.12). Oberoi (2011) states that the judiciary as an ‘institution’ is different than any other profession (p.189).

Chin and Alcorn (2013) in an interview with Baroness Hale reproduces her comments that ‘it is important that judges are recruited from people who have done stuff other than judging’. Hence, through judicial education a judicial officer who lacks experience as a litigator can become an exceptional performer on the bench. ‘I do not even think it is necessary to be a top litigator to become a top judge’ (p.223). The selection to the bench should reflect a cross section of society.

Judicial Education helps judges to develop their ‘judicial identity’ (Dawson, 2015, p.176). The transition from lawyer to the bench is aided by judicial education. On the other hand,

whether one needs judicial education to be an effective judicial officer has not been thoroughly researched.

The process of growth take place when education occurs. To be able to measure and evaluate this growth is paramount in determining the effectiveness. As we transform judicial officers in social awareness training or enlighten on judgement writing skills, judicial education becomes more relevant and appreciated. There is no doubt that there are some judicial officers who see no benefit to their development as a result of judicial education and training.

## **Eliminating of Judicial Arrogance**

Training is needed to assist Judges who have developed ‘judicial arrogance’ (Felter, 1997, p.96). While judicial independence has to be guarded jealously, ensuring that Judges and Magistrates are accountable is critical to engendering public confidence. ‘Judicial accountability’ cannot be achieved if there is judicial arrogance (p.97). Having an awareness of what can cause judicial arrogance is critical to its elimination.

Buhai (2011) suggests that ‘prospective judges’ need to be introduced to classes while in law school that creates an awareness ‘of their own biases, myths and prejudices’ (p. 178). On the other hand, judges are normally selected from the ranks of practicing lawyers and so would have had sufficient time in their career to understand these challenges and may not need formal training to identify such hurdles.

Kirby (2000) indicated that the United Kingdom’s Lord Devlin ‘fear’ was that judicial education would infringe on judicial independence. This appeared to be a sound argument, however, when judicial arrogance supersedes judicial accountability then judicial independence is eroded due to deference to absolute power. Dickert (2005) submits that judges fight arrogance daily because of the esteem received and perceived power accorded with the role. When one examines qualities in relation to Judges and Magistrates ‘humility’ is not usually mentioned (Amaya, 2018, p.97).

Anti-judicial speech is an area that tests the mettle of the Judiciary to resist exercising its power while not being perceived as arrogant. Very few national courts in common law jurisdictions protect anti-judicial speech (Keck, Metroka and Price, 2018, p. 747). According to Fuentes-Hernandez (2002), when there is unhappiness with the justice services, there should be new approaches to improve poorly performing institutions.

There is a need for leadership from the ‘private bar, working with government and the judiciary’ to ensure more ‘access to justice’ (Vermeulen, 2016, p.112). Through interaction in judicial education and training programs it is possible to bring all of these stakeholders together to discuss a myriad of complex and contentious issues related to judicial development.

## **Conclusion**

Judicial education is a developing discipline that requires professionalised persons to practice. Its importance to the judiciary has become more recognized and in particular, the contribution to improving access to justice.

Judicial officers throughout the commonwealth spend thousands of hours collectively engaged in training programs to promote competency in knowledge, skills and/or social awareness. Through the use of reflective learning the judicial officer is able to improve in quality of learning experience. Ensuring that judicial officers are accountable in their roles is also a part of what judicial education and training aims to accomplish. Contributing to the growth and development of democracies is part and parcel of the role of the judiciary.

Using adult education tools and embracing effective techniques which promote an efficient judiciary will continue to grow public confidence in their ability to access justice at all levels of the justice system. For judicial officers who are newly engaged or veterans with many decades of experience, judicial education helps to differentiate between good and great. It helps to uplift and build the ability of the Judge or Magistrate to impartially and with integrity administer justice to all and sundry. It may seem as cliché but it rings true to the ordinary man in the Clapham omnibus as attributed to Lord Bowen in the *Tichborne Claimant* case of 1871. It further rings true for the lady in Mt. Hagen, Papua New Guinea or the young boy in Bodden Town, Cayman Islands or the elderly lady in Tarpum Bay, Bahamas.

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