
JUSTICE IN SOCIAL CONTEXT

Editors:

Leonel González Postigo
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Prologue:

Hon. Justice Sheilah Martin

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Presentation by the editors

The process of training justice system operators has moved through various stages at the international level. It was initially described by what Sartre called a ‘nourishing concept of knowledge’ and or Paulo Freire has referred to as a ‘banking concept of education’ In other words, the learning process was conceived of as a “deposit” that educators made to their students without conceiving of the latter as subjects with prior experiences and interests. This initial stage was characterized by the domination of memory-based training focused on legal and dogmatic elements.

The world of education changed in the 1970s as a result of the “inside out” perspective, which encouraged students to reflect on their experience and to use a range of skills and abilities. This new vision of judicial training can be summarized by the idea of “learning by doing” and the empirical assessments conducted in Canada show that these methodologies have a greater pedagogical impact on the creation of knowledge.

This publication is framed by the most recent wave of judicial training, which is training of judicial operators in the social context of justice system users. We have identified several international experiences in which the institutions responsible for judicial training have incorporated methodologies focused on training judicial operators about the social, cultural or racial context of the people who access the judicial system. Specifically, this publication includes experiences that have been developed in Anglo-Saxon systems like those of Canada, the United States, the United Kingdom and Israel and in civil law contexts such as Argentina’s national justice system. We are very grateful to the experts who have contributed with their articles to this project.

These new learning spaces share several goals: to reduce the risk of discrimination by judges, increase the quantity and quality of information that judges have available to them when they issue a ruling, to generate greater trust and legitimacy through procedural justice and to increase community involvement.

We are also pleased that this work coincides with the important foundational milestone of the 25th anniversary of the unanimous decision by the Canadian Judicial Council in 1994 to approve the concept of ‘comprehensive, reliable and exhaustive programs on matters related to social context including aspects of race and gender.’

We hope that this work can serve as an initial step towards creating a judicial system that is much more open and respectful of the social, cultural, ethnic, sexual and religious diversity that exists in our contemporary societies.

Leonel González Postigo and Marco Fandiño Castro

Prologue by the Hon. Justice Sheilah Martin

As this collection of essays demonstrates, the need for judges around the world to understand and appreciate the social contexts within which they work is stronger than ever before.

Most people readily accept the pressing need for judges to engage in continuing professional educational programs. Laws change, precedents evolve, knowledge increases and judicial decisions must be based on current norms. As judges strive to deliver justice according to law and equal justice for all, an important part of their professional formation is to understand the social contexts in which people live and in which judicial decisions are rendered and received.

The nature of the judicial role is such that judges have special obligations in this area. Judges occupy a unique position of power and responsibility over their fellow citizens. They must decide questions such as with whom a child should live, how long an offender should be incarcerated, and what monetary value should be placed on an injury caused by another. While it is widely acknowledged that judicial independence is a cornerstone of the rule of law, an independent judiciary is not the same as an isolated one. As Catherine Fraser, Chief Justice of Alberta, has observed, “without knowledge about the real problems of real people and the world around us, it is difficult to understand how one can judge fairly.”¹

Moreover, judges have the ultimate responsibility to interpret a nation’s constitution, a society’s most basic expression of its shared values. In many countries, as in Canada, equality rights of various types receive constitutional protection to combat any longstanding patterns of discrimination and injustice which pervade many societies and legal systems. Without credible and comprehensive instruction, not all judges will understand what discrimination looks like and what equality requires. Judicial education is thus an important bridge between a judge’s own education and experience, and the wisdom and life experiences of others.

In Canada, today, it is widely accepted that judges should receive social context education to eliminate unconscious bias and to achieve the heightened impartiality required to administer justice for all in a diverse society. Since 2003, the National Judicial Institute, which educates federally appointed judges in Canada, has integrated substantive law, skills development and social context awareness into its judicial education programming.

Social context education is a broad topic that is inextricably tied to judicial competence. It includes education on the nature of diversity and the impacts of disadvantage and on the particular social, cultural and linguistic issues that

¹ National Judicial Institute, *Year in Review 2016-2018*, online: <https://www.nji-inm.ca/index.cfm/publications/public-resources/nji-in-review-2016-2018/> at b.

shape the people who appear before them. It is intended to help judges explore their own assumptions, biases and views of the world with a view to reflecting on how these may interact with judicial processes. Much of this education is built upon relevant research and community experience. It is designed to enhance judicial reasoning and provide jurisprudential and analytical tools to enable judges to examine the underlying basis of legal rules and concepts to ensure that these rules and concepts correspond with social realities and conform to any constitutional or legal guarantees of equality.²

Just as important as the ‘what’ of judicial education is the ‘how.’ Judges have unique learning needs, and effective training must be insightful, interactive, and immersive. It should specifically address and respect the role that judges are asked to play in society, and be designed with a skills-based approach so that it can be readily applied. Design and delivery of judicial education is often best led by judges themselves, not only to ensure its usefulness but also to ensure its integrity and independence.³ That does not mean, however, that judges cannot benefit enormously from the insight and experience of academics and the people and communities involved.

Although some may question the need for social context education, experience has shown that it enhances, rather than threatens, judicial independence. As my colleague, Justice Rosalie Abella, wrote in the Yukon Francophone School Board case,

Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and [an] empty one.⁴

Social context education helps judges expand their horizons in order to better understand and interpret the societies they work within. Of course, different people start in different places, just as different judicial systems exist in different legal and social cultures. This collection of papers, drawn from different countries at different times, is a worthwhile project that helps start a conversation about this vitally important topic.

Hon. Justice Sheilah Martin
Justice of the Supreme Court of Canada

2 National Judicial Institute, *The Social Context Education Project*, 2004, online: <https://www.law.columbia.edu/sites/default/files/microsites/clinics/sexuality-gender/files/SG13.pdf> at 1.

3 See, for example, the National Judicial Institute’s “20 Principles of Judicial Education” in National Judicial Institute, *Year in Review 2016-2018*, online: https://www.nji-inm.ca/index_cfm/publications/public-resources/nji-in-review-2016-2018/ at 10-11.

4 *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 SCR 282, 2015 SCC 25 (CanLII) at para. 33.

1. Social context and judicial education: A tool for improving the quality and legitimacy of judicial decisions

Leonel González Postigo⁵ and Marco Fandiño Castro⁶

1. Introduction

The purpose of this article is to explain why ensuring that judges are familiar with aspects related to the social contexts of judicial system users can improve the quality and legitimacy of judicial decisions.

First, we will offer a retrospective analysis of the various stages of changes that have taken place in the area of judicial training, and we will identify the methodologies that have emerged at the international level to train judicial officials and make them more sensitive to the social context of people who access the judicial system.

We will then review the main connections between the operation of the justice system and society, and we will generate a theoretical framework regarding the type of information that we will consider as part of the category of *social context*.

In the third section, we will reflect on the arguments that have made regarding equitable and differentiated treatment of at-risk groups. We will propose an ambitious and balanced vision that starts from equality of rights but does not ignore differences and diversity within social groups.

Finally, we present a few reasons why justice system operators' familiarity with social contexts can help to improve the quality and legitimacy of judicial decisions.

2. The emergence of social context as an element of judicial training⁷

Training in judicial spheres is a fairly recent development. In fact, the first judicial academies were created in the late 1970s and over the course of the

⁵ Training Director, Justice Studies Center of the Americas.

⁶ Research Director, Justice Studies Center of the Americas.

⁷ This section was based on the study *Capacitación judicial en América Latina. Un estudio sobre las prácticas de las Escuelas Judiciales* (COOPER, Jeremy and GONZÁLEZ, Leonel, Santiago, Chile, JSCA, 2017).

1980s. Many of them are still redefining their structures, roles and spheres of action. As such, this area is maturing and defining the scope of its work.

In the pages that follow, we will present three key moments that training has moved through over the past 25 years. These stages are linked to the development of judicial training and the emergence of ideas, demands and specific actions and are not linked to a specific temporal order.

a) Description of traditional training: Knowing the law

Provision of regulatory information or doctrine

Experience shows us that one of the distinctive images of legal training (which also includes law schools) in this first stage has been that of *a professor who presented the dispositions that comprised a rule and the doctrine or case law associated with it*. This is what Sartre (1960) has called the nurturing concept of knowing, or what Freire (2008, 52) has called a “binary concept of teaching.” This implies that the relationship between the educator and the student is narrative-discursive-lecture and that the educator sends messages and makes “deposits” that the students memorize and repeat.⁸ According to this logic, students or participants in courses are reduced to passive subjects who merely store the information that is provided to them by those responsible for the training. In the specific case of judicial training, this concept has resulted in rigid trainings in which the professors were the protagonists and were exclusively responsible for building knowledge to be applied, in the best case scenarios, to the judicial reality. The students (that is, judges, officials or employees) were merely passive subjects receiving this information who did not have the opportunity to provide feedback based on their personal and professional experiences, much less subjects with an equal level of participation in the construction of knowledge.

In this dynamic, the contents provided are limited to regulatory or doctrinal information regarding a specific topic. This is what Baytelman (2002, 26) has called “legal training,” explaining that our authors continue to be ensnared in the issue of whether criminal procedure law and civil procedure law belong to a single general theory of procedure, in the memorization of deadlines, in distinguishing between process and procedure and in decoding the mysterious

legal nature of acts and rulings. This example is representative of the general trend in university and judicial training in which the main focus was the discussion of procedural institutions in the abstract sense with no connection to daily praxis.

At the same time, the doctrine (understood as the theoretical reflection on a certain area of law) had a neutralizing effect on teaching as a political strategy for supporting the changes that occurred in the judicial system. From the training of the intellectual movement called “Critical Legal Studies” in the 1970s, Duncan Kennedy has stated that doctrine is a space of intended neutrality around which the remaining components of the programs of study revolve such as the orientation of policies, public law, interdisciplinary studies and clinical teaching (Kennedy, 2012). That centrality of doctrine, specifically referring to private law, is what has moved universities and judicial academies away from the discussion of the specific problems that occurred in the daily practice of the courts.

This is why Binder referred to encyclopedic teaching through which attorneys were taught to repeat or memorize laws (Binder, 2016). The idea of training as (i) the delivery of information and (ii) an activity that is focused on regulations and doctrine has become deeply rooted in training spaces, and this is one of the key characteristics that has marked training in the first stage since its appearance in the region.

Disconnection from processes of change

The other specific factor of training has been its independence from the changes that judicial systems underwent during the 1990s in regard to procedures and underlying rules. In general, judicial academies and universities have had a work agenda that was different from the changes that took place in the courts.

While the systems moved slowly towards the introduction of hearings or undertook important changes to civil or criminal laws, responding to new social realities, the structure of training spaces continued to operate on the basis of courses or programs that were developed for the logic of the case file or through training in areas that did not respond to the main demands of attorneys’ daily work.

As such, Baytelman (2002) argued that a structure of incentives developed around this logic so that attorneys would be trained based on income, promotions and prestige. From the perspective of public policy design, he argued that people underwent training to be able to increase their income, move forward

professionally by obtaining promotions or because their prestige would be negatively impacted if they failed to do so. This was based on the idea that prestige is also a tool for their work and thus impacts their career and income. What does that mean? It means that while the courts progressively moved towards an agenda of changes, the training system revolved around incentives that were disconnected from the judicial reality. Why was this the case? To a great extent, it was due to the fact that the operators interpreted the changes through the lens of the written or traditional system that had been in place and thus did not respond to the need to acquire skills in order to work in the new system.

In addition, the courts themselves did not look inward at the work dynamics and results that they generated. Marenzi (2002) suggested that a cleavage developed between the production of knowledge (the scientific realm), the transmission of that knowledge (the educational realm) and the application of that knowledge (reality). A comprehensive perspective on these three phenomena would allow units to study the role that they were playing, to serve as spaces for dialogue about and analysis of that information and to allow for the application of new mechanisms or approaches in order to correct the areas that had been identified as critical or that could be improved in order to achieve the goals that had been set.

b) The new demands of judicial teaching: Acquiring skills and attitudes

The deepening of civil and criminal judicial reforms

Over the past 15 years, a large number of countries have implemented comprehensive judicial reform programs based on a broad set of actions oriented towards consolidating transitions to democracy. In this context, a general belief emerged regarding the need to modernize justice administrations by replacing traditional written models with oral ones.

This new context has led to a rethinking of operators' practices. Judiciary staff members have had to move away from a long, deep approach to their work that consisted of preserving the written file as the main source of the judicial process. New practices have been linked to the incorporation of litigation techniques in public hearings, which become the only means of substantiating a civil or criminal process. However, this transition has not been a peaceful one. Despite the implementation of regulatory reforms, a process that Binder calls "dueling practices" emerged, which consisted of a confrontation between old

and new, between the tradition of inquisitorial practices and the new forms associated with the adversarial model (Binder, 2012, 143, our translation). In contrast to what could be seen as poorly achieved implementation, the scope of a high level of conflict between practices constitutes an initial step without which the implementation process would not have made so much progress.

The impact of developments and innovations in the field of pedagogy

The past few decades have seen very significant progress in the consolidation of new trends in and conceptual approaches to adult education. This has been accompanied by empirical research that allowed for these approaches to be compared and contrasted and for the development of very valuable tools for contributing to the discussion of teaching and learning.

In regard to conceptual contributions and reflections, the theory of experiential learning began to take shape during the 1970s based on the contributions of David Kolb, John Dewey, constructivism (Jean Piaget), critical pedagogy (Paulo Freire) and Carl Rogers, among others⁹ who called into question the traditional model and proposed a renewal of the field of education.

This movement positioned education as a student-centered process and learning as a process through which knowledge is created through the transformation of the experience. At the same time, it provided a perspective of *looking out from inside* that contrasted with the approach of *looking in from the outside*. In other words, in order to take advantage of internal interest and the students' intrinsic motivation, the work was based on their knowledge and prior experiences. In this way, the role of the educator was to facilitate that process of extraction through the creation of a safe, welcoming space in which students could reflect and make their own meanings based on their experiences (Kolb, 2014).

This theory holds that learning comes from resolving the creative tension between four modes of learning that present themselves as a cycle or spiral in which the student "touches all the bases": experiencing, reflecting, thinking and acting. All of these phases are experiences.

In this same sense, Donald Finkel clearly elucidated the polarization of the two training models: "narrating the class" and "teaching with your mouth shut." The former was associated with a mechanism of transmission of information while the second was characterized by centering the function of the

9 A specific description of the characteristics of this movement is provided in the study *Sobre convertirse en un educador experiencial: el perfil y rol del educador* (Kolb et. al, 2014).

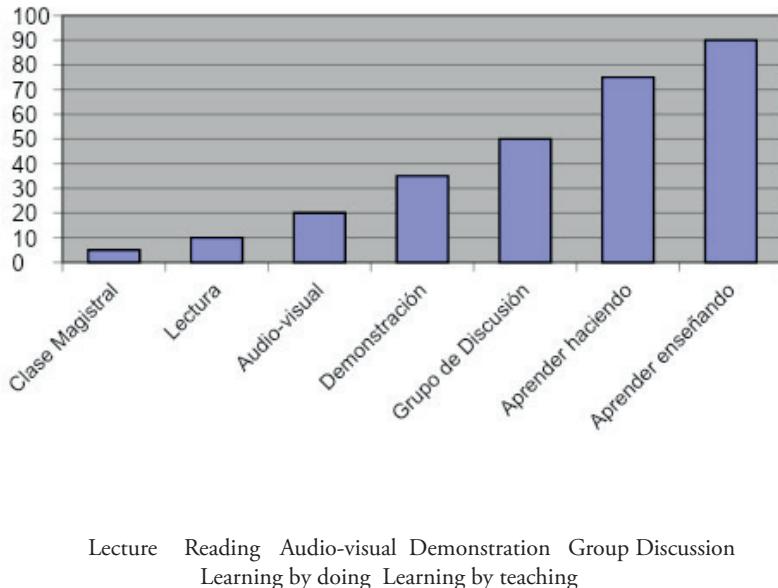
student in the learning process and defining the professor as the “lighthouse” who should guide that path. As Bain (2006) put it, this meant recognizing that teaching is not only giving lectures, but anything that we can do to help and encourage students to learn without causing them any significant harm. Finkel also defined “good teaching” as the process by which the circumstances are created to bring meaningful learning about in third parties, that is, going beyond the traditional vision of the professor in a lecture (2008, p. 42).

All of this intellectual scaffolding was slowly filtered into the sphere of judicial training and into the way that educators thought about the learning of judges and other institutional stakeholders. One example of this is the work conducted by Canada’s National Judicial Institute (Dawson and Williams, 2013), which recently began to include this perspective in the planning and execution of training activities.

As these ideas have taken shape, studies and empirical research began to be conducted on the way in which training was delivered.

It is interesting to highlight the work that Ken Bain did for 15 years in US universities in order to identify common characteristics among hundreds of teachers whose work was considered to be exceptional by students, other teachers and institutional authorities. Bain collected data on the work of 63 teachers from the fields of medicine, the natural sciences, the social sciences, the humanities, the arts and law, among other fields. He used various approaches, including observations in classrooms and labs, studies, videotaping, conversations, and the review of materials, syllabi, examinations and worksheets. He found that the most important element was the way in which the teachers understood the class and valued human learning. Specifically, Bain found that there are seven common principles in the practices of the teachers that he studied: 1) they create a critical learning environment; 2) they capture the students’ attention and hold onto it; 3) they begin with their students instead of with the discipline; 4) they seek out compromises; 5) they help the students to learn outside of the classroom; 6) they attract students to the disciplinary reasoning; and 7) they create diverse learning experiences (Bain, 2006).

Another important study in the field of education was conducted by the Applied Behavioral Science Institution, which measured retention rates based on teaching strategies:



Source: Dawson and Williams, 2013.

This figure shows us that traditional methodologies like the lecture have the least impact on participants in training activities in contrast with modes that place the students at the center, such as *learning by doing* or *learning by teaching*. This study aligns with the ideas that we have mentioned in regard to experiential learning theory both in terms of its benefits for empowering students and in regard to its pedagogical effectiveness for producing knowledge.

Now, what is the connection to judicial training? To a great extent, the common factor of the courses provided to members of the judiciary has been their one-dimensional nature in terms of methodology and the way in which they conceive of interaction between teachers and participants. Training activities have been conceived of as spaces in which *knowledge* is delivered through lectures or rigid courses in which a teacher *transmits* certain information. However, judicial academies have slowly incorporated a new teaching perspective that addresses the challenges and presents other training approaches. Latin American training has moved through three phases of Bloom's taxonomy:

from knowledge to abilities and skills.

c) The current situation: Towards judicial education on social context

Judicial training has been conducted for three decades, and based on this we can conclude that a relationship has formed between areas of training and judicial reform processes. In addition, pedagogical innovations have slowly been incorporated into the entire internal circuit of judicial academies' work.

Despite this moderate progress, judicial education spaces still revolve around technical or -in the best cases- pedagogical discussions. One of the main challenges is the need to include a cross-cutting perspective on the changes that have taken place in society over the past few decades, mainly based on the expansion of rights and the heterogeneity of justice service users.

A clear example of this is related to the expansion and growth of the feminist movement at the global level, which has called into question the patriarchal dynamic of judicial systems and has led to numerous discussions about its implications.

This demand is what the common law system has known as "education on social context," mainly based on the experience that has developed in Canada since the 1990s. Swinton defines this work as the social context that judicial decision-making produces, paying special attention to the concerns on the equality of groups that have faced discrimination, such as women, racial minorities, people with disabilities and members of indigenous groups. This means that when judges become involved in a judicial case, they must learn about the environment and living conditions of judicial system users.

The fact that those who impart justice have this knowledge does not impact their impartiality. On the contrary, it means rethinking this principle in political terms: the judge does not simply manage the interests of the parties, but also removes any preconceptions and prejudices that they may have as a product of their life stories and that are often unknown or unrecognized as factors that determine how they rule. This is not a negative in and of itself because it is natural that any judge will accumulate a set of experiences that define them. This process is meant to increase their knowledge of social groups and their dynamics so that their decisions can be based on those realities.

In the specific context of the work of judicial academies, the first approach has been based on the need to incorporate the gender perspective into the work

of judging. A large number of these entities have issued internal protocols or manuals and have created training spaces with experts on the subject.

However, this is a very limited approach to the way in which judicial academies can focus training on social context. While there are various models that can be adopted (in fact, Swinton mentions autonomous learning, the integration approach and the immersion approach), the important thing is to recognize the need to adopt them.

In any case, their incorporation should be related to two aspects: the expansion of the at-risk groups to be considered (for example, including indigenous groups, inmates, the LGBTQ community and others) and the diversification of the way that these groups are approached. The latter means, for example, that judges learn about the way that they live, their concerns and the limitations that they impose on the judicial system first-hand.

This also implies a possible form of holding judges accountable by creating a space for interaction between them and the system's clients.

3) Justice and its classical connections to society: The concept of social context

The connections between the work of the justice system and society are clearly endless. If we analyze the work of Comte, Weber, Durkheim or Marx, the fathers of modern sociology, we will see how many of their efforts were directed at the study of relationships between justice and society.

A clear example of this is the three models of the judge elaborated by Weber: traditional, based on the sacred nature of the tradition; charismatic, which is much more emotional than rational; and legalistic, which is focused on the application of legal regulations to specific cases (López Ayllón, 1989). For his part, Karl Marx also addressed the study of justice in his critique of the program of the German Workers' Party at the Gotha Conference of 1875.

Incidentally, the same holds good for “free administration of justice” demanded under A, 5. The administration of criminal justice is to be had free everywhere; that of civil justice is concerned almost exclusively with conflicts over property and hence affects almost exclusively the possessing classes. Are they to carry on their litigation at the expense of the national coffers? (Marx, 1975)

The study of relationships between law and society would expand a great deal in the 20th century and would lead to the emergence of sociology of law or legal sociology as an entire category within the general field of sociology. In order to provide a simple and complete definition, it seems appropriate to cite Argentina's Correas (1999), who said that legal sociology or sociology of law is a scientific discipline that seeks to explain the causes and effects of law.

It thus seems clear that while law focuses on the study of legal regulations, the sphere of legal sociology is much broader and focuses on both social factors that lead to legal regulations and the consequences or results of their application. Another characteristic aspect of Legal Sociology has to do with empirical research methodologies connected to the production and application of law (Treves, 1966).

On the other hand, the relationships between law and society also have been analyzed from the perspective of how judges are influenced by society's expectations about specific cases. In regard to this topic, and linking it to issues of judicial independence, Andrés Bordalí (2013) referred to Calamandrei's writings as follows:

If we assume that the law expresses a popular demand that lives in the conscience of all members of society, every judge is responsible for finding that social conscience when interpreting and applying the law. In order to achieve this without any distractions, that judge should feel the full weight and import of that responsibility. Calamandrei would say that that judge must be alone with his conscience so that he can hear what popular demand dictates (our translation).

We believe it is also interesting to present Habermas' reflections. He mentions that the judge stops hiding behind a supposed legal neutrality of his reading of the constitution and accepts that his decisions about the law are political decisions inspired by models of democracy that reproduce in the judicial ruling the conflict and tension referred to above, which cannot be overcome without assuming a deliberative model of democracy which, taking as its Fundamental Rule the Discursive Principle and erecting public opinion as its alter ego, guarantees equal deliberation proceedings for all subjects (Mejía and Guzmán, 2002 cited by Nieves, 2013, 18, our translation).

These discussions seek to address the foundation of the judicial ruling and whether or not it responds to social demands and expectations. Our intention is not to address this debate, but to explore a more modest and limited research question: What information about the social context of judicial sys-

tem users should judges and other judicial system operators know in order to ensure that judicial decisions (products of the justice system) can be of higher quality and have more legitimacy?

It is reasonable to think that alongside the beginning of a judicial action, various social, cultural and religious characteristics of judicial system users will influence the process and continue to have an influence once it is complete.

The Critical Sociology of Justice analyzes the impact that social factors have when selecting dispute resolution mechanisms. Following Boaventura De Sousa Santos (2012), social factors are key when it comes time to channel a conflict through the various dispute resolution systems that comprise the litigation pyramid. These social factors include those related to personality, sex, educational level, ethnicity, age and other interpersonal variables derived from relationships among individuals.

While all of these social factors influence the selection of a dispute resolution mechanism, they also have an impact once the case has been channeled through one of these entities.¹⁰

From our perspective, social contexts are all of the characteristics derived from the social, cultural, economic, religious and gender experiences that influence the user's perception of a dispute resolution mechanism and can have consequences in terms of their satisfaction with and trust in that mechanism.

4) Equal or differentiated treatment in access to justice?

There is a question that we must answer prior to expanding our discussion. Should justice system users be treated equitably given that they have the same rights, or should differentiated treatment be provided for disadvantaged groups? We outline our position below, presenting a historical discussion and how it was resolved.

An important case for sexual discrimination was decided in 1979 under the direction of the Equal Employment Opportunity Commission in the United States against the company Sears. The case questioned Sears' hiring policies because commission contracts for sales people were mainly held by men, with

¹⁰ Once the litigation, regardless of which type it is, has been submitted to a certain resolution mechanism, it is transformed by the powers, styles and regulatory resources of the mechanism before it is solved. The family member, therapist, neighbor, group or church reformulates, expands on or contracts the litigation as it receives information about the case in order to adjust it to the type of solutions that it can credibly issue in light of its powers, style and regulatory resources. (De Sousa, 2012, 241, our translation)

women occupying just a small fraction of the positions. The company's justification was workers' individual choices, which were oriented towards that type of work for diverse cultural reasons.

In order to justify their positions, each of the parties asked expert witnesses to testify, including historians Alice Kessler-Harris and Rosalind Rosenberg, and they defended opposing positions. Kessler-Harris defended what we could call the equality thesis. For her, sexual differences had no significant impact on labor choices, which instead depend more on the specific context and owners' decisions. Meanwhile, Rosenberg defended the differences thesis, arguing that the labor choices of men and women depended on a variety of factors including those related to sex. She also referred to how difficult it was to refer to women as a homogeneous group.

Kessler-Harris underwent a hostile cross-examination that called her thesis into question. Inconsistencies were found between her narrative and academic articles that she had published, which contradicted the thesis that she had defended at trial. In the end, the judge ruled in favor of Sears and, as a result, in favor of the equality thesis. Milkman (1986) offers interesting reflections on the Sears case, referring to the need to consider the political aspect of the debate and the fact that the case went to trial in the middle of Reagan's neo-conservative wave. As such, the ruling was seen as a setback for feminist claims at the time. For Milkman, the path to be followed should be equality but without rejecting or ignoring differences.

We think it is very interesting to present ideas about the "dilemma of difference" described by Martha Minow, which are also referred to in this Katherine Swington publication. For Minow, in some cases, leaving aside the differences of disadvantaged groups can imply a defective neutrality, while focusing on them could increase the stigma of deviation. Focusing on and ignoring difference both pose the risk of recreating it. That is the dilemma of difference (Minow, 1984 cited by Scott, 1988).

This interesting discussion presents various challenges when it comes time for judges to hear information about the parties' social context. Our position is that judges and/or other judicial operators must have certain information about the social context in order to issue decisions.

For example, the mere fact that a woman is part of a judicial process does not necessarily imply that the justice system has to treat her differently because of her gender. In some cases, it will be necessary to provide differentiated treatment, but in others that treatment may encourage inequality. For example, if a businesswoman is fighting for visibility in a male-dominated world and turns to the civil or commercial courts for a remedy and she is unjustifiably treated in an exaggeratedly different manner, the result could be negative when the

justice system is expected to provide equal conditions for all parties.

Our position is based on the following ideas. An initial element is the need for judges and other justice system operators to be aware of information on the social context of the various groups that turn to the system. This information can provide a better understanding of everything the parties say, argue or testify to. In some cases, specific contexts can require the application of special measures in order to guarantee better access to justice.

5) Managing social context to improve the quality and legitimacy of judicial decisions

In the pages that follow, we will present arguments explaining why judicial officials' knowledge and understanding of the users' social context can help to improve the quality and legitimacy of judicial decisions.

Deepening the connection to the community and transparency

A fairly cross-cutting characteristic of judges in Latin America that is also true of other justice system operators is the lack of connection to the community from their various roles. This detachment from the community has its foundations in some elements of the continental legal tradition that has permeated Latin American legal culture.

As Aldunate (2001) suggests, one of the characteristics of the Spanish justice model was respect for the principle of social detachment according to which judges were to avoid active participation in community events and limit themselves to their case resolution work. That model, which was part of the monarchic absolutism, was transferred during the colonial period and continues to impact Latin American legal culture. It is frequent to perceive that judges feel that this sort of community activity could compromise their impartiality in some way.

If we analyze this phenomenon, we quickly see that the contrary is true. Judges who refuse to engage with the community and work separately from it find themselves in a situation of greater opacity and thus generate conditions that are more conducive to the loss of impartiality. However, if they participate in social activities in the community, they increase the level of transparency in their relationships and connections that could have greater social control and thus reduce opportunities to operate in favor of certain interests.

All types of activities related to judges learning more about the social context in which they impart justice contributes to greater integration of them in the community and thus to them working in a context of greater transparency. As we will see throughout this article, there are numerous opportunities and methodologies for making justice system operators interact with communities so that both can become more culturally aware.

Improving levels of satisfaction with the results of the justice system

Justice system user satisfaction has frequently been studied in empirical analysis in the field of social psychology. A large field of study has developed in the legal sciences and psychology that has been catalogued as procedural justice.

Background on the development of the concept of procedural justice can be found in the work of Max Weber (1968), who developed a concept of legitimacy composed of two main aspects: the individual feeling of obligation to obey authorities and the feeling of belief and confidence placed in legal officials. As a result of this, good governors or leaders do not need to use force or imposition, but achieve obedience through voluntary compliance with the rules.

Another piece of background information on procedural justice is found in John Rawls' theory of justice, which states that there are procedures that can help us reach equitable results. These constitute a situation of pure procedural justice (Gargarella, 1999).

According to one of the most respected authorities of recent times, procedural justice from a legal perspective refers to the quality of a process through which a decision is reached. From the psychological perspective, it is related to the subjective assessment of users regarding the quality reached in the decision-making process. This must be differentiated from distributive justice, which is focused on the equity of the result or how favorable it has been for the parties. There are numerous studies in the field of social psychology that show that perceptions of procedural justice have impacts on how people think and behave in regard to the results that they receive from the justice system. It also allows one to predict future compliance with sentences and agreements (Tyler, 2011).

One of Tyler's most emblematic works, *Why People Obey the Law*, is based on an empirical study conducted in Chicago where interviews were randomly conducted in which the respondent was asked about their experience after having turned to the judicial system. It showed that people were very sensitive to the way that they had been treated and that judicial procedures that were

catalogued as just showed an increase in levels of trust in institutions. However, this satisfaction was independent from whether or not the result was favorable (Navarro, 2015).

As such, procedural justice holds that an equitable procedure in which the treatment of justice system users will generate these positive aspects of satisfaction. It is now time to connect that good treatment of people to the aspects of social context that we addressed above.

Let's imagine, for example, that the victim of a serious crime belongs to a culture that is not familiar with speaking in a loud voice. If the judge communicates with this person in a very loud voice, he or she may be intimidated or the exchange may have negative consequences for their statement. By contrast, if the judge has identified the person's cultural origin and communicates in a quieter voice, they may provide better treatment for this person and thus deliver a more satisfactory experience with the justice system.

Greater opportunities to adequately manage and solve the primary conflict

One fundamental goal of judicial processes is related to the possibility of collaborating on the management of disputes between private parties or between private parties and the State. In many cases, it has been understood that the goal of dispute resolution could go against the traditional objective of applying the legal rules to concrete events introduced in the process.

On the contrary, our position is that the solution of primary disputes¹¹ yields better quality justice services. In fact, it is not a coincidence that the majority of the legislation at the international level recognize these values when regulating the obligation of judicial conciliation in civil processes or the principle of dispute resolution¹² in criminal proceedings, for example. In this way, judges' work hearing cases should not only focus on the traditional paradigm of seeking the truth in order to apply the corresponding law. Alongside this, all judicial system operators should move towards adequately solving the primary disputes that people experience. This generates various forms of responsibility: judges see their conciliatory role as stronger, attorneys must support this process through collaborative law and other staff members such as mediators

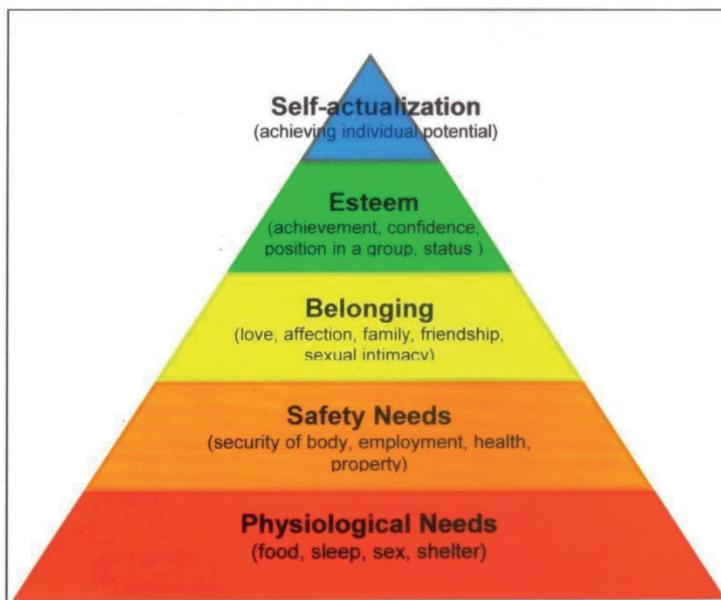
11 We use this term following Binder and differentiating between the original conflict and the legal conflict that derives from the initial dispute.

12 Art. 17 of the Neuquén Criminal Procedure Code states that judges and prosecutors must resolve the primary conflict that emerged as a result of the act in order to contribute to reestablishing harmony among the parties and social peace. The imposition of a sentence is the last resort (our translation).

and conciliators who work for the judiciary or are external to it should also contribute to the best possible dispute management and resolution.

In order to achieve these goals, all of these legal professionals must use a series of tools and skills related to dispute management. One of the fundamental techniques is the identification of interests and needs, which are used to differentiate positions (that which the parties say they want) from interests or needs (what the parties truly want).

This complex process of identification of interests and needs requires that the third parties that seek to manage the conflict explore the real concerns of the parties through open-ended questions. This will allow for their true interests and needs to be identified, which psychologist Abraham Maslow (1943) organized into Maslow's Pyramid, which sets out the various needs that human beings experience.



Source: (Maslow, 1943)

Humans experience needs related to their physical and psychological well-being and safety. There are also needs that have to do with feelings of belonging, esteem, recognition or satisfaction. In these last three levels, we find that there are needs that are to a great extent conditioned by various aspects of our social, cultural, religious and even artistic context.

As such, the handling of these social and cultural aspects by judicial operators who participate in conflict management will be key for identifying the best

way to manage the interests and needs of the parties and adequately resolve their conflict.

Improving the quality of information on the facts and evidence during the judicial process

As we stated above, the traditional goal of judicial systems is to apply a certain abstract legal regulation to the specific facts that are placed into evidence before a judicial authority. There are various mechanisms that intervene in this process. One of the most interesting is the assessment of the various types of evidence presented by the parties to support the veracity of the various facts provided by each of the parties.

Over the course of the judicial process, the parties will seek to generate a belief in the jurisdictional entity. To that end, they must prove that certain things did or did not happen. As such, judicial officials will have to weigh various evidentiary means so that, based on rational parameters, they can assign levels of credibility of the evidentiary means. In this process, information based on social context can help to improve the credibility of a certain version or, on the other hand, may weaken it.

For example, when considering the credibility of a woman who has been the victim of a sex crime, it is possible that her narrative will include omissions or inconsistencies, but this should not negatively impact her credibility. If judicial officials receive information on the psychological context of victims of this type of crime, they will likely understand that this sort of omission or lack of consistency in the narrative is understandable and even normal.

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2. Judicial Impartiality and Social Context Education

Katherine Swinton¹³

The issue of judicial independence has received much attention in recent years, both in litigation and other settings. Books have been written, and cases litigated on issues ranging from judges' pay scales and pension contributions to the attributes of an independent tribunal¹⁴. Surprisingly, less attention has been directed to another fundamental cornerstone of our constitution, judicial impartiality¹⁵. Yet the two concepts are not of equal stature. Judicial independence is not an end in itself, rather, it is a condition that exists to safeguard impartiality.

These two elements are accorded constitutional status by section 11(d) of the *Canadian Charter of Rights and Freedoms*¹⁶, which guarantees a person charged with an offense the right to be tried "in a fair and public hearing by an independent and impartial tribunal". This provision builds on the guarantees of judicial independence for federally appointed judges found in sections 96 through 100 of the *Constitution Act, 1867*¹⁷ that trace their origins to the *Act of Settlement, 1701*¹⁸. Their contemporary meaning in Canada is captures by the often-quoted words of LeDain J. in *Valente*:

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial"

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14 See, for example, the decisions of the Supreme Court of Canada in *Valente v. R* (1986), 24 D.L.R. (4th) 161; *Canada v. Beauregard* (1987), 30 D.L.R. (4th) 481 at 491-496; *MacKeigan v. Hickman* (1989), 61 D.L.R. (4th) 688; *R. v. Généreux* (1992), 88 D.L.R. (4th) 110; *R. v. Lippé* (1991), 64 C.C.C. (3d) 513; and the report of M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

15 Two interesting Canadian articles on judicial impartiality have recently been written: Judge M. Omatsu, "The Fiction of Judicial Impartiality" (1995 - mimeo); R.F. Devlin "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18 Dalhousie L.J. 408.

16 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

17 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

18 *Act of Settlement, 1701* (U.K.), 12-13 Will. III, c. 2.

[...] connotes absence of bias, actual or perceived. The word “independent” in section 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind of attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive branch of government that rest on objective conditions or guarantees.¹⁹

Both independence and impartiality serve the rule of law, since their underlying aim is to ensure that the decision in a particular case is made on the merits — on the basis of the relevant facts as presented in evidence and the applicable law, without influence from extraneous sources or biases, or preconceived notions about the value of one party’s case or credibility. Both concepts are necessary to promote public confidence in the administration of justice, without which, in the words of LeDain J. “the system cannot command the respect and acceptance that are essential to its effective operations”²⁰.

This paper addresses the issues of judicial impartiality (sometimes called “neutrality”), rather than the more well-worn ground of judicial independence. In a world where equality is a constitutional norm, members of some groups have challenged the alleged impartiality of the justice system. After outlining their concerns, this paper discusses the role of social context education for judges as one response. “Social context education” (sometimes called “judicial awareness education”) deals with the social setting within which judicial decision-making occurs, with particular attention to equality concerns of groups who have suffered discrimination, including women, racial minorities, those with disabilities, and Aboriginal persons. My discussion of social context education will describe some of the models for its delivery, including their strengths and weaknesses, ending with an argument for such education as a way to pursue greater “impartiality” in the justice system.

1. JUDICIAL IMPARTIALITY: REALITY OR ASPIRATION?

Many today assert that the justice system is not impartial — the Justitia, our image of justice with her blindfold and scales is, in her human manifestation, sometimes affected by the race, gender, or some other characteristic of litigants and witnesses. Some members of the judiciary have been shown to hold ste-

19 Valente, *supra* note 1 at 171-172.

20 Ibid. at 172.

reotypical views about women, for example, that create, at a minimum, a reasonable apprehension of bias and, at worst, an apprehension of actual bias²¹. The number of such complaints may not be large, but each draws public attention to the judiciary and calls into question the overall fairness of the system.

Numerous reports have also shown unexplained discrepancies in the treatment of racial minorities and aboriginal people within the criminal justice system, leading some to conclude that there is a degree of unconscious bias or systemic racial discrimination in the system that affects decisions about pre-trial release or incarceration rates²². Social science studies have also shown that women face greater obstacles than men in credibility assessments in courts²³. These and other examples generate claims for a justice system more truly impartial from those groups who feel unfairly treated — in other words, the plea seems to be for a readjusted blindfold.

Yet some will argue that despite the commitment to impartiality, this is a quest that can never fully succeed. Even if judges make every effort to decide an individual case solely on the basis of the facts and law before them, their aspiration to impartiality can only be that — an imperfect attempt to reach an ideal. The truth is that behind the blindfold, each judge brings a lifetime of experiences that play subtly upon the decision-making process. Religion, family history, relationships, region, career experiences, financial circumstances, physical or mental condition, and gender — to name but a few factors — will have some impact on the fact finding process and the interpretation of the law. Someone who has lived in a sparsely populated rural area may quickly grasp arguments about the need to draw electoral boundaries with flexibility to facilitate communication between constituents and representatives; a former criminal lawyer may well understand the dangers of reliance on lie detectors;

21 For example, see the report of the Committee of Inquiry of the Canadian Judicial Council into the conduct of Quebec Superior Court Judge Jean Bienvenue (July 4, 1996), where a majority of four (to one) recommended his removal on the basis of his having become incapacitated or disabled from the due execution of his office due to misconduct and conduct incompatible with the due execution of the judicial office under section 65(2)(b) and (d) of the Judges Act, R.S.C. 1985, c. J-1. One of the grounds for removal was his comments about women, which were said to contain sexist stereotypes contrary to the principle of equality in section 15 of the *Canadian Charter of Rights and Freedoms*. The report states: “Les propos du juge sur les femmes et les conceptions profondes qui, chez lui, ses sous-tendent, mettent légitimement en doute son impartialité dans l'exercice éventuel de sa fonction judiciaire”. Subsequently, the Canadian Judicial Council voted in favour of a recommendation to the Minister of Justice to set in motion procedures for the judge’s removal from office, and he resigned.

22 See, for example, the report of the Commission on Systemic Racism in the Ontario Criminal Justice System (the Cole Report), (Toronto: 1995), especially chapter 5 (systemic discrimination in pre-trial imprisonment) or the report of the Aboriginal Justice Inquiry of Manitoba, (Winnipeg: Hamilton/Sinclair, 1991), at 100-113.

23 See, for example, L.H. Schafran, “Credibility in the Courts: Why is there a Gender Gap?” (1995) 34 ABA Judges’ J. 5.

a member of a racial minority who has experienced discrimination firsthand may understand why a victim is reluctant to speak up to stop harassment, yet nevertheless feel deeply wounded by the comments; and a judge familiar with Aboriginal spirituality and governance may readily understand an argument that individual rights claims are inconsistent with the Aboriginal conception of collective rights²⁴. This is not to suggest that empathy and understanding are impossible without actual experience; nor is it to suggest that good judges fail to examine their own perspectives — clearly, many are well aware of the need to understand others' life experiences. Rather, my point is to emphasize that sometimes judges may need to consider ways to expand their sensitivity to the experiences and needs of the litigants before them, whether to create a more accessible courtroom or to improve the fact finding process. Therefore, they may need to let down the blindfold to reveal who is before them in order to consider whether the litigants' experience is similar to that of the judge²⁵.

But the challenge to the judicial system goes further than this. The guarantee of equality, found first in our human rights codes and now enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*, requires judges to consider whether laws or practices discriminate on the basis of the listed characteristics and those analogous to them and, if so, to determine whether that discrimination is justified — an exercise that requires us to consider the possibility of accommodating the affected group²⁶. Even without a formal challenge

24 My point is hardly startling or new. B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 12-13 stated:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them “— inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of “the total push and pressure of the cosmos”, which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

For more recent expositions, see S.J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992) at 245-246; M. Minow “Foreword: Justice Engendered” (1987) 101 Harv. L.R. 10.

25 A good example of an area of the law where the importance of perspective emerges is sexual harassment, where the alleged harasser often argues that he did not know that his comments or conduct were unwelcome or ought reasonably to have been known to be unwelcome. Many cases have focused on the lack of objection by the victim to argue against liability, rather than consider whether the reasonable person here incorporated characteristics not only of men, but also women. For a case discussing this issue, see *Re Canada Post Corp. and Canadian Union of Postal Workers* (1987), 27 L.A.C. (3d) 27, Swan J.

26 The Supreme Court's jurisprudence on equality is in a confused state, with the leading cases now *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Egan v. Canada*, [1995] 2 S.C.R. 513.

to a law under section 15 of the Charter, the societal commitment to equality requires scrutiny of common law and statutory rules to determine whether the distinctive experiences of women and other equality seeking groups are fairly reflected in their application²⁷. Again, the call is not for blind justice in order to ensure impartiality; rather, the argument is that a Justice conscious of the fact that laws reflect certain values should be alert to whether those rules or practices require modification, because they were framed without due sensitivity to their impact on groups whose perspective has not always been at the forefront of decision-making — for example, women, minority groups or those with disabilities. This approach can generate challenges to prohibitions on wearing head coverings in a courtroom that exclude those who cover their heads for religious reasons,²⁸ or to rules of evidence that allow access to the medical records of victims of sexual assault and, therefore, may give undue weight to legal rights and insufficient weight to gender equality,²⁹ or the laws that fail to consider the burden of child care responsibilities on women³⁰.

Thus, the criticisms of the justice system illustrate what M. Minow has called the “dilemma of difference” — at times, the plea is for greater neutrality that ignores characteristics like race or gender; at other times, the call is for a greater sensitivity to those characteristics in order to fulfill the commitment to equality before and under the law.³¹ This creates a difficult challenge for a judge, both to understand the perspectives and needs of groups who have been disadvantaged by legal and societal structures, and to decide the appropriate response, given that there are valid judicial concerns about their institutional responsibilities and proper role. Some of the criticisms of the judicial system will be perceived as unfair, in that they lack a grounding in truth or they only apply to some, but not all judges. Alternatively, the challenges may invite what is seen as inappropriate judicial activism in changing the law, which would be better addressed to legislative institutions.

Not surprisingly, therefore, the response from judges to the criticisms voiced above varies. Some would like to draw their robes around them, ignore the

Nevertheless, a majority of the judges agree that the equality guarantee protects individuals against discrimination on an enumerated or analogous ground in ways that perpetuate disadvantage of groups.

27 Good examples of where this has occurred in relation to gender equality are *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.) and *R. v. Lavallee*, [1990] 1 S.C.R. 852.

28 For example, the dispute over head coverings in the Royal Canadian Mounted Police or the wearing of kirpans in courtrooms.

29 *R. v. O'Connor*, [1995] 4 S.C.R. 411.

30 *Symes v. Canada* (1993), 110 D.L.R. (4th) 470 (S.C.C.).

31 M. Minow, *supra* note 11 at 12.

critics and get on with their job. T.D. Marshall's recent book on judicial independence seems to stake out this position, with its rejection of virtually any concept of judicial accountability, let alone responsiveness, because of the interference with a judge's independence.³² Others respond emphasizing the unfairness of the complaints in light of the actual role of the judge, especially at the trial level, where discretion is limited and cases turn very much on the facts as presented in evidence and the relevant law, as set elsewhere. Chief Justice MacEachern of British Columbia, in a recent speech to the Canadian Bar Association, decried the practices of the media, "agendists" and academics who unfairly criticize the judiciary for failing to decide cases in certain ways, in that they ignore the evidentiary and legal constraints in a given case, and the institutional limitations facing courts when asked to act as a tool for redressing social injustice.³³

There is clearly some merit in what Chief Justice MacEachern says about the limits of judicial discretion, especially with respect to the lower courts. Nevertheless, there are still very good reasons to reflect on the impartiality of the justice system, as other judges have acknowledged.³⁴ At a minimum, the judiciary should do so in order to maintain public confidence in the fairness of the system. Judges, like any other group wielding power in our society, ignore at their peril an examination of concerns about their performance. Even though some judges shy away from the suggestion that they should be accountable to the public, respect for the system will increase if judges are willing to consider the validity of criticisms of the justice system. However, the exercise of self-examination should be responsive not only to external stimuli, but the internal ones as well. A judge's pursuit of individual excellence should lead to a willingness to reflect on issues of impartiality, inclusiveness and equality in the justice system.

2. INSTITUTIONAL RESPONSES

Often, the next element in a paper on judicial impartiality is a discussion of the judicial appointments process. There are respected individuals who take the view that objectivity and neutrality are unattainable, among them former Justice B. Wilson, who relied on C. Gilligan's research to argue that women have a distinctive world view (the "ethic of care"), with the result that wom-

32 T.D. Marshall, *Judicial Conduct and Accountability* (Scarborough: Carswell, 1995).

33 Speech to the Canadian Bar Association Annual Meeting, August 1996 (source: Quick-law).

34 See, for example, speeches by Fraser J., "Judicial Awareness Training", (mimeo, September 1995); McLachlin J., "Judicial Neutrality and Equality" (mimeo, November 1995).

en judges are likely to be different from men.³⁵ The proposition contains an element of truth, in that women's world experiences are likely to be different, to some degree, from those of men. But the points of difference should not be overstated: given the fact that women come from many races and ethnic groups, economic backgrounds, and personal experiences, there are bound to be diverse viewpoints among women, as there are among men. Women will bring a variety of perspectives to the bench, as do men and members of other groups. The same is true of those in different racial and ethnic groups, or those with disabilities. Therefore, the argument for appointing members of different groups to the bench is not to ensure that an "essential" viewpoint is represented; however, such appointments can usefully expand the perspectives brought to bear on problems and enrich the dialogue among judges about law and the justice system.

To be more precise, the argument for greater diversity in judicial appointments should not be that we must be judged by those who are like us. That has never been the goal of our legal system; moreover, "identity politics" that stresses representation as an element of judicial appointment can not feasibly be incorporated in the task of adjudication, especially at the trial level, where men and women and those of different races and other background characteristics are generally involved as parties in any individual case.³⁶ But more to the point, the judicial system continues to strive for impartiality — provided that term is defined with a sensitivity to the complexity of society and its commitment to equality. Therefore, diversity in appointments can be justified for a number of reasons, including increased legitimacy of the system and expanding the perspectives brought to bear both within the courts as a whole and in the adjudication of legal principles, without requiring that women or Aboriginal judges or those from other groups be "representative" of those groups.³⁷

Another important way in which these goals can be pursued is through social context education for the judiciary, the subject of the rest of this paper.

35 B. Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 Osgoode Hall L.J. 507, especially 520. C. Gilligan's most famous work is *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

36 For discussion of the rationales for appointing women judges, see I. Grant & L. Smith, "Gender Representation in the Judiciary", in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) at 57.

37 This ongoing commitment to impartiality is the underlying perspective in the Parks case, in which the Ontario Court of Appeal permitted prospective jurors in Metropolitan Toronto to be challenged for their possible partiality against a Black accused in a homicide trial involving drug dealing. The goal was not to create a representative jury nor a jury of the same background as the accused; rather, the goal was to create a jury that was impartial by examining their views about race. See *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), extended in *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.). This approach was rejected by the British Columbia Court of Appeal in a case involving an Aboriginal accused in *R. v. Williams* (1996), 106 C.C.C. (3d) 215, especially at 230.

3. THE CASE FOR SOCIAL CONTEXT EDUCATION

In March 1994, the Canadian Judicial Council passed a unanimous resolution approving the concept of “comprehensive, in-depth, credible programmes on social context issues which includes race and gender [...].” Many efforts have been made to provide this kind of judicial education, with programmes offered by the Canadian Institute for the Administration of Justice, the Western Judicial Education Centre, the Canadian Association of Provincial Court Judges, and the courts of various jurisdictions. Most recently, the federal Department of Justice agreed, in the summer of 1996, to fund an ambitious effort by the National Judicial Institute in Ottawa to develop social context programmes for delivery throughout the country.³⁸ The Institute (formerly the Canadian Judicial Centre) was created in 1988 to provide educational programmes for federally and provincially appointed judges.³⁹

Social context education can perform a number of functions. At its most modest, the objective is to ensure non-discriminatory conduct by judges (and court personnel). Thus, programmes may emphasize the use of appropriate language, such as gender neutrality, forms of address for those from different cultural groups, improper references (such as the assumption that all members of visible minority groups are immigrants), and communication methods.⁴⁰ Other issues that might be covered relate to appropriate behaviour — for example, the use of various oaths or affirmation and the role of interpreters.

A second objective of social context education is to broaden a judge’s base of knowledge. Here, the emphasis is on increased awareness of the characteristics, needs and values of a group or the magnitude of legal problems confronting them. Examples could include information about Aboriginal spirituality, the incidence of domestic violence or its impact on children, the belief structures of various religions, or the problems of those with disabilities in gaining access to the legal system. The information presented can range from the empirical

38 I acted as a consultant to the National Judicial Institute to assist in designing a blueprint for the development of social context education. The report which I prepared is available from the NJI, “Report on Social Context Education for Judges” (mimeo, February 1996). The funding decision is described by Chief Justice Antonio Lamer in a speech to the Canadian Bar Association Annual Meeting, August 1996 (Source: Quicklaw).

39 Information about the Institute is found in its annual reports, as well as in T.D. Marshall, *supra* note 19 at 56-60.

40 This kind of education is provided, for example, in the NJI videos on “Judicial Awareness: Race, Culture and the Courts” and on “Gender Equality”, as well as panels at various conferences on sexist language. The Ethnic Minorities Advisory Committee of the Judicial Studies Board in England has published a document on “Body Language and Cross-Cultural Communication” and emphasizes this kind of issue in its seminars on race relations for judges (see its third annual report, 1995).

(for example, the incidence of female poverty, or the changing demography of Canada) to the interdisciplinary and the personal — for example, presentations from specialists in fields other than law, by individuals from these groups, and by those who work with them (for example, specialists in psychology might talk about the battered women's syndrome; Aboriginal elders may discuss spirituality and community traditions; victims of sexual assault may describe their experience with the justice system).

This information is designed to provide background to raise judicial awareness about issues in future cases. While some judges fear that this is an inappropriate way of acquiring evidence outside the courtroom, it should not be seen in this way. Rather, this is one of many sources of education about our society and legal system that can enrich the judge's knowledge, in the same way that reading, television viewing, or personal conversations with friends and family help shape awareness.

A further objective of social context education requires judges to evaluate the meaning of equality, within the Charter and as a broader social norm. This can lead to discussions of equality in relation to a range of legal issues, in an extrapolation from the decisions of the Supreme Court of Canada.

The more ambitious social context programmes go beyond increasing awareness of social facts to ask judges to reflect on their own role and responsibilities, building on the criticisms of the lack of impartiality and fairness in the current system outlined earlier. Social context education programmes can be designed to ask judges to reflect on whether they carry unconscious stereotypes into their fact finding and decision-making, whether the alleged systemic bias in the law is, indeed there, and if so, whether judges (as opposed to some other institutions) have the power to deal with the problem.

These objectives can be pursued through a variety of educational techniques. One possible method is self-teaching, whether through reading or use of materials specially designed for judges. The National Judicial Institute, for example, provides videos on race and culture and on gender issues, along with manuals of readings and questions, to all newly appointed federal and provincial judges. One must applaud the effort, but this is far from a satisfactory method of education, in that it focuses only on new judges, rather than incumbents, and it does not provide a forum for discussion of issues that often warrant examination in light of judges' practical experience.

A second model for delivery can be called the "integration" approach, where social context issues feature as part of a larger programme of judicial education. This might take the form of one panel on equality issues in a larger conference dealing with a full range of issues — for example, a discussion of family violence as one element of a programme that included recent develop-

ments in civil procedure, criminal law or evidence. Alternatively, a conscious effort can be made to bring out equality issues in every panel where these issues are relevant — for example, in a panel on criminal law developments, there might be a discussion of the gender issues in recent cases involving the defence of drunkenness; a discussion of evidence law might include discussion of the evidence of children or those with mental disabilities.⁴¹

A third model is the “immersion” approach pioneered in this country by the Western Judicial Education Centre and emulated in a number of other jurisdictions, most recently Australia. Under the leadership of Judge Douglas Campbell, then of the British Columbia Provincial Court, the WJEC organized a series of “full immersion” courses on gender, Aboriginal, and race issues, primarily for western provincial court judges.⁴² These programmes were different in scope and approach from other judicial education courses. They rested on an openly articulated philosophy that there is systemic discrimination in Canadian society and the legal system against women, Aboriginal people, and racial and ethnic minority groups. The clearly expressed goal was to examine equality issues in the hopes that this would increase public faith in the judicial system by creating a more empathetic judiciary.⁴³

The programmes lasted between four and six days, as they were designed to be “immersion”, not conference learning. In the opinion of the organizing team of judges, academics, practising lawyers, and other resource persons, it was necessary to get judges together for a significant period of time in order to promote effective communication of and appropriate reflection on the material.

The first three courses dealt with both gender and Aboriginal issues, with the conferences building on each other to some degree. The goal of the first was described as “consciousness raising” — for example, about the status of women in Canadian society, power relationships between men and women; and Aboriginal values and beliefs. The second and third went on to emphasize practical solutions, in addition to what might be called “cultural awareness”.

41 A fuller examination of these models and an inventory of some of the Canadian efforts at social context education is found in the NJI report mentioned, *supra* note 25.

42 The programmes were “Sentencing: The Social Context” (Vancouver, 1989); “Sentencing: The Social Context, Part II” (Lake Louise, 1990); “Equality and Fairness: Accepting the Challenge” (Yellowknife, 1991); “Seminar on Racial, Ethnic and Cultural Equity” (Saskatoon, 1992) and “Congress on the Role of the Judge in the New Canadian Reality” (Vancouver, 1992). Some of these programmes were described in a 1991 evaluation report prepared for the federal Department of Justice by Professor N. Wikler, *Educating Judges About Aboriginal Justice and Gender Equality: The Western Workshop Series 1989, 1990, 1991* (mimeo, Ottawa: Department of Justice, 1991). The description of them as “full immersion” is found at 5.

43 For example, the programme objectives of the 1991 Yellowknife meeting included developing the perspective that judges can and should be leaders in gender equality and that “dealing with these issues in a meaningful way requires self scrutiny and reflection on the issues of one’s personal life”.

The programmes worked with a variety of formats, including dramatizations, videos, panels, speakers, and small discussion groups. The latter were a central element of the WJEC approach. While the panels or presentations might involve judges, academics, individuals able to present facts about and concerns of the groups under study, and others offering various kinds of expertise, the small discussion groups were for the judges to have an opportunity for frank discussion in a safe setting. Led by specially trained members of the judiciary, the groups were often joined by a resource person to bring in the perspective of the group under discussion. While the goal was to encourage energetic discussion among judges about the material, there were mixed reactions to the way in which some discussion groups operated, with some critical of the confrontational atmosphere in some sessions.⁴⁴

Nevertheless, the model was described by Professor N. Wikler in a 1991 evaluation report as “extraordinarily successful”.⁴⁵ While the WJEC has done no follow-ups post-1992, various other groups have emulated the model, most recently, the Ontario Provincial Court Judges Association in their May, 1996 annual meeting — a three day conference on “The Court in an Inclusive Society”. Again, the format was a mix of panels, speakers, and discussion groups, with the latter offering a forum for judges to speak mainly to each other about issues related to judging in a racially diverse society.

4. WHICH MODEL?

There is value in offering social context education in a variety of forms: both as an element of any judicial education programme, where equality issues are relevant, and as a larger immersion programme closer to the approach of the WJEC. The integration model emphasizes that equality issues are pervasive to the practice of law and judging today, rather than some problem detached from judging and responsive only to interest groups. However, there is a real advantage to the immersion model, because it gives judges time to discuss and reflect on what can be troubling and difficult issues affecting groups disadvantaged by the legal system.

As those involved in presenting feminist, Aboriginal or race issues to law students can testify, it is difficult to convey the problems, perspectives and the range of debate about the meaning of equality for any of these groups without a concentrated period of time for reflection. At the University of Toronto Law Faculty, for example, there are one week bridge periods for first year students

⁴⁴ These seminars, and the extensive planning process behind them, are described by Judge Douglas Campbell in *The Process of Developing and Delivering Social Context Education* (Western Judicial Education Centre, 1994).

⁴⁵ N. Wikler, *supra* note 29 at 65.

when other classes are cancelled and the students are immersed in issues such as “Feminist Analysis of Law” and “Race, Culture and the Law” (as well as Law and Economics, Legal History, and Law and Philosophy). These weeks are challenging, sometimes disturbing, and an important way to broaden perspectives that will, hopefully, inform other courses when students return to the regular curriculum.

In the same way, some period of immersion is important for judges who have not confronted the equality issues arising with respect to gender, race or disability. A single panel or periodic references to equality issues will be a much less effective way to educate on these issues, especially if the information is presented in a fairly passive format, with speakers and listeners provided little chance for interchange.⁴⁶

5. POINTS OF RESISTANCE, POINTS OF CAUTION

As the National Judicial Institute embarks on its ambitious plan to develop social context education programmes for judges, there are a number of design issues to address that are key to success.

Some judges remain resistant to this type of judicial education. At its extreme, the reaction is that this is indoctrination for the purpose of “political correctness”, which is unwarranted at best and an interference with judicial independence at worst. Reaction against these programmes is particularly fierce when it is suggested that they be compulsory,⁴⁷ a point I am not prepared to argue, since little will be achieved on an educational level if the audience is fiercely resistant. One would hope, however, that judicial leadership and peer commitment to this type of education will affect the willingness of reluctant individuals to participate, even if they come with a somewhat sceptical mind. Moreover, there are practical ways to present these issues so as to encourage attendance — for example, incorporating them in the annual meetings of judges from a particular court.

The greater challenge is to make these programmes a valuable educational experience, which will eventually encourage judges to attend. This leads to a story of how not to do social context education. The National Judicial Institute has a film, “Judicial Awareness: Race, Culture and the Courts” available for educational programmes and distributed to all newly appointed judges. It contains a series of vignettes, with commentary of an incident. Despite repeat-

46 Ibid. at 67-68.

47 Compulsory training for judges in both gender and racial issues was recommended by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 191.

ed questions, the witness is unable to be more specific about the time of the event than that it occurred after work and before sundown. The film then cuts to a commentator who explains that the witness is from a rural agrarian society where time is not measured in the same way as in much of Canadian society.

What is the judge to make of this? There is no attempt to understand the problems of the judge in this situation, where the time of the incident may be very important to a determination of credibility or to the identity of an accused or the occurrence of an event. Moreover, there is no effort to consider what a judge should take from this film: for example, aren't there dangers to assuming, in other cases, that black witnesses have a different sense of time? Will a judge be accused of stereotyping if she or he takes this information and uses it elsewhere? Should counsel be expected to raise cultural issues and lead evidence of practices, or should the judge intervene to seek it? In short, what is the judge's role in an adversary system?

The fact that similar questions are raised by each of the other vignettes illustrates the importance of judicial input into the design of the programme, so that these important questions for the judiciary are front and centre in the programme. Moreover, this illustrates the importance of the discussion format described earlier. Judges are well educated and self-directed learners, who can, and should, bring important insights and experience to discussion of these issues. In sum, the educational programme must be responsive to the judicial task.

But I do not want to imply that judges have all the answers in these areas, nor that they should be isolated from academic and broader community inputs in these programmes. This is an area where a team effort between the judiciary and others with expertise and perspectives to offer can lead to a much better educational effort, as has been seen in the WJEC and other judicial education programmes.

But what of concerns such as the following voiced by Chief Justice Mason of Australia:

*We must take good care to ensure that under the guise of judicial education, judges are not subject to indoctrination or attempts by interest groups and pressure groups to influence judicial decision making in favour of such a group [...]?*⁴⁸

One response is to point out that while past programmes have included some “language” and communication training, seen by some as “political correctness”, the legitimate goal here is to convey ways of being sensitive to and respectful of the hearer. Some conduct and commentary are no longer accept-

48 Quoted in L. Armytage, “Judicial Education on Equality” (1995), 58 Mod. L. Rev. 160 at 163.

able in this society. To find discussion of these areas an intrusion on judges' independence is unacceptable in a judicial system committed to equal justice for all.

However, when programmes include discussion of the perspective of groups, delicate and difficult issues can arise with respect to who can and should speak for a group — for example, in discussing Aboriginal issues, should Aboriginal women be ensured a place in the programme? How does one convey the diversity within First Nations and across Aboriginal groups? How can one impart anything meaningful about racial and cultural groups, given the large number of groups in Canada and the differences among them? Similarly, when discussion turns to legal issues, such as the role of fault in divorce reform, the appropriate design of sexual assault laws, or the degree to which multiculturalism requires accommodation of religious difference, competing perspectives and difficult issues emerge.

For judges, these complexities raise a number of valid concerns in the design of social context education. Groups, whether defined by race, gender, disability or some other characteristic, may share some common perspectives, but they are also diverse within their own membership. Aboriginal women within their communities face different sets of problems and have different responses than middle class white women working in an urban setting. The same is true within different racial and cultural groups in Canadian society. Moreover, the meaning of equality can generate debates, both within these groups and within the broader society.

The appropriate response is not to excuse judges from engaging in social context education because there isn't a "Right answer" to the meaning of equality, or because issues of race and culture vary across groups and generations. To the contrary — judges should still be aware of the flavour and complexity of these debates, just as they need to be aware of the variety of experiences within these groups. One of the most important contributions of feminist scholarship has been to "bring the woman question in", even if this does not lead to one correct answer.⁴⁹ So, too, are we increasingly aware of the impact of racial and cultural diversity on our society and legal system. While there are ongoing debates about what equality requires,⁵⁰ decision-makers, including the judiciary, should be attuned to this debate. But it must be understood by all involved that these programmes are designed to raise awareness and to provide tools for analyzing future cases; they are not designed, for the most part, to give right answers nor to replace the need for careful consideration of the evidence in an actual case.

49 K.T. Bartlett, "Feminist Legal Methods" (1990), 103 Harv. L. Rev. 829.

50 See, for example, the range of feminist theories described in A.C. Daley, "Feminism's Return to Liberalism" (1993), 102 Yale L.J. 1265.

Therefore, in the design of social context education programmes, judicial concerns about independence must be recognized as an important consideration. This requires a shared understanding that many issues are open to debate, as outlined above. As well, it must be acknowledged that judges have to act on the evidence and law before them, for the most part, so that many changes sought by groups and individuals may have to come from either the highest level of court, legislative action, or societal change.

One safeguard for judicial independence is provided by close judicial control of such programmes as, for example, provided in the new National Judicial Institute initiative where two judges, the Honourable Mr. Justice John McGarry of the Ontario Court (General Division) and the Honourable Judge Donna Martinson of the British Columbia Provincial Court, act as co-directors of the project. Of course, this does not mean that the design and delivery of programmes should be left solely to judges, and the NJI project contemplates a structure with an advisory panel and curriculum groups that reach beyond the judiciary to bring in various forms of expertise.

Finally, the delivery of high quality social context education is a long term process, as programmes dealing with the perspective of different groups take time to develop and present on a national basis. Moreover, judicial time available for educational programmes is limited. At this point, the Canadian aspiration is ten days of education for each judge annually, but this is often not feasible, given the pressures from crowded dockets. Moreover, social context issues are not the only area in which judges perceive the need for further education. Therefore, social context programmes will have to share the time available with programmes on other important matters, such as recent developments in criminal law. However, if these programmes are to be given the attention they deserve, relief from sitting time, rather than encroachment on judgment writing days or vacation, would demonstrate the judicial system's commitment to this enterprise.

6. CONCLUSION

This paper started with a discussion of challenges to judicial impartiality. While some in our society despair of the fact of true impartiality in any individual, the judiciary is one institution in which we continue to seek that quality, however imperfectly we may, as human beings, achieve the goal. Social context education, well designed and sensitive to the judicial task, is an important instrument to lessen the appearance of judicial "partiality" and move us towards an inclusive method of judging that will, in the end, make for greater impartiality in the system.

3. Social context and judicial education in Canada

Brian Lennox and Natalie Salat⁵¹

Once, not so long ago, the vast majority of people finished their lives where they were born. No longer. Everywhere in our globalized world, people are on the move. And as the pace of demographic change accelerates, so people find themselves living in countries and communities quite different from those to which they were born. Canada's first "citizens" were the populations we now call our First Nations. To these were added settlers from France, the United Kingdom, the present United States and most recently, people from all races and all parts of the world. The 2006 Census reported that one in every five Canadians was born in another country,⁵² and that nearly half of the population of urban centres such as Toronto and Vancouver came to Canada as immigrants.⁵³ This "deep diversity" obliges courts and society to adapt to meet the needs of all Canadians. Managing diversity in a way that is positive for society raises issues that inevitably find their way to the courts. It requires members of majority and minority groups to make reasonable compromises or "accommodations" with each other on issues like language, religious practices and cultural traditions. Lines must be drawn on a case to case basis, and determining what is reasonable in a particular case is often difficult. There can be no more delicate or important judicial work than this. The peaceful coexistence of the nation's people depends on it... judges whose duty it is to make these decisions, cannot confine themselves to looking back to how things once were, nor allow themselves to be blinded by sentimental visions of a society that seemed simpler and better than the one they now confront. They must accept and understand the present reality of the actual diversity

51 The Hon. Justice Brian W. Lennox is the former Executive Director of the National Judicial Institute of Canada; Natalie Salat was Communications Officer of the National Judicial Institute at the time that this paper was written but has since retired. The authors wish to thank the persons listed below for the use of the background material drawn from their essays prepared for the 20th Anniversary of the National Judicial Institute: NJI's Bold Moves: Collaboration and Progressive Pedagogy, Justice Donna J. Martinson Pioneering Efforts: NJI's Social Context Education Project, Justice John F. McGarry Sustaining Social Context Education: phase I of the Social Context Education Project, 2000-2004, Justice Donna J. Hackett and Professor T. Brettel Dawson.

52 Susan Crompton, "Census Snapshot - Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census" (2008) Canadian Social Trends 85.

53 Ibid.

of their communities and countries and render decisions that are just in the context of that reality. They must seek fairness for all, even those who have come recently or carry a different race, ethnicity or religion. They must judge in the present with a view to the future peace of the nation.⁵⁴

The Canadian National Judicial Institute (NJI) was created in 1988 at the initiative of the Right Honourable Brian Dickson, then Chief Justice of the Supreme Court of Canada. Its mandate was to: produce and deliver excellent judicial education programs and resources; uphold Canadian Charter of Rights and Freedoms values, judicial independence and rule of law; and act with integrity, reliability and consistency in fulfilling this mandate. The mission statement of the NJI declares it to be an independent institution building better justice through leadership and the education of judges in Canada and elsewhere in the world.

One of the main challenges facing the NJI following its creation in 1988 was the increasing importance and impact of fundamental changes in Canadian demographics and in Canadian society, frequently captured under the heading “social context”. Dealing with social context both as a practical reality and as a subject of judicial education has had a significant impact on the manner in which judicial education is delivered in Canada.

Perhaps the most recent example of social context is the kind of diversity of which Chief Justice McLachlin speaks in the introduction to this article. From the beginning of the European settlement in Canada in 1608 (and thereafter for a period of almost 350 years) Western Europe was the principal source of immigration to Canada. A significant portion of that original European settlement of Canada consisted of immigrants from the British Isles and France. In 1900, 96.3 per cent of the Canadian population had its roots in Europe, with 58 per cent from the British Isles and 31 per cent from France (Only 0.004 per cent of Canadians had roots in Asia and 0.003 per cent in Africa). As a result, the Canadian immigrant population was visibly and physically homogenous in its appearance, with any diversity being found not in race, but in language, culture and religion. The dominant languages were English and French and the dominant religion was Christian (albeit divided between Catholic and Protestant).

With the important exception of its Aboriginal peoples, Canada has always been a nation of immigrants, but it is the shift in the countries of origin of those immigrants that has led to increasing and accelerating diversity. In 1971, almost 62 per cent of the recent immigrants to Canada came from Europe and

54 The Right Honourable Beverley McLachlin, P.c., Chief Justice of Canada. Remarks on the Opening of the Twentieth Anniversary Seminar of the National Judicial Institute, April 23, 2009.

12 per cent from Asia.⁵⁵ A short 35 years later, in the 2006 census, Europe and Asia had traded places.⁵⁶ Almost 54 per cent of recent immigrants to Canada in 2006 came from Asia (including the Middle East) and only 16.1 per cent from Europe.⁵⁷ In contrast to the 1900 census results, the 2006 census found that just over 2 per cent of recent immigrants to Canada came from the United Kingdom and 1.5 per cent from France.⁵⁸ If current population trends continue, it is estimated that the current visible minority populations of Toronto (Canada's largest city) and Vancouver (Canada's third city) will become the visible majority in those cities by the year 2017. In the whole of Canada, the visible minority percentage of the population will increase from 13.4 per cent in 2001 to 20.6 per cent in 2017.⁵⁹

This growing diversity in the nature of the Canadian population represents a fundamental shift in the national demographic. It is now and will continue to be a source of growth and of strength. At the same time, it has also created an imperative of adaptation for the whole of Canadian society and in particular for our justice system.

Although population diversity is one of the most significant changes in Canadian society in the 20th and 21st centuries, social context in judicial education was first addressed through an issue that had been of much longer-standing significance, that of gender. Canada has always been viewed and has viewed itself as a generous and progressive country. Like many other nations, however, it had been slow to recognize the inequitable manner in which it had treated its female population. By way of example, the right to vote was not granted to women until the 1st World War, and then only on a conditional basis.

55 Statistics Canada, census of population, 1971.

56 Statistics Canada, census of population, 2006

57 In 1971, 9 per cent per cent of recent immigrants came from Central and South America and the Caribbean, 3 per cent per cent from Africa. In 2006, the percentage of Immigrants from the Americas and the Caribbean had remained roughly the same, while African immigration increased from 3 per cent per cent to almost 11 per cent per cent.

58 The largest single source of immigrants currently is the People's Republic of China, followed in order by India, the Philippines and Pakistan, together making up almost 38 per cent per cent of total immigration.

59 Belanger, A. and E. Caron, Malenfant "Population projections of visible minority groups, Canada, provinces and regions: 2001-2017" (Statistics Canada Catalogue No. 91-S41-XIE). The distribution of immigrant populations in Canada is also interesting. In the 19th century, Canada's population was largely rural and agrarian: even in 1900, over 60 per cent per cent of the population still *lived* on farms. Now, 81.8 per cent per cent of Canadians live in a metropolitan area, with 34.4 per cent per cent of the Canadian population living in one of Canada's three largest metropolitan areas, namely Toronto, Montreal and Vancouver. This same pattern is reflected in the immigrant population. Of the immigrants who arrived in the 10 years preceding the 2006 census, 81 per cent were living in one of Canada's six largest urban areas, with 70 per cent of recent Immigrants living in Toronto, Vancouver or Montreal, and 41 per cent in Toronto alone.

That right was not fully available throughout Canada until the second half of the 20th century. There were numerous other examples of gender inequities, many relating to areas of employment and property rights or to criminal law. It was the coming into force of the equality rights provision of the Canadian Charter of Rights and Freedoms in 1985 that provided the formal recognition that gender equity required priority treatment in Canadian society and in Canadian courts. That provision, section 15 of the Charter, provided for equality before and under the law and the equal protection and equal benefit of the law without discrimination. The Federal Parliament had previously enacted the Canadian Bill of Rights in 1960 and Canada already had both federal and provincial human rights legislation, but the application of those laws was not uniform and none of them had constitutional status. Section 15 of the Charter formed part of Canada's Constitution and had a broad reach. It provided that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the area of judicial education, the Western Judicial Education Centre (WJEC) had, by the late 1980's, begun to prepare what would then appear to be a revolutionary way of educating judges on social context issues. The WJEC was an institution created by the Provincial Courts of Canada's Western Provinces. It was headed by Judge Douglas Campbell, then of the Provincial Court of British Columbia. The WJEC developed and presented a series of major judicial education programs focusing on social context, including a significant emphasis on gender and Aboriginal issues. Its programming was original and innovative and required an extensive process of planning and preparation. Large planning committees involved not only members of the judiciary but academics and representatives of the public. Seminars were intensive and used modern adult education pedagogy, including well-documented materials, videotapes, panel discussions, small group discussions and plenary reports. The Canadian judiciary had the benefit of this original education programming until 1995 when the mandate of the WJEC came to an end.

Prior to the pioneering work of the WJEC, judicial education in Canada had largely focused on substantive legal issues and its principal method of delivery had been lengthy lecture sessions to large groups of judges. Social context issues clearly required a different approach. In the first instance, social context did not lend itself readily to group lectures: it was not simply a subject area that could be presented through lecture. The traditional case study model was also not available, since in the late 1980's and early 1990's, there was a dearth of reported cases in the area of social context. Social context subjects could

not themselves be discussed without significant discomfort in large groups and it was imperative that meaningful discussions be conducted in small group sessions. In order to have such sessions, it was also necessary that they be facilitated by judges or others who had been trained in facilitation skills. Finally, it proved impossible to deal with social context issues without involving, not only judges, but at a minimum, academics and members of the Bar. One of the key innovations of social context programming was the involvement in all phases of the process of representatives of the broader community and civil society.

While the WJEC was planning and presenting its social context programming, the NJI was itself undergoing a significant period of growth from its modest origins in 1988 as a secretariat with three or four staff members. By the early 1990's, the NJI had become an important national judicial educator and had quickly turned its mind to social context education. In a paper prepared to commemorate the 20th Anniversary of the NJI, Chief Justice Beverley McLachlin remarked on the meaning and importance of social context education. The Chief Justice noted that social context education: "stresses that good judging requires an appreciation of the social context from which the matter before the court arises and the varying perspectives of the people before the court ... In a world marked by pluralism and cultural diversity, the judge stands as the interpreter of difference, the one who listens to every voice, and understands it. We are not judges of this community or that community; we are judges of everyone in every sector of society, high and low, rich and poor ... We are independent, and hence impartial. The National Judicial Institute, through education for judges, led by judges, will prepare the Canadian judiciary to meet these challenges."

Recognizing the fundamental importance of social context education for judges, in 1994, the Canadian Judicial Council (CJC) (the national body of Chief and Associate Chief Justices responsible for federally appointed judges) passed a resolution calling for social context education that would be "comprehensive, in-depth, and credible," and that would include race and gender.

It was under that strong mandate that the NJI created its national Social Context Education Project (SCEP). The initiative was co-chaired by Judge Donna Martinson, then of the Provincial Court of British Columbia, and Justice John F. McGarry of the Superior Court of Justice (Ontario). As Justice Martinson⁶⁰ later stated, the SCEP represented a "bold shift in the approach to national judges' education in two key ways". The first change was the recognition that all judges, whether provincially or federally appointed, could benefit from the joint development and presentation of educational programming in

60 Donna Martinson, now retired, was subsequently appointed to the Supreme Court of British Columbia.

areas of common interest.⁶¹ The second change has become fundamental to judicial education in Canada and involved moving from the traditional approach to judicial education – which involved judges teaching other judges about legal doctrine, often using the large-group, lecture style – to an innovative approach, employing adult learning techniques and incorporating perspectives from legal academia and the wider community.

The NJI invited judges from all courts across the country to a National Judicial Consultation on social context education. This consultation was unprecedented (judges from the different levels of court had never met together at the national level) and it led to joint programming in provinces where this had never happened before. This cooperative approach ensured that all judges would have access to social context education programming, something that continues to pay dividends in Canada's justice system.

The SCEP also introduced what has become one of the guiding principles of integrated social context education: the “three pillars” principle. This principle provides that, while judges (pillar one) would lead the development of judicial education, community leaders and legal academics would serve as the other two pillars in creating the foundation for well-rounded programming. Justice Donna G. Hackett of the Ontario Court of Justice and NJI Academic Director Brettel Dawson have stated: “[s]ocial context education is generally about what judges do not know, or have not experienced. While judicial education must always be led by the judiciary ... experts on issues of diversity, disadvantage and difference must be relied upon to help identify social context issues and be involved at all stages of development, design and delivery of judicial programs and curricula.” Community leaders provide direct experience of social context issues which “legal academics can then help to filter and translate into relevant legal concepts and issues. Finally, judges can mould and focus these experiences into the act of judging.”

The SCEP was divided into two phases. The first phase provided for a multi-disciplinary Social Context Advisory Committee, with members drawn from across the country, from the judiciary, academia and the community. It also included the development and presentation of pilot social context programs in three superior courts in different provinces. For the purpose of developing the academic and pedagogical aspects of the pilot programs, the NJI retained the services of law professor Rosemary Cairns Way of the University of Ottawa. As Justice McGarry later noted, “[t]his was one of the first of many innovations that the NJI pioneered through the SCEP - retaining a legal educator and curriculum development expert to complement the leadership role of judges in judicial education.” The major breakthrough for the project

⁶¹ In Canada, provincial court judges are appointed by provincial governments, while superior court judges are appointed by the federal government.

came after a half-day presentation to the Canadian Judicial Council, following which the Council and its members strongly endorsed the project.

By the end of phase I, the SCEP had developed and delivered some 20 programs to more than 1,000 judges. As an incidental by product, the process also led to the establishment of permanent education committees within a number of Canadian courts, committees which had not existed when the project began. “The secrets to the success of phase I lie in the strongly collaborative approach taken,” noted Justice McGarry. “At all times, the SCEP worked as a partner to the courts and court education committees, which themselves shaped the programs to the particular experience of their jurisdiction.”

The NJI began phase II of the Social Context Education Project with a consultation intended to discuss the achievements of phase I and to set the priorities for the next phase. The consultation concluded that the SCEP had successfully introduced adult learning techniques to many courts and had established new networks to ensure that social context education would continue at a local level. The goals identified for phase II were:

- 1) to find ways systematically to integrate social context issues into all forms of judicial education and planning, and
- 2) to sustain ongoing social context education into the future.

The most important element in achieving those goals was the initiation of a faculty development and curriculum design program. This five-stage program brought together judicial leaders and educators from all courts to work with a diverse faculty of community and academic leaders. That program, which lasted several months, had the following components:

- 1) a three day skills development course that included instruction on adult learning methods;
- 2) design and development by judge participants of a social context education program for their own court, including the use of a needs assessment and an *advisory* committee;
- 3) presentation of the program design to other phase II participants and SCEP faculty, with feedback;
- 4) presentation of the program or seminar to colleagues at local courts (programs developed included sessions on poverty, literacy, aboriginal issues, disability, self-represented litigants and domestic violence); and
- 5) a report containing court feedback from the program together with an evaluation of the process and suggestions for program improvement. Upon completion, a certificate was received signed by the Chief Justice.

This *five-stage* program was repeated on four separate occasions to groups of up to 25 judges over a two-year period between 2001 and 2004. Through the program, some 100 judges from all courts across Canada enhanced their skills as judicial educators and subsequently delivered approximately 40 integrated social context education sessions to their colleagues. Some of these programs became NJI modules of education, which were then made available to other courts for social context seminars beyond Phase II.

As the SCEP was concluding, the NJI hosted the International Conference on the Training of the Judiciary (with the International Organization for Judicial Training (IOJT)) in the fall of 2004. The conference devoted two days to social context education and attracted nearly 200 judicial educators from over 60 countries. It showcased Canada's SCEP project and other similar initiatives around the world, providing valuable opportunities for dialogue and networking. Since the conclusion of the Social Context Education Project, the NJI has continued to develop and present social context education both in independent programming and as a component of education in substantive law, judicial skills or judicial career programs. The lessons learned have been incorporated into the *Ten Principles of Social Context Education* (attached as Appendix 1). Perhaps more importantly, those principles and the practices that have been developed from them, together with the lessons learned through the SCEP, have fundamentally altered the nature of judicial education in Canada.

The Social Context Education Project, which continues to exert an important influence on judicial education in Canada (and in NJI projects abroad) has significantly increased the awareness of the value of integrating social context issues into all judicial education curricula and has created new resources and networks for doing so. It has led to the development of truly adult education pedagogy and a disciplined and structured approach to judicial education. This approach includes an intensive process of design, planning and delivery; a comprehensive overview of curriculum, the extensive use of planning committees, recourse to academics, the bar and members of the wider civil society; the ongoing identification and training of judicial faculty; the identification of learning needs and the development of specific program objectives; the use of the “learning circle” pioneered by Professor David Kolb: recognition of different learning styles by the use of different and varied methods of instruction, skills-based, experiential education; a commitment to continuous review and improvement; and *above* all, an emphasis on judicial leadership in practical and useful education that is judge-led and judging-focused.

The impact of social context on judicial education in Canada has been remarkable. It has both left a legacy and created a path for future judicial education. We conclude this essay where it began, with the words of Chief Justice Beverley McLachlin:

[J]udges whose duty it is to make these decisions, cannot confine themselves to looking back to how things once were, nor allow themselves to be blinded by sentimental visions of a society that seemed simpler and better than the one they now confront. They must accept and understand the present reality of the actual diversity of their communities and countries and render decisions that are just in the context of that reality. They must seek fairness for all, even those who have come recently or carry a different race, ethnicity or religion. They must judge in the present with a view to the future peace of the nation.⁶²

62 The Right Honourable Beverley McLachlin, P.c., Chief Justice of Canada. April 23, 2009. Remarks on the Opening of the Twentieth Anniversary Seminar of the National Judicial Institute.

APPENDIX 1. Ten Principles of Social Context Education - National Judicial Institute

One important enduring outcome of Phase II of the National Judicial Institute's Social Context Education Project was the evolution and solidification of the following ten principles of judicial social context education. These principles were found to be essential in phase II, and now serve as a model for sustaining and integrating social context education throughout all forms of judicial education. It should be noted at the outset that these ten principles do not operate in isolation and, when applied together, have a synergistic effect.

1. Judicial Leadership

An initial and sustained commitment to social context education from chief justices and chief judges, education committees and local judicial leaders is critical.

2. The Three Pillars of Integrated Social Context Judicial Education

Social context education is generally about what judges do not know, or have not experienced. While judicial education must always be led by the judiciary, judges alone cannot develop, design and deliver effective social context education programs or integrate social context issues into all programming. Experts on issues of diversity, disadvantage and difference must be relied upon to help identify social context issues and be involved at all stages of the development, design and delivery of judicial programs and curricula. This expertise is best found in well-respected community leaders (pillar one) who have direct experience with these issues. Legal academics (pillar two) can then help to filter and translate these experiences into relevant legal concepts and issues. Finally, judges (pillar three) can mould and focus these experiences and issues into the act of judging. In this interactive way, the Three Pillars of social context education provide the best foundation for structuring the development, design and delivery of integrated social context judicial education curricula and programming.

3. Sustained Social Context Integration

Equality and social context issues are so diverse, pervasive and ever-changing, that an effort must be made to systematically and continually identify them in all judicial education topics, programs, and curriculum planning. Structuring this input by means of institutionalizing the participation of the Three Pillars at each stage of program development is the most efficient and effective way to

achieve and sustain integration.

4. Local Input and Relevance

Integrated social context programs require planners to identify and include social context elements that are relevant for the work of the targeted judicial audience. Consequently, seeking input specifically from the participants' jurisdiction is critical in order to identify and address relevant issues, priorities and resources from conceptualization through to delivery.

5. Needs Assessment

The identification of the education needs of judges when formulating both curriculum and programs should be done in consultation not only with judges, but also with those affected by the work of judges, particularly those in situations of disadvantage and those with diverse backgrounds and experiences. The involvement of the Three Pillars is therefore important in the initial needs assessment.

6. Focus on the Judicial Role

In order for equality and social context issues to be understood as relevant and important in all forms of judicial learning, their presentation has to be connected to legal and factual issues faced by judges on a daily basis. This grounded and practical approach will link judicial education to judicial tasks and roles. The interaction of the Three Pillars facilitates linkage and balancing between judging and access to justice issues.

7. Skilled Planners and Faculty

Social context education explicitly engages values and attitudes, and touches upon assumptions and world views. It connects legal principles with lived realities. As such it is not like other forms of judicial education and requires a broader array of learning approaches. Those who plan social context programs need a skill set that encompasses knowledge of equality and social context issues, the pedagogy of adult learning and effective program design. Optimally, planning committees and faculty members, including facilitators, will have the opportunity to develop their skills in support of social context program design and delivery through participation in a pre-program session involving the Three Pillars.

8. Effective Program and Curriculum Design

Social context issues require a skilful balancing of social and legal issues to address the experience of disadvantage, and to connect to the unique characteristics and responsibilities of judges. As such, programs must be carefully designed to foster a learning process that touches upon the emotional, perceptual, intellectual and behavioural capacities of judges. More so than in other forms of judicial education, an “experiential model” of program design is particularly useful, with a focus on clear learning objectives and varied learning methods. The latter include problem-based exercises that require them to share and apply their own judicial experience to social context issues using the pedagogy of adult learning.

9. Adult Learning Principles for Judges

Judges are a unique group of learners. Like other adult learners, judges have a wide range of skills and experiences that are important resources in the teaching and learning process. Judicial education is thus most effective when it draws on these experiences and is based on learning activities where they can be shared. Several attributes and concerns of judges as adult learners need to be taken into account. Learning spaces and approaches must respect confidentiality and uphold judicial independence. Relevant knowledge and skills must be provided prior to undertaking problem-solving or practice activities. Particular attention must also be paid to a balance between non-prescriptive approaches while advancing Charter values, including equality.

10. Evaluation and Feedback

Effective judicial social context education and curriculum development require ongoing feedback and evaluation at all stages of planning and delivery. As in other areas, ensuring that feedback is received from members of each of the Three Pillars helps to ensure that judicial education can continually evolve to meet our ever-changing judicial needs and social context.

4. Dissident sexualities and access to justice in Argentine: The role of the public prosecutor's office and the need to rethink judicial training

Javier Álvarez⁶³

1. Introduction

Coordination among the agencies that form part of the justice administration service and the various at-risk groups in today's societies has not yet been addressed. The conversation around it tends to be marked by stereotypes and prejudices held by many of those who work in the judicial system, which are embodied in practices that pose obstacles to access to justice.

The most important issues are those that involve women and members of sexual minorities, all of whom are victims of the patriarchal system that dominates our region.

Gender-based violence is a manifestation of unequal power relations that have as their maximum expression femicides and hate crimes based on gender or sexual orientation. These are expressions that seek to establish a level of hierarchies because they always seek to subordinate some members of society as one of the crudest manifestations of misogyny.

In that sense, the steadiness and persistence of this tradition also includes habits and conduct in various social strata and in particular in the agencies that form part of the branches of government.

In the judicial system, these practices lead to revictimization and discrimination. In some cases, victims are blamed for the crimes committed against them and are denied any type of subjectivity with the resulting expulsion from the system.

This system also takes on specific characteristics when criminal justice is involved.

Our region's procedural regimes continue to present remnants of the institutions formed under the colonial process, which imprint inquisitorial characteristics on criminal trial systems.

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For example, Argentina's federal criminal procedure code continues to concentrate the roles of judging and investigating in the figure of the *juez o jueza de instrucción*. This stage of the process is characterized by hypertrophy, secret and the use of written procedures with strong alignment with formalities. This inquisitorial bias imposes a process that is initially written and formalized, partially secret, disjointed and hardly contradictory. It presents significant limitations in regard to the intervention of the parties and the opportunity for them to effectively exercise their rights.

This model also has major impacts on the justice administration service that can be grouped into three main areas: a) formalism in the sense that formality takes precedence over content; b) procedural lethargy, as the written file goes against celerity; and c) the practice of law reduced to the management of the case file in which professionals become interlocutors between the bureaucracy and the interests of the people who use the justice system.

The system is thus permeable and protects privileges and interests to the detriment of access to justice and its social function (Binder, 2012, p.19).

These prerogatives include, among others, the patriarchy. The situation described above serves the interests of the patriarchy because it stands in the way of the management of social conflict posed by machista violence.

This can be clearly observed when examining the role of the public prosecutor's office, because its function is weakened when the management model is imposed case by case in contrast to strategic criminal prosecution of complex phenomena.

Furthermore, this situation is accompanied by difficulties and barriers to guaranteeing the autonomy and independence of that judicial agency because, despite the regulatory and constitutional mandates, strong tensions that go against its strengthening persist in the region.

This leads to the need to promote measures that strengthen the intervention of this key agency in government institutions through lines of criminal and institutional policy that allow its work to be oriented in alignment with the conventional mandates undertaken in the international community and the commitment to the public. It is also necessary to rethink how its staff members are trained because they are the main drivers of change.

In this article, I examine the current situation that members of dissident sexualities are facing in Argentina in regard to access to justice, changes to the public prosecutor's office and the implementation of training and education strategies for its staff in order to promote innovative processes that guarantee members of this group full enjoyment of their rights.

Access to justice for non-hegemonic sexualities: A pending matter

The subjective connections that comprise interpersonal relationships and their resulting plan for personal realization tend to obtain protection through legal orders following a slow process driven by diverse members of civil society.

Over the past few decades, legal changes have been developed by a certain sector of the international community. This generated a framework for recognition and expansion of the rights of various historically underserved groups. These include people who are part of non-traditional families or whose masculinities and femininities diverge from the classic construction based on the biological or anatomical binome.

In this sense, the recognition of dissident sexualities has undergone a process marked by pathologization and criminalization. For most of the last century, homosexuality was catalogued as a psychiatric condition by medical science, and in Argentina criminalization was based on rules created by the police that allowed for prosecution and incarceration of individuals who engaged in homosexual activity.

The HIV/AIDS pandemic and the return to democracy were two decisive developments for the visibilization and growth of movements for the rights of members of the LGTTTBQ+ community (lesbians, gays, transgender, transsexual, transvestite, bisexual, intersex and queer) that emerged at the end of the 1960s. However, it was not until the 1990s that trans and intersex people began to form part of the public agenda, as they faced greater difficulties when it came to recognition (Barranco, 2014, p. 1).

It has only been in the last ten years that Argentina made significant regulatory progress at the federal level that allowed a specific legal framework to be created through the passage of the Marriage Equality Law (Law No. 26.618, 2010), the Gender Identity Law (Law No. 26.743, 2012) and the approval of the new National Civil and Commercial Code (Law No. 26.994, 2014).

Through this set of regulations, the legal framework was updated to reflect the changes that were revealed in society. Legal regulation was provided for the various types of relationships and life pathways without discrimination based on sexual orientation or gender identity.

However, this recognition did not guarantee that the historical rates of violence against the community of dissident sexualities would be reduced.

Despite the progress made on the legal front in Argentina and in other countries in the region, the Inter-American Commission on Human Rights (hereforth IACHR) has expressed its concern regarding the high rates of violence that are exercised against this population in the region and the lack of an efficient state response to the issue.

This is revealed in the failure to adopt effective measures to prevent, investigate, punish and provide reparations for acts of violence committed against members of dissident sexualities, which continue to occur frequently throughout the Americas (IACHR, 2015, p.11).

IACHR statistics suggest that over a period of 15 months, some 770 acts of violence were committed against this population, resulting in 594 deaths (IA-CHR, 2015, p. 23).⁶⁴

Along with this assessment, it was proved that the acts that resulted in deaths and other acts of aggression against the members of this group share a high level of violence. These acts frequently are characterized by the use of knives and other weapons, burning, decapitation, brutal beatings, stonings, the throwing or bricks or use of hammers, strangling and dismemberment (IACHR, 2014).

Furthermore, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that in a considerable number of cases of torture of members of this group, sexual violence is present and is exercised as an effort to punish the victim for breaking gender barriers. He also stated that these victims are disproportionately subject to torture and other mistreatment because they do not conform to what people expect of one sex or another based on the binomial limitation (Special Rapporteur's Report, 2001, para. 17).

The violence is even more severe when the victim belongs to the trans community. There is no doubt that this group is immersed in a cycle of violence, discrimination and criminalization from a very early age based on their exclusion from their homes, communities and schools.

Based on data gathered by IACHR, the majority of trans women who are murdered are younger than 35 and are especially vulnerable to violence by state security forces (IACHR, 2015, p. 26).

This is a multi-causal, complex global phenomenon that requires the development of public policies designed to prevent, investigate, prosecute and punish those responsible.

The situation is even more serious when one considers the low rate of reporting of non-lethal attacks, which makes daily violence even less visible.

The low reporting rates are mainly due to the fact that these aggressions tend to be considered part of daily life and to the desire to avoid coming up against a judicial system that is not responsive to this sort of violence, tends to hold the victim responsible and increases the damage by combining it with exposure about essential aspects of the victim's privacy.

⁶⁴ The sample was taken between January 2013 and March 2014, op. cit. p. 23.

In addition to continuing to expand legal protection and recognition of rights, the current agenda of movements that seek to emancipate dissident sexualities targets the need to guarantee access to justice.

In order to respond to this demand, an efficient criminal justice policy must be developed by the public prosecutor's office along with a training strategy for its employees, who are the agency's internal transformation tool.

The role of the public prosecutor's office: The design of a management model

Efforts to reduce gender-based violence require state intervention based on the implementation of public policies of prevention and punishment that also remove social, economic and regulatory obstacles that restrict or prevent victims from accessing justice.

It is with this goal in mind that Argentina's public prosecutor's office began to redesign its management model in 2012 based on the adoption of general resolutions and the creation of specific structures designed to guide its work towards a smart policy and commitment to the public. This organizational approach was then required of all of its agencies through the approval of a new statutory law for the Public Prosecutor's Office, Law 27.148, in June 2015.

One of the main pillars of this process of transforming the agency was the inclusion of the gender approach and community access to justice in its work. A series of strategic decisions were adopted to reach the proposed objectives.

In 2012, the Gender Policy Program (Attorney General's Office Resolutions No. 533/12, 1960/15 and 427/16) was created in order to strengthen the public prosecutor's office so that it could incorporate the gender perspective into its spheres of action.

The Community Access to Justice Program was later created (Attorney General's Office Resolution No. 1316/14) in order to facilitate access to justice for those at risk and guarantee their participation in the judicial administration system through the introduction of decentralized public prosecutor's office spaces in at-risk areas.

As part of its efforts to incorporate gender-based violence into the main lines of criminal justice policy, the Prosecutorial Unit Specializing in Violence Against Women (UFEM for its title in Spanish) was created and was given a mandate that includes cases of violence against members of dissident sexualities. It was created because there was an understanding that gender-based violence and discrimination manifest in structural criminal phenomena that have patterns and systematicities that must be addressed with well-coordinated,

specialized and strategic criminal policy (Attorney General's Office Resolution No. 1960/15 and 427/16).

Internal reforms were also introduced in order to deepen and extend gender policies regarding the work of the agency's employees.

This led to the inclusion of trans women as members of the public prosecutor's office staff for the first time. They were hired to work in the General Directorate of Victims Support, Guidance and Protection (DOVIC), the Territorial Access to Justice Agencies (ATAJO) and in administrative and human resources roles.

Furthermore, the agency's leave framework (Attorney General's Office Resolution No. 3140/16) was modified to reflect the regulatory progress that had been made at the national and international levels regarding the recognition and expansion of the rights of dissident sexualities.

Maternity and paternity leave programs were modified and replaced by leave based on the birth of a child, distinguishing between the cases of gestating parent and non-gestating parent. As such, they allowed for cases of co-maternity or co-paternity and for leave for the birth of a child in the case of a gestating trans man.

The new rules also allowed for leave in single parent cases or when both parents are males, and new types of leave were created to allow for assisted human reproduction treatments to be conducted and meetings that form part of the adoption process.

Finally, gender violence leave was created to facilitate access to justice for women who were victims and to call attention to the phenomenon. This sort of leave also triggers the provision of institutional resources such as the assistance of the General Directorate of Victim Support, Guidance and Protection and the Specialized Prosecution Unit for Violence against Women, the General Directorate of Gender Policy and the Labor Wellbeing and Dispute Resolution Office.

However, the institutional effort made to design an agile, dynamic management model with a gender perspective would be insufficient unless it was accompanied by a clear training strategy for members of the agency because the success of criminal investigations depends on them.

One of the main characteristics of violence against dissident sexualities is that it is difficult to successfully undertake judicial investigations. This is due to the fact that members of this group tend to be made invisible by their peers and often are not even recognized by their family. As such, many crimes are not reported, and if they are reported to the authorities, there is no cooperation on the part of those close to the victims.

Violence against this group is grounded in the stigmatization and segregation that it generates, and in many cases those who suffer from it choose to silence or hide it.

It has been said that the decision by the victim to keep their sexual practices and preferences private can contribute to vulnerability and impunity because in this context of silence and hiding it is unlikely that the family or close circle will wish to contribute information about suspects or the circumstances surrounding the crime (Parrini Roses and Britos Lemos, 2012, p. 161).

On the other hand, an important obstacle to the investigations is the prejudice and disrespect generally held by judicial officials towards this population, which leads to what is called institutional discrimination.

It is common for prosecutor's offices to bring charges based on the "surroundings of the victim," investigating their lifestyle to find the supposed error that they made that led to the aggression.

This practice leads to the development of case theories based on stereotyped and prejudicial hypotheses or to avenues of investigation that would quickly and effectively clarify the situation and hold the perpetrators responsible being abandoned.

There are also opportunities for the jurisdictional agency to reduce the sentence or absolve defendants based on the defense's argument that they suffered from "gay panic."

This defense strategy involves trying to show that the victim's sexuality or gender identity are objective and reasonable reasons for the defendant to have lost control in order to decrease their sentence or argue that the actions were justified or argue inimputability.⁶⁵

This defense strategy is based on the idea that homosexuality is so repugnant that violent attacks are justified. In the case of violence against trans people, it has been used to try to excuse their violent deaths, arguing that the perpetrator was so shocked to discover that their partner was trans during a consensual sexual encounter that they reacted violently.⁶⁶

This generates an imperative need to create an internal training policy designed to eliminate prejudicial investigation and defense strategies. There

65 One of the first uses of "gay panic" as a defense in the US is the case *People v. Rodriguez* (California, 1967). The defense argued that the defendant killed the victim due to a temporary psychological reaction caused by the revulsion that he had felt when he was grabbed from behind, generating an uncontrollable fear of homosexuality. This argument led to a lighter sentence and for the crime to be qualified as attenuated homicide.

66 Situations like the one described here also have led to the use of the term "trans panic" to identify similar arguments.

is also a need to adopt strategies that promote citizen prevention.

Rethinking the judicial training model: Community training on rights

The judicial training processes that tend to exist in the region are endogamous in the sense that they are usually developed by judicial operators themselves.

For example, the training courses offered in a public prosecutor's office are almost exclusively designed and offered by prosecutors who share their knowledge –based on limited or extensive experience- as a model for teaching the rest of the staff.

They also tend to prioritize learning legal regulations based on acquiring cognitive skills and reinforcing conceptual contents, leaving aside teaching based on transmitting operational and litigation skills.

Training frequently focuses on the profile of a judicial official with limited adherence to the social context and with limited training in regard to innovating in their work practices.

Criminal procedure reform processes have forced professionals in this field to reformulate the judicial academy agenda to focus their strategies on adversarial litigation. This requires a rethinking of the entire judicial training model.

This is the context in which I became the General Director of Training and the Public Prosecutor's Academy in 2014. I proposed that we rethink how those who joined the agency were trained. The goal was to move away from the written paradigm and replace it with a framework that focused on field work aligned with the changes that the agency had been undergoing over the past few years.

This began a process of breathing new life into the habitual cloister of instructors as well as the traditional academic offering with the purpose of abandoning old concepts that fed into that paradigm.

This change was necessary given the arrival of the adversarial trial system would be implemented in Argentina's federal criminal justice system, placing prosecutors in a leading role in the judicial context.⁶⁷

In that sense, the participation of external teachers was increased through agreements signed with the Criminal Thought Association, INECIP and JSCA. Teachers from various parts of the country were also hired.

⁶⁷ The National Criminal Procedure Code is based on the adversarial trial model. It was approved in December 2014 through the passage of Law No. 27.063 and was scheduled to enter into force on March 1, 2016. However, the Executive Branch suspended its application in December 2015 through Decree PEN 257/15.

The general in situ training was focused on three clear and precise lines: a) training in investigation practices; b) training on updating new internal and international regulations; and c) optimization and improvement of judicial practices.

More offerings focused on investigation practices, coordination of crime scenes, expert analysis, training in litigation, public speaking, techniques for using clear language and other skills also were included. It became clear that there was a need to promote training programs focused on citizen prevention.

The *Community Training Program on Rights* (Attorney General's Office Resolution No. 136/16) was created to bring the entity closer to the community through the implementation of ongoing training strategies in specific at-risk sectors.

The program was designed in the context of a general policy for promoting access to justice as a human rights which is widely recognized in the constitutional field (Art. XVIII of the DADH; Art. 8 of the DUDH; Art. 2.3 of the PIDCyP; Art. 8.1 of the CADH and Arts. 5 and 6 of the CEDAW).

The mandate emanates from the statutes of the public prosecutor's office, which require that it hear complaints and expressions of need from various social sectors, keep the community informed and provide access to justice, particularly for those who have fewer resources for accessing it (conf. Art 36, Law 27.148).

The main mission of the program was to promote the entity's commitment to the community through activities, courses, meetings focused on raising awareness, reflection and the exchange of knowledge in order to improve and expand dialogue between the justice administration and the public, contributing the tools necessary to generate greater awareness of rights.

The program formed part of the institutional policy line of promoting access to justice based on the institutional role of the public prosecutor's office in regard to prosecuting crimes and preventing violence in all of its forms.

Workshops were held based on topics such as domestic violence and child abuse, human trafficking for sexual and labor exploitation, human rights and the politics of memory, truth and justice, abusive practices related to consumer crimes and consumers' rights and institutional violence for professional organizations, non-profits, schools, NGOs, care centers and other civil society stakeholders.

In short, the new system proposed for training for the public prosecutor's office was founded on judicial training focused on operational skills in a context of promotion of equal and non-discriminatory access to justice.

The results of implementing this management model in the General Training Directorate and Public Prosecution Academy based on training prosecutors focused on active and community training on rights were very positive. During the first year, a record number of people participated in online and traditional training activities (Public Prosecutor's Office Management Report, 2015, p. 42):

For its part, the Community Training Program on Rights conducted 34 activities attended by 978 people.

A total of 8,288 participants were recorded during the first year of the implementation of the management model.

A survey of the participants' level of satisfaction with and opinions about the activities was conducted, with 1,303 participants. Of these, 76% rated the quality of the faculty as excellent and/or very good and 97% rated the topics as very interesting and/or interesting. Furthermore, 93% stated that the course contents were "useful" for their work. Finally, the survey revealed that 91% found that the courses met their expectations.

This significant increase in participation and satisfaction made it clear that the new training model was successful and that there was a need that had to be addressed.

One of the main changes to the agenda was inclusion of the gender perspective and non-hegemonic sexualities in training processes for the first time.

Rather than emerging as a personal choice, this was presented as a necessary tool that responds to the commitments undertaken by the country in the international community directed at promoting equality in the exercise of rights.

As a result, there was a need to promote training on effective and dynamic criminal prosecution techniques in response to machista violence.

For the first time, programs meant to raise awareness about the dissident sexualities community were designed exclusively for members of the public prosecutor's office.

Training courses on hate crimes based on sexual orientation and gender identity were offered to increase knowledge about this specific criminal phenomenon and to promote institutional dialogue between the agency and organizations that promote the rights of the LGTTTBIQ+ community.

An agreement was signed with the group Comunidad Homosexual Argentina (CHA) to coordinate joint actions in the form of technical programs or projects, training programs, professional development and dissemination of information about rights, among other activities (Attorney General's Office Resolution No. 1930/16).

Similarly, leaders of the main sexual diversity organizations were included in the faculty to teach workshops and courses focused on the implementation of the gender identity law in judicial practices, the investigation of institutional violence against the trans population, gender-based discrimination and discrimination based on sexual orientation, among other topics.

The inclusion of trans women as speakers at various conferences and meetings for prosecutors and other public prosecutor's office officials is worthy of note. This made the community visible and allowed its members to present their complaints and describe their reality, which has historically been marked by a lack of full enjoyment of their basic human rights.

This resulted in the creation of spaces that allow members of the entity responsible for prosecuting crimes to reflect on the situation of inequality and vulnerability in which the majority of community members find themselves.

Programs were also developed to empower members of the sexual diversity community and improve the effectiveness of criminal prosecution by prioritizing services and support for victims.

Workshops and courses on promoting rights were offered for students of the Bachillerato Popular Trans Mocha Celis (Attorney General's Office Resolution No. 385/15), an inclusive educational space focused on gender, sexual and cultural diversity that was created to respond to the historical exclusion suffered by trans people in the education system. The program focused on the crime of human trafficking for sexual and labor exploitation and access to justice.

Similarly, the General Directorates of Access to Justice and Gender Policy promoted the project "Gender Training for Territorial Promoters (*Formación de Promotoras y Promotores Territoriales en Género*, RETEGER)," which is designed to share theoretical and practical tools with social and neighborhood leaders who can support women and members of the LGBTTTIQ+ community who are facing situations of violence through the creation of community networks around the country (Attorney General's Office Resolution No. 1617/17).

This strengthened the institutional policy on territorial training in the network to promote and guarantee equal access to justice and non-discrimination.

Like any other innovative process, there was some resistance related to fear of the unknown. However, as the training and updating policy moved forward and deepened, the success of the criminal investigations of violence against sexual dissidents made it clear that this was the right path.

The most prominent case may have been the transvesticide of community leader Diana Sacayán. The investigation was completed in collaboration with UFEM and the prosecution team that had participated in training courses and

workshops on the gender perspective that were oriented towards analyzing the specific characteristics of violence against sexual dissidents.

Conclusions

Promoting an inclusive model of justice requires the coordination of institutional policy lines committed to resolving individual and collective issues in order to establish concrete actions that make it possible to facilitate access and citizen participation.

Initiatives should focus on historically neglected social groups and should be designed to reduce their vulnerability and develop mechanisms for preventing crime.

In that sense, while dissident sexualities and the trans community have begun to demand that their rights be respected over the past decade, access to justice –among other rights- continues to be a pending issue on the public agenda.

It is important to note that it is not enough to create specific types of crimes or incorporate special aggravating factors into certain crimes because the phenomenon of gender- and hate-based violence towards dissident sexualities is not simply a criminal issue.

In that sense, the public prosecutor's office has an enormous responsibility as the main government agency responsible for reducing gaps for effective access to justice and full enjoyment of the rights of populations that are neglected as subjects.

The measures adopted by Argentina's public prosecutor's office beginning in 2012 show that will and management ability can make it possible to offer tools that are oriented towards that goal.

The challenge is not to slide back in this institutional policy despite the changes in the leadership of the entity and its internal dependencies, and to extend training to other justice service and security agencies.

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5. Out-of-Classroom Experience: Judicial Education's Use of Experiential Learning Opportunities

M. Christy Tull⁶⁸

Picture yourself in the following two judicial education programs. Which teaching method might be the most impactful way for judges to learn about evidence from a crime scene?

Option A: Classroom Setting: Lecture by forensic experts on how investigators analyze crime scene evidence followed by questions and answers; or

Option B: Field Experience: (1) Observation of forensic science experts and hands-on opportunity to process the evidence in a science lab; (2) Debrief this experience with the experts; (3) Lecture on the technique and findings; and (4) Discussion about this education's use in your courtroom?

While there is nothing inherently wrong with Option A, getting to observe and *experience* the analyzing of evidence in Option B will typically increase the likelihood of comprehension, retention, and confidence to use the learning.

1. Learn By Doing, Reflecting, And Applying

Many theorists support the finding that experiences maximize learning. Malcolm Knowles, the father of adult learning theory, posits that impactful education for adult learners requires that the learner is actively involved in the learning process and that they see the relevancy of the education (Knowles, 1980). The National Training Laboratories states that retention of learning is at its greatest when a person goes from listening to watching to participating to teaching others. Research on episodic memory and “memory transforma-

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tion” further adds to the body of research positing that events or experiences can be seared into our long term memory allowing vivid recall and changes in behavior (Santoro, Frankland, Richards, 2016).

The “experiential learning theory” by David Kolb is a seminal work upon which much of judicial education is based in North America (NASJE, 2012). It is also a key theory that informs the delivery of judicial education in many nations involved with the International Organization of Judicial Training, including Latin American countries (Gonzalez and Cooper, 2017, p.18-20).

In brief, Kolb’s experiential learning theory integrates key concepts from a number of education theorists and introduces how experiences can be transformed into learning through a process. As Kolb defined experiential learning, it is “the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience” (Kolb, 1984, p.41). At the core of this learning process is philosopher John Dewey’s theory that experience alone is not sufficient. (Kolb, Yeganeh, 2011). Experience obtained either directly or abstractly must be coupled with reflection and application.

Kolb’s experiential learning theory or “cycle” is a four-step process. First, give the learner a concrete experience such as a movie clip, case study or demonstration to introduce and connect the learner to the content. Second, provide time to reflect on the experience. Third, present the new content in-depth to help clarify or provide general concepts perhaps through a lecture. Fourth, allow the learner an opportunity to apply or practice what has been taught.

“Experiential learning opportunity” (ELO) like Option B above is a teaching strategy that uses the Kolb learning cycle and takes it to a higher level. Judges literally go outside of the traditional classroom and into real life settings to learn. ELO is a method that was introduced to many state judicial educators by the former Institute for Faculty Excellence in Judicial Education based at the University of Memphis in Tennessee in the 1990s through early 2000s.

Ohio has used this teaching method modestly since the late 1990s and now with more regularity and with great success. As one judge stated after attending one ELO course, “Please tell the Supreme Court this is the preferred way” to learn. While much of our education is appropriate to offer in the traditional classroom setting, Ohio, several other states, the National Association of State Judicial Educators, and other nations are giving greater attention to teaching strategies that are delivered in social settings called “experiential learning opportunities.”

2. Experiences Used To Increase Knowledge

Education on substantive and procedural law will always be a key subject area for judicial education. However, with the complexity of the world and many demands on today's judges, there is a growing body of knowledge that a 21st century judge needs to acquire to competently fulfill their role. Experiential learning opportunities and use of experts from non-legal professions can enhance needed knowledge and understanding.

As far back as the mid-1990s, our Supreme Court of Ohio Judicial College moved the judges out of the classroom and into police cars to observe officers' use of laser and radar technology to identify cars that were speeding. "The hands-on training/observation was very educational and also enjoyable," reported one judge. This real life demonstration helped the judicial officers understand the equipment that was used to collect traffic evidence. Back in the courtrooms, this new knowledge and visualizing how it was collected for moving violations aided the judge when testimony was presented.

Help Centers for Court Users

Another example of a knowledge-based ELO included a visit to two "Help Centers." A typical Help Center is an office in a court building where self-represented litigants receive legal information, resources, and individualized assistance. Citizens are helped to navigate the court system and their court cases (e.g., landlord/tenant, small claims, debt collections, criminal record sealing/expungement). The need for these centers has increased because the number of self-represented litigants have increased across Ohio and the United States of America.

A full-day course was offered in two Help Centers in the big city of Cleveland, Ohio's common pleas court. The learning objectives were to both sensitize court staff to the needs of self-represented litigants and model an innovative way to serve this population. Participants observed staff and court user interactions. They used hypothetical scenarios to learn more about typical situations and court solutions. In addition, legal and non-court social services staff gave participants a more in-depth and hands-on experience. Ways to fund and implement the Centers were also discussed.

When asked what, if anything, was learned, one attendee said:

I was impressed by the approach. It really helped to see where everything happened, see the staff in action, see things as they actually happened. It did help to ask more intelligent questions later. Also, I

saw principles and ideas that could be used in our court. Seeing the paperwork, describing the issues in the actual setting made it real and gave me a better understanding of what the person who used the services was exposed to when (in the court) (e.g., building location, where everything is in the building, signage or lack of, how information and knowledge is given, meeting expectations).

Based on the evaluation feedback, it was evident the two objectives were met. Empathy for the litigants and the challenges they face were increased. And, the experience gave the attendees a new approach and the confidence needed to potentially replicate it in their courts.

Forensic Science and Technology for Judges

Most recently, the program mentioned in the opening of this article gave judges a unique opportunity to learn forensic science at the Ohio Attorney General's Center for the Future of Forensic Science. The experience included hands-on exploration of forensic science issues in the areas of crime scene investigation, DNA, fingerprints, trace evidence, and drug chemistry.

Another opportunity was held several years ago in another criminal justice information center of the Federal Bureau of Investigation (FBI) located in West Virginia, a state adjacent to Ohio. Among the one and one-half days of education, leading experts showed the judges national law enforcement databases including its use when screening for weapon purchases. In addition, judges observed and compared fingerprints, facial analysis, and more. The judges were able to apply their new knowledge to be more effective at using the crime data systems used in civil and criminal matters.

In addition, an unexpected impact resulted from this FBI seminar in West Virginia. Through this ELO, the Supreme Court of Ohio became aware of gaps in the reporting of mental health adjudicatory issues by courts, mental health hospitals, and treatment providers. As a result, a project was initiated to educate judges on needed reporting. Also, an electronic version of the reporting form was created. The result was an increase in the number of reports regarding involuntary commitments. This finding at our course and subsequent efforts helped narrow a gap in the system. Consequently, this course contributed to greater protections for the citizens of Ohio.

Judges are bombarded by the extraordinary amount of science and technology being introduced to the courtroom through litigation. From DNA to genetic engineering to cancer diagnosis, the topics brought to the courts in the area of bioscience and biotechnology are escalating exponentially every

year. Recognition of the need to help judges obtain knowledge in these areas of complex litigation led to the formation of the “Advanced Science and Technology Adjudication Resource” or “ASTAR” education program for judges. The aforementioned FBI education program was one of a series of courses to obtain additional adjudication skills to handle these areas of litigation. While the ASTAR program no longer exists in Ohio, ELO science and technology education continues and allows judges to learn by seeing and doing.

Like Ohio’s experience, several Latin American countries also use non-legal experts to teach and hands-on learning (Gonzalez and Cooper, 2017). Undoubtedly, the goal is the same. Any education experience within a non-legal field is not to make our judges expert in an area that they are not. Instead, as Ohio’s longest serving Chief Justice Thomas J. Moyer stated, “Ohio judges are at the forefront of an effort to learn about the merging issues of science and the law. This education better prepares the courts of Ohio for resolving the questions of tomorrow.”

3. Skills Learned Through Doing

Mock Trials

Annually for the past ten years, all new Ohio judges – without judicial experience — are required to participate in a mandatory judicial orientation program prior to taking the bench and then four months after. During this orientation, one of the highest rated components is a mock trial. The experience simulates a real trial and focuses on trial skills. Ohio based its mock trial format on Florida’s successful use of this teaching technique.

Prior to the mock trial experience, faculty describe the format and benefits the new judges will receive from the experience to try to help alleviate concerns. Several makeshift courtrooms are set up for the simulation. In each room, there are at least three experienced judges and staff who role play as attorneys, victims, parties in the case, and court personnel. Each new judge is given a judicial robe, case files to be heard, and then a bailiff ushers them into their mock courtroom. “All rise” and a simulated trial or initial arraignment begins. The new judge is not expected to apply substantive knowledge about the cases before him or her. The goal is courtroom management, skills, and demeanor. Once the simulation is done, the new judge is asked to reflect upon their experiences, strengths, and weaknesses. The experienced judges then provide feedback to continue the reflection, learning, and offer tips and techniques for

when the true first day in the courtroom arrives.

As one new judge declared about this ELO, “I was terrified but this was so helpful.” Another remarked, “I learned a lot in a short amount of time” and “...will take (it) to the bench.” The new judges report numerous lessons they gained such as techniques for maintaining control on the proceedings, people, and even exhibits. They report learning the bailiff’s role, the need to slow down, and as one judge stated, “the reality of it.” Another said they learned that “the pressure of being the sole decision maker is intense.” Going into the experience, most judges express their trepidations and find the anticipation nerve wracking. Every effort is made to create a safe learning environment for the new judges.

Mentors

Mentoring is a key component to the success and development in many professions. And it is available across the United States and around the world for judges and others in the judicial branch.

Experiential learning opportunities are embedded within Ohio’s mandatory Mentor Program for new judges and magistrates (non-elected judicial officers). During new judicial officers’ first year in the profession, each must have a minimum of four quarterly contacts with their mentor, two of which must be in person. While not required, it is “strongly encouraged” that at least one contact include a court observation in the new judge’s court and one visit in the mentor’s court.

Court observation is a powerful learning tool (Bandura, 1977). Both observing and being observed coupled with a confidential feedback session help hone a new judge’s competence and confidence. Several comments from judges in the mentoring program underscore the benefits: “Observing arraignments, pleas, sentencing, probation violations (was) so beneficial.” After a mentor visited a new judge’s courtroom and observed, the new judge said, “The first year is very uncertain,” and it helped to have someone giving feedback who “will not judge you!”

The goal of mentoring is eloquently described by Tony Dungy, Hall of Fame National Football League coach as follows:

Mentor leaders seek to have a direct, intentional, and positive impact on those they lead. At its core, mentoring is about building character into the lives of others, modeling and teaching attitudes and behaviors, and creating a constructive legacy to be passed along to future generations of leaders.

The one-on-one mentoring relationship is an informal teaching strategy that significantly advances the “community of practice,” a group of people who share a profession (Lave and Wenger, 1991). It develops both the person being mentored and the person mentoring. As a mentor in our program stated, “I think this program is helpful to both the ‘mentor’ and ‘mentee.’ The exchange of ideas was great!” The success of this informal education relies on trust between the mentee and mentor. A “safe learning environment” is essential. A new judge stated the mentorship relationship “gives a ‘safe’ place for judges to share information.” Another said, “Having the personal connection was beneficial in reducing any apprehension about seeking assistance.”

4. Experience Changes Attitudes

Up to this point, experiential learning opportunities have demonstrated their value when helping judges achieve learning outcomes that are cognitive (i.e., knowledge-based) and psychomotor (i.e., skills-based) in nature. Experiential learning opportunities can be powerfully used when the learning desired is “affective” and helps challenge and transform one’s attitudes, values, philosophy, or thinking (Anderson and Krathwohl, update of “Bloom’s Taxonomy” learning theory, 2001).

Similar to Canada and other nations across the world, judicial branch educators recognize the need to offer more than just substantive and procedural law. Growing and changing “social context” issues dictate a more expansive curriculum to sensitize and equip the judiciary (Lennox and Williams, 2013).

All judges in the United States are bound by a code of judicial ethics. Most states have adopted a version of the American Bar Association Model Code of Judicial Conduct. Within the last ten years, Ohio added greater specificity to its rule that mandates judicial ethics, professionalism, and conduct education. Among the conduct topics is “access to justice and fairness in the courts and how these issues impact public trust and confidence in the judicial system and the perception of justice in Ohio.” Experiential learning opportunities are an ideal teaching strategy to achieve deep absorption of this education as will be illustrated below.

Lessons from the Amish.

On any given day in Ohio courthouses, our diverse society with a multiplicity

of values, beliefs, and practices are evident. There is a large population of Amish in Ohio who are a religious group committed to living separate from mainstream America and who generally do not use electricity or other modern conveniences. Their presence in our state provided the basis for a unique experiential learning opportunity.

While this course began with learning about the Amish, it was more expansive and had practical application. Judges were challenged to think about individuals from various religious communities or those with a set of beliefs or experiences that can impact their trust in, perception of, and interactions with the courts.

The primary learning objectives for this seminar, were three-fold: (1) Discuss the origins of the Anabaptist Amish and the ethnic discrimination and persecution that contributed to a people committed to a “separate community;” (2) Name the means by which the Amish communities resolve their disputes; and (3) Discuss the legal and procedural challenges before judicial officers to ensure religious liberty while maintaining fairness in the courtroom.

Description of the Experience. Approximately fifty (50) Ohio judges and magistrates traveled to the heart of Amish country to a farmland community where approximately 45 percent of the county’s population, or 30,000 people, are Amish. The Amish are a Christian religious group closely related to Mennonites who follow simple customs and live in rural areas in North America; there are especially large populations in Ohio and Pennsylvania. For religious reasons, many of these individuals refuse to take oaths, vote, or perform military service. Most shun modern technology and electricity, and use horse and buggies for transportation. While there are many variations of the Amish practice, generally, their appearance is distinctive with plain colored clothing, married men are bearded, and women wear head-coverings (Hurst and McConnell, 2010).

Before the judges and magistrates attended the course, they were given a pre-course reading assignment and directed to view a two-hour television program titled, “The Amish.” Upon arrival to the course, a judicial faculty member guided a discussion about the reading and helped them make “reflective observations” to relate it to legal, procedural, and diversity issues in each of their courtrooms. They visited a one-room schoolhouse where they learned that a typical Amish member has only an eighth grade education. They discussed the impact of *Wisconsin v Yoder*, the landmark decision regarding Amish education and religious liberty. The group then observed the history of ethnic discrimination and persecution of the Amish and Mennonite communities through a large circular mural at the heritage center. They then visited an Amish home, ate supper with their host family, and talked with their hosts about the Amish way of life.

After the onsite experiences in the Amish community, the judges and magistrates met with an Old Order Amish Bishop, a former Amish man who is now in law enforcement, local judges, and others from the community. The dialog focused on legal, procedural, and ethical challenges of maintaining religious liberties while ensuring fairness in the courtroom.

Participants examined practices to encourage courtroom participation and discussed ways to mitigate the tendency towards unintentional or “implicit” bias in the court. The judicial officers and panelists discussed issues ranging from a hate crime done by members of the Amish community in Ohio to forced medical treatment. They also addressed Amish religious views on doctrines such as forgiveness and restoration as well as practical matters such as electronic monitoring, head coverings, and other religious expressions.

Evaluation of Experience. The judicial response to this course was overwhelmingly positive and impactful based on evaluations and feedback received after the course. One attendee wrote:

It was an absolutely awesome experience in every way. It was educational. It was thought-provoking. It was enlightening, and it was transformational. The ideas and knowledge gained are certainly translatable into courtroom contact with people of other cultures and religions besides the Amish.

Two other judges stated:

“I hope to be more open-minded in the courtroom and more cognizant of the fact that some people know very little about court systems.” “(Knowing this), I will do better in my instruction and engagement with (litigants) in the courtroom.”

After the course, one magistrate wrote:

I applaud your effort at experiential learning.... It was so much more insightful than hearing someone lecture about (the Amish).

Slavery, Lincoln, and the Art of Judging

“Upon the subject of education,....I view it as the most important subject which we as a people can be engaged in.” —U.S. President Abraham Lincoln (1832)

The acclaimed National Underground Railroad Freedom Center on the border of Ohio and Kentucky served as a “classroom” for this experiential learning opportunity for seventy (70) judges. Experiences were obtained through interactive displays, reenactors, and videos that immersed the judges into the 1800s era of slavery. In addition, and provocative exhibits educated them about today’s “invisible slavery” of human trafficking. Several discussions among the judges challenged their thinking and added to this transformative experience.

The objectives of this experiential learning opportunity were for judges and magistrates to (1) reflect upon the historical impact of slavery on our nation; (2) discuss legal challenges for judicial officers and how historical and modern-day slavery reverberates in our society and courts today; and (3) identify leadership qualities, ethics, and courage needed by judges then and now.

Before experiencing the museum, judges reviewed two cases from a reading assignment given prior to the course. These case studies from the 18th century involved runaway slaves and provoked lively discussions. Court processes, federal versus state powers, and executive versus judicial powers were debated. Participants saw the consequence of lawyers not doing their job and judges with the courage to do their job, despite their dislike for a particular law. These discussions together with the museum experience helped judges bridge history with modern day lessons on such topics as remaining impartial and struggling with personal beliefs and one’s role of upholding the law. It raised awareness about the disenfranchised or those who feel invisible or powerless and perceive there is no justice to be found in the courts.

Evaluation of Experience. Attendees at this course were moved by the experience and reportedly inspired to change with representative comments from judges captured below. They responded to the question, “In what way, if any, do you foresee today’s experience will affect your performance or thinking as a judge?”

This learning opportunity has encouraged me to continue to be sensitive to the cultural and socio-economic dynamics that every litigant brings to my courtroom and to apply the law in a way that is consistent with the law and my understanding of fairness and impartiality.

I hope that I will be more courageous, more committed to doing the right thing regardless of popular opinion.

It has already started some discussion among colleagues about our court; we

want to look at some things and discuss where we want to go from here.

5. New Judges Experience Realities of Youth Prison

One final example of an experiential learning opportunity is an annual visit to the Ohio Department of Youth Services facility where incarcerated youth reside. This opportunity is designed for new juvenile judges to experience what youth experience. The judges are driven to the youth prison in a vehicle with bars on the windows. Once through the entrance, the gate locks behind them. In the intake and reception area of the facility, judges observe tears of some youth and interactions with the prison staff. As they progressively move through to the residential area of the facility, young inmates eagerly talk to the judges about the reality of living behind bars. Judges observe classrooms, recreation areas, and more. At the close, the judges meet with the state director and staff to debrief the learning and gain additional information.

After each experience, the new juvenile judges reported that it was “one of the best aspects of the orientation.” As one judge explained, the experience allowed her to see first-hand the conditions of the facility to which she will send youth. It will help her explain to a juvenile “what it is like to be locked-up.”

6. Use Of Kolb Experiential Learning Model

Every effort is made to ensure that the experiential learning opportunities described heretofore make a difference and are transferred to the workplace. It requires conscious adherence to the design of these ELO courses by employing all four stages of the experiential learning theory or “cycle” developed by David Kolb and introduced earlier in this article.

The first step is to give the learner a *concrete experience* to take in new or re-learned education. This experience is meant to fully engage the learner and prompt them to feel or connect with the experience. This direct experience is the first mode of grasping or apprehending the experience and learning. In the Amish course, judicial officers observed a one-room classroom that was in session with teachers and students. While they were in the Amish school, the judges used Attachment A, an observation guide, to capture their responses to the experience.

Step two of this learning cycle gives judges the opportunity to reflect upon the experience. It is essentially an opportunity to stop, and even struggle with,

the new experience with others in discussion or to do so individually (e.g., journaling). Both the Amish and Slavery courses pushed many of the judges to face dilemmas that might be inherent in their judicial roles. Attachments B and C are samples of reflection guides used at the courses.

The significance of this reflection stage is summarized by the Institute for Faculty Excellence in Judicial Education founder Patricia Murrell as she writes that this kind of learning helps:

...the recognition that legal rights and individual responsibilities and values may clash, that cultural and societal norms may not always align with the law. The ability to acknowledge and cope with inner conflicts, to transcend polarities, and to see reality as complex and multifaceted is discussed as necessary in the process of judging and other decision-making (Murrell, 2004, p. 159).

Both steps one (i.e., concrete experience) and two (i.e., reflective observation) help to “prime” the learner and get them ready for wanting to know more and apply the education they have learned or relearned. While ELO relies heavily on concrete experiences, each course builds in each step of the Kolb experiential learning model.

Step three is called *abstract conceptualization*. After the first two steps, the learner is ready to make sense of the information and link his or her observations to sound theories or principles. For example, in both the Amish and Slavery courses, faculty expounded on the cases and facts from historical events from the reading assignments. At the Slavery course, a retired Chief Justice from Rhode Island lectured on the lesser-known fact that President Abraham Lincoln, who led the country during the Civil War era, once served as a substitute judge. The lesson of this session focused on the leadership qualities, ethics, and courage often needed by judges then and now.

Finally, step four (i.e., *active experimentation*) requires judges to test the implications of the new concepts or learning. In other words, they are asked, “So what?” What, if anything, will the judge do the same or differently based on the education? In this writer’s experience, without attention to this step, learning can get lost. Opportunities to process the new learning and practice it in the safe environment and then apply the education at their workplaces are essential. The debrief session with experienced judges during the mock trial technique lets the new judge discuss application. Two other examples of this *active experimentation* step include questions like #4 on Attachment C. And, on every evaluation form, the following question is asked: “In what way,

if any, do you foresee that today's experience will affect your performance or thinking as a judge/magistrate?"

7. CONCLUSION

"Better to take a risk, try something, and distill the answer from experience ... Action leads to insight more often than insight leads to action"

--Authors Chip and Dan Heath,

The Power of Moments: Why Certain Experiences Have Extraordinary Impact

As this article indicates, judges are effusive in their praise of experiential learning opportunities. ELO courses are among Ohio's highest rated. Without promptings, judges describe the impact of these courses and often tell of their commitment to action because of these courses. This kind of response is not typical from traditional classroom experiences. Thus, many judicial educators like the Supreme Court of Ohio's Judicial College believe experiential learning opportunities are one of the best teaching strategies available. The effort to plan and implement ELO courses is substantial, but the rewards are worth it.

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Attachment A

Observation Guide for the Experiential Learning

Visit to Amish School

This time is largely unstructured. You are encouraged to use the pages in this booklet to generate questions for faculty and/or capture observations, new realizations or knowledge that you may apply back in your courtrooms.

What are your lingering questions about the education of the Amish youth?

Observations, new realizations or knowledge:

If any, what observations or experiences at the Amish school raises ethical, professionalism and/or access to the courts or fairness issues for you? (*Use the questions on the following page to prompt your thinking, if needed.*)

Prompts to provoke thinking:

How does an Amish school experience differ from your experience with the public schools? What are the positives and negatives?

What observations do you have about the content taught (e.g., emphasis on the “3 Rs”- reading, (w)riting, & (a)rithemetic, and less on critical thinking skills)?

What impact might an eighth grade education have on the Amish people?

In what way, if any, might the level of education impact an individual's participation in the courtroom? Explain.

Are there conscious or unconscious biases or judgments you might have regarding undereducated persons?

What, if any, professional, ethical or fairness issues arise for you?

Are there any analogous individuals or populations that share the same issues as the Amish regarding education?

Attachment B

Lessons from the Amish Course

INDIVIDUAL REFLECTION GUIDE

For Small Group Discussion

Use this guide for your own personal use and to capture observations.

Increasing access to justice and fairness in the courts

Think of a time when there was a person from a minority religion in your courtroom.

In what way were you made of aware of this fact?

Was there an issue? If so, did you do anything differently to accommodate a request or a concern based on a known religious practice?

Were you aware of any reluctance or concerns to participate or cooperate in any court proceedings? Y/N

If so or if not, did you or your staff do anything differently to increase their comfort level?

Checking our “implicit biases”

Studies on implicit bias tell us that our brains tend to group people with like characteristics and then expect them to behave or think in a certain way. As a result of today's seminar, you hopefully learned that there are significant variations among Amish people, despite a shared minority religion.

What tools do you, or could you, use in your courtroom to mitigate the tendency to leave an implicate bias unchecked? (For example, perhaps you ask a colleague to observe and give feedback as to your ability to treat each plaintiff and their case uniquely.)

Attachment C

Slavery, Lincoln and the Art of Judging

Self Guided Tour Reflections

What in the museum particularly raises judicial **ethics** issues for you? Be specific (e.g., identify an exhibit, write a quote from a display)

What in the museum particularly raises judicial **professionalism** issues? Be specific (e.g., identify an exhibit, write a quote from a display)

What in the museum particularly raises **access to the courts** and/or **fairness** issues? Be specific (e.g., identify an exhibit, write a quote from a display)

In what form might you see any of the “unfreedoms” in your courtroom today (i.e., racism, illiteracy, genocide, hunger, tyranny, slavery—including human trafficking)?

What, if anything, can you do to address today’s “unfreedoms” or “invisible slavery?”

6. Peer group consultation as a judicial training model

Daphna Blatman-Kedrai, Ori Landau and Boaz Munk⁶⁹

Tell me, and I will forget. Show me, and I may remember. Involve me, and I will understand.

- Confucius, 450 B.C.

[T]here is an intimate and necessary relation between the processes of actual experience and education.

- John Dewey, 1938

Introduction

This paper presents a method for judicial training that we call *peer group consultation* (PGC). This method has a sound philosophical, theoretical and practical rationale, has been successfully tested in many organizations of various types, and is particularly suited for professional training (O'Keeffe, 2002; Argyris, 1999; Senge, 1990; Gokhale, 1995; Lee, 2014; Wenger, McDermott, Snyder, 2002). Therefore, the implementation of this tool is an innovation that carries a lot of potential for judicial training.

Peer group consultation is a learning method whereby a group of judges at a particular place of work or a particular field meets on a regular basis to conduct an open dialogue on their work. This might involve analysis of work experiences raised by group members, joint examination of issues related to

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their work such as practices, procedures and standards, and group discussion on issues of collegiality, rules of conduct and mutual assistance.

This article is based on the experience acquired in the magistrates' courts of Israel's Central District in the years 2010–15, placing it in relation to current trends in the field of professional development in general, and in the field of judicial education in particular (for a review of state of the art practices of judicial training, see Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015; Dawson, 2015; Ronsin, 2015). Its purpose is to introduce peer group consultation to the judicial profession at large, and to start a discussion on what it is, its potential benefits, and how it can be put into practice.

This article is divided into ten parts:

The effectiveness of peer group consultation - this part is based on the testimonies of judges taking part in peer group consultations, highlighting the unique experience of participation in such groups, and the quality of the insights that PGC provides

Placing PGC in relation to current trends in judicial education

- Although continuing judicial training (CJT) is a comparatively recent discipline, remarkable developments were achieved in the past decades. This part reviews the current trends in the field of judicial training, placing PGC in relation to this field and presenting its innovative contribution

Judicial expertise and know-how as a unique form of knowledge that requires PGC learning methods - Different types of knowledge require different kinds of learning methods. Judicial expertise and know-how is a unique form of knowledge that is referred to by experts as *judicial art and craft* or *judicial artistry*⁷⁰ (see Dawson, 2015; Cervero, Azzaretto and Tallman, 1990; and Armitage, 2015). It is our contention that such a form of knowledge requires special learning methods, and that the peer group consultation is one of the most suited to meet this challenge. This part is aimed at presenting and describing the unique aspects of judicial knowledge in order to substantiate our argument for the need of PGC.

⁷⁰ The term *judicial artistry* was first suggested by Cervero in light of Schon's concept of *professional artistry* (Armitage, 2015). Armitage himself has adopted the term (Armitage, 2015; p. 157). Dawson (2015) characterizes this form of knowledge as *judicial art and craft*. This view of judicial professional expertise is vital to the argument of this paper. Part IV, therefore, presents the theoretical basis of the concept of *judicial artistry*, and places it within a comprehensive theoretical framework of interconnected concepts, such as *professional artistry*, *reflection in action*, *the reflective practitioner*, *the learning community*, *community of practice* and PGC. This theoretical framework substantiates the argument that PGC is a most effective way of judicial training.

The theoretical foundations of the PGC approach - As previously noted, peer group consultation has extensive philosophical, theoretical and practical foundations concerning three basic and interrelated issues: 1) the particular nature of professional knowledge; 2) how professional knowledge can be developed and disseminated; and 3) how to design a comprehensive organization-wide system of professional training. This theoretical framework is presented in this part.

The use of PGC in judicial training of magistrates in Israel's Central District

Central District - As previously noted, this article is based on five years of real-world and continuous experience of implementation throughout an entire court system of a particular jurisdiction (the magistrates' courts of Israel's Central District). In this part, we describe this experience with regard to two levels: a) the organizational system level - the transformation of the law courts into a learning community; and b) the level of the peer group consultation - the issues discussed, the reported outcomes, and the requisite conditions for establishing and developing peer consultation groups. This chapter relates also to the use of Organizational Development (OD) consultants in assisting processes of both levels.

Peer group consultation as a cultural change - This part provides a detailed description of how the culture of peer group consultation differs from traditional organizational culture of judicial systems - particularly with regard to formality, hierarchy, and discourse.

The advantages of community learning in the field - This part and the following part (Part VIII) present the complementary relationship that may exist between local community learning and learning at a national training center (which is the common practice in all countries). While centrally-organized training has advantages of standardization and control, community learning in the field has significant advantages in terms of the effectiveness of the learning processes.

The leading role of a central training institute in building, maintaining and developing PGC communities - This part presents the leading role that a central training institute may play in establishing and guiding PGC communities. While this article is dedicated mainly to the discussion of local PGC, this part describes the functions that a central training institute might fulfill in leading the introduction of a nationwide PGC system.

PGC and judicial independence - This part examines the question of how to ensure that peer group consultation does not compromise judicial independence.

Conclusion - This part concludes the article by returning to the wider context of managing judicial systems in contemporary environment. In particular, we believe that peer group consultation, and the concept of courts as learning communities, offer an important response to the special environmental pressures that judges currently face.

Part I: Real-world examples of the effectiveness of peer group consultation

The testimonies of participants in peer group consultation point to its effectiveness:

One judge reported that while listening to a colleague of hers in the group, she identified several deficiencies in the way she herself handled crisis situations, and that the discussion helped her improve in that regard

The day after he had taken part in a consultation, another judge reported that he solved a problem involving a particular procedure that previously had taken a lot of time

At one of the meetings, a veteran judge noted that after hearing at a previous meeting how a fellow member had dealt with a particular issue, he realized that it was better than his own approach, and after implementing it, found that that this was indeed the case

Another judge reported that while listening to a colleague's case presentation, he identified flaws in his own basic assumptions with regard to that case, and that he intended to apply the same kind of focused listening in the courtrooms, as well

One judge shared with the group a ruling she had given. After the discussion, she remarked that she felt greatly supported and strengthened, and how valuable the discussion had been for her

One judge spoke about a particularly difficult case that she had heard in her court that day. After doing so, she reported feeling a sense of relief that helped her regain her composure

One young judge noted that taking part in the group had "saved me ten years of learning on my own"

Many judges report that case studies within the group gave them the tools and knowledge they needed to resolve similar issues that subsequently arose in their own courts.

These testimonies demonstrate the open atmosphere that exists within the groups; the readiness of the participants to learn from one another; their ability to present difficulties and to conduct a conversation in a supportive and mutually respectful atmosphere; and their need for moral support. Notably, the nature of the discussion within the groups also affected how discussions were subsequently held in other settings - including in their courtrooms.

Peer group consultation and the concept of the court system as a learning community are innovative ideas in the judicial training field. In Part II, we review the current trends in the field, what the PGC method has in common with other approaches, and what is new about it.

Part II: Placing PGC in relation to current trends in judicial training

Continuing judicial training (CJT) is a comparatively new phenomenon. In continental Europe, the first judicial training schools were established in the 1950s and 60s (Pacurari, Hirvonen & Hornung, 2015; Ronsin, 2015) - while in most common-law countries CJT arose only in the 1990s (Armitage, 2015).

Despite initial resistance among judges to the idea of continuing judicial training (CJT) when it was first proposed, in recent years there appears to be a broad consensus that it offers potential benefits for judges, such as greater professionalization - improved quality of judgment; helping judges to keep abreast of developments; prevention and correction of judgment errors; and lower judicial costs - and greater accountability to the public at large (Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015; Dawson, 2015; Ronsin, 2015).

The main arguments against judicial training have been that it may result in an indoctrination of judges, thereby compromising their judicial independence. However, it may be possible to safeguard against such risks by observing certain key principles—such as voluntary participation; allowing judges to lead the program in an autonomous fashion; individualized learning based on the learners' preferences; and the use of facilitation rather than authoritative instruction methods (Armitage, 2015).

Some experts have argued that, despite the significant progress that has been made in the field of continuing judicial training (CJT), and despite the remarkable congruence in the training principles formulated independently in various countries, an overall and common international policy is still lacking (Ronsin, 2015; Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015).

Armitage (2015) surveys the various views held on the subject, and proposes a

policy that is founded, on the one hand, on the latest developments in the field of CJT, and on the other hand, on judicial culture and on the particular learning characteristics of judges (for more on current training methods involved in CJT, see Pacurari, Hirvonen & Hornung, 2015; Dawson, 2015; Ronsin, 2015). In his view, the three principal pillars of this policy are as follows:

The learning process must be voluntary, independent, and judge-led - According to Armitage (2015), studies have shown that judges are driven by a desire to be as professional as possible, and are accustomed to learning independently rather than being taught. Therefore, a learning process based on facilitated self-direction is preferable to authoritarian lecturing

The training must address the issue of “professional artistry”⁷¹ - Judicial training must explore the realms beyond conventional judicial knowledge. The judicial craft, as he sees it, is a complex intellectual process of problem resolution that is resistant to procedural answers and predefined outcomes. In a sense, the judicial process is more about *problem setting* than *problem solving*. Judicial training must therefore develop what he calls the “professional artistry” of judging - that is, the expertise and professional excellence beyond the purely technical skills involved. Accordingly, the learning process must focus on critical reflection and reinterpretation of the learners’ experience, while applying it to the problems that they encounter on a daily basis. It is a process in which introspection plays a key part, with the aim of developing the faculty of self criticism

Individualized learning - Judges prefer learning that they regard as relevant and immediately applicable to the problems they encounter on a daily basis. The form of learning described in the previous paragraph is well suited to this learning culture. However, for the learning to be relevant to problems and issues encountered by the learner on a daily basis, he or she must define, jointly with the instructor, the subject matter and learning methods. In other words, traditional instruction must be replaced by a more facilitative approach.

The arguments put forward in the present article are consistent with most of the premises set out by Armitage (2015) with regard to the nature of judicial knowledge and to the learning culture of judges (see also Pacurari, Hirvonen & Hornung, 2015; Dawson, 2015; Ronsin, 2015).

In addition, the method put forward in this article is also very much in line

⁷¹ As previously noted, the term *judicial artistry* was first suggested by Cervero in light of Schon’s concept of *professional artistry* (Armitage, 2015). Armitage himself has adopted the term (Armitage, 2015; p. 157). Dawson (2015) characterizes this type of knowledge as *judicial art and craft*. Part IV of this paper presents the theoretical basis of the concept of *judicial artistry*, placing it within a theoretical framework of interconnected concepts representing a state of the art notion of professional training.

with the principles that Armitage proposes as the basis of a comprehensive policy of continuing judicial training - namely, that learning must be focused on the “professional artistry” of judging, and that it must be voluntary, independent, judge-led, and individualized.

To this, however, we propose adding a group-based element. We base this on new developments in professional development theory and practice (see, for example, Senge, 1990; Argyris & Schon, 1996/1978; Lave & Wegner, 1991), and on the cumulative experience of peer group consultation at the magistrates’ courts of Israel’s Central District. These underline the importance of training in local groups, of the learning community context, and of the continued ongoing basis of group learning for professional development (see, for example, Argyris & Schon, 1996/1978; Lave & Wegner, 1991). The experience of the magistrates’ court system of Israel’s Central District demonstrates its applicability to the judicial context.

Although Armitage (2015) recognizes the importance of group-based learning, he argues that it is of limited effectiveness, due to the nature of judges’ learning culture, which tends toward individual learning. For this reason, he argues, group-based learning cannot serve as a general training strategy.

We agree with Armitage that peer group consultation represents a profound cultural shift, as it involves learning with one’s peers in an organic group - that is, a team of judges working in the same field, at the same workplace, who meet on a regular and continuing basis in parallel with their own daily work, such that learning becomes an integral part of the ongoing work. Nonetheless, we argue that:

PGC provides a worthy and comprehensive answer to the principles Armitage recommends – namely, it deals with real-world and current issues; it accompanies ongoing professional practice; it is founded on critical reflection; and allows each judge to raise case studies for discussion at a time and in a manner that suits them. The learning agenda - in terms of the topics of discussion as well as the learning method - is determined by the individual and the group, and is also influenced and guided (depending on participants’ consent) by the policy set out by the President and the vice-presidents, and in accordance with the courts’ identified learning requirements.

For the type of judicial knowledge that Armitage discusses (professional artistry, the complex intellectual process, etc.), the group-based approach to learning does in fact offer fundamental added value (Argyris & Schon, 1996/1978; Lave & Wegner, 1991; Senge, 1990).

The fundamental added value of peer group consultation justifies the effort required in bringing about the profound cultural shift that it entails. In Part V below, we briefly describe the general, cultural shift that has taken place in

the magistrates' courts of Israel's Central District in order to enable the implementation of the PGC method.

In conclusion, it is important to note that PGC offers additional values besides the development of professional artistry: it provides mutual moral support at the workplace itself and helps to foster a system-wide sense of solidarity and belonging; allows organizational and group-related codes of conduct to be explored and established in a participative manner; and enables work processes to be streamlined - not only at the individual level, but at the court level as well.

Part III: Judicial expertise and know-how as a unique form of knowledge

Judicial knowledge falls in two main types: legal knowledge that is common to all legal practitioners, and what might be called *judicial artistry*⁷² which is unique to the judicial role, and includes judicial skills, social context, and "being a judge" (see Dawson, 2015; Ronsin, 2015; Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015). While legal knowledge entails a thorough command of the law, existing rulings, etc., judicial artistry involves knowledge of how trials are conducted and decided: identifying the essence of the conflict to be resolved; understanding the interpersonal relationships within the court and outside it; the processes and social contexts relevant to the conflict; the dynamics of the trial conduct of the litigant parties; identifying the obstacles and areas of difficulty, and creating effective solutions for removing them; distinguishing between what is important and what is not; and taking into account the various considerations relevant to the ruling - while strictly separating one's own personal feelings and opinions from one's duty to apply objective judgement, etc. Amidst all this, the judge must also know how to manage a courtroom; keep a timetable of proceedings; manage a hearing; multitask and prioritize; resolve unexpected problems; bring the two parties to agreement whenever possible; etc.

Judges in Israel are appointed after assessment of their legal training and prior professional track record. They will have acquired their legal knowledge at universities, from the literature and from their previous work. In the course of their judicial career they will also keep abreast of innovations and updates by studying previous rulings and the professional literature, and by attending courses at the Institute of Advanced Judicial Studies (IAJS) and elsewhere,

⁷² On the term *judicial artistry* see footnotes 2 and 3. For theoretical clarification and for the linkage to PGC, see part IV in this paper.

thereby maintaining and furthering their knowledge of the legal field. While this knowledge is the core of a judge's work and is undoubtedly of the utmost importance, it is not enough, in and of itself, to ensure optimal professional judicial performance, which requires the skills of judicial artistry, as well.

Unlike the extensive corpus of writing about legal knowledge in general, the literature on judicial artistry⁷³, is comparatively new (Armitage, 2015; Dawson, 2015; Ronsin, 2015; see also the IAJS's courses, 2016). This "know-how" type of knowledge or practical skills is derived primarily not from books or formal legal training, but rather from judicial experience.

In the professional development literature, such knowledge is variably referred to as *tacit knowledge*, *knowledge in practice*, or *knowledge in action* (Schon, 1983; Planyi, 1967; for application of the idea to the judicial context, see Cervero, Azzaretto & Tallman, 1990).

Unlike traditional legal knowledge training approaches, which are well-established and developed, the field of tacit knowledge and effective methods of its acquisition have emerged only in recent years (Armitage, 2015; Dawson, 2015; Ronsin, 2015).

Today it is generally agreed that such training should be modeled on the proven principles of adult education (Dawson, 2015; Ronsin, 2015; Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015). Thus, it is now understood that it is no longer enough to use frontal instruction, and that the learning is significantly more effective when workshop training tools - such as case studies, experiential learning and role play simulations - are used (see changes introduced by the IAJS in Israel, JAIS, 2016; and the adoption of adult education learning approaches at various institutes throughout the world - Dawson, 2015; Ronsin, 2015; Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015).

Nonetheless, the theory of judicial artistry development is still far from making optimal use of the most advanced theories of professional development. Innovative approaches such as community of practice and community of learning (Senge, 1990; Argyris & Schon, 1996/1978; Lave & Wenger, 1991) which were developed for the acquisition of professional knowledge, have yet to find their way into the judicial training institutes throughout the world, and are still absent in the judicial training literature (see, for example, the 2015/3 issue of the journal of The International Organization for Judicial Training).

The PGC method of training is based on these latest developments in professional training and on the experience gained from its successful application in Israel's Central District courts in the past few years, which indicates that it has considerable potential and is particularly well suited for judicial training.

73 On the term *judicial artistry* see footnotes 2 and 3. For theoretical clarification and for the linkage to PGC, see part IV in this paper.

To illustrate the benefits of these approaches, it is worth first reviewing the essential features of judicial artistry.

Judicial artistry: judicial skills

In recent years, considerable effort has been invested by the directors (presidents and vice-presidents) of Israel's magistrates' courts in analyzing and identifying the necessary skills that judges need in their work (see, for example, Hadassi-Herman, 2015; Vice-presidents, Central District, 2011). This has been done in parallel with the development of workshops on skills such as writing legal rulings and court proceedings management, at the Institute of Advanced Judicial Studies (see the IAJS list of judicial training courses, 2016).

The experience of presidents and vice-presidents in managing judges, in allocating cases to judges, in hearing them and managing their oversight, contributed to the formation of a list of judicial skills. These include:

Effective case management - how to quickly familiarize oneself with the important procedures and details of each case, and the various interests involved; how to explore ways of bringing the sides to a settlement; and how to spot creative and quick resolutions of conflicts.

Procedural management skills - When is it right and appropriate to prescribe another pre-trial meeting, with a view to progressing the case or settlement? When is it right and proper to go directly to evidence hearing? When should one hear principal witness statements - and when should one not? When should one hear verbal summations? When (and if) one should accede to motions for deferments in presenting written summations?

Managing major cases - needs analysis; expected duration of proceedings; examination times; witness appearances and summation dates in coordination with counsels - all while maintaining shared logs, managing exhibits, etc.

Multi-sided cases - courtroom management techniques; organizing and efficient hearing of sides; curbing the number of examiners; reducing time spent on examination, etc.

Task management and successful completion - when and how to work on task lists; when to write interim decisions in various cases; which decision should be delivered before the hearing and which should be postponed to the first, or final, hearing; when is the right time to do what - e.g., when to start writing the ruling on a case where verbal summations have just ended, and when to write the case that has been waiting in a box for several weeks; how to manage large cases concurrently with other tasks.

Agenda and timetable management - the appropriate number, mix, and or-

der of hearings in a given day; the appropriate ratio of pre-trial hearings and evidence hearings; best methods of setting aside court scheduling days; allocating appropriate durations for each hearing; establishing a weekly timetable (allocating days to various types of rulings, leaving adequate time for decision writing, etc.)

Effective courtroom management - in view of the number of hearings and tasks involved, in a manner that is at once respectful, gives adequate time for fair hearing by all parties, and makes optimal use of courtroom time; when to summon the litigant parties; when to add or summon additional parties to the hearing, etc.

Dealing with litigants in general, and legal counsel in particular - how to be assertive and maintain boundaries in hearings, and arguments; how to protect the dignity of the court, etc.

Handling exceptional incidents - such as serious disruptions, complaints, media, etc.

Managing chamber staff - appropriate division of labor; how and when to make use of a legal assistant, an intern, or court clerk.

Conduct with other judges - collegial relations - e.g., how to transfer a case to another judicial panel and in what circumstances; issues of joint responsibility; mutual backing; changing past decisions; responsibility for old cases that had been heard by another judge; and resolving old issues, even if they had started under another judge.

Conduct with court staff and external bodies.

Procedural norms - avoiding tardiness and deferments; complying with protocols with regard to timely writing, absences, attending courses, etc.

Judicial artistry: proactive judging

The skills listed above are particularly important with regard to the proactive judging approach. This approach is now the official policy of the Israeli legal system (see Israeli court system's strategic plan, July 2014).

The proactive judging approach is founded on the notion that the judge must control the court proceedings, and assume responsibility for timely resolution of cases brought before him. This is different from the classic, adversarial approach in countries of the common-law tradition (including Israel), whereby the judge is charged only with ensuring that the proceedings are fair and conducted in the proper manner, and responsibility for the pace of the legal proceedings and trial lies with the litigating parties.

The proactive judging approach is very different from the adversarial approach, and is therefore unnatural for the conventionally-trained judge in the common law tradition. It requires the judge to intervene proactively in the planning and conduct of the judicial proceedings, through a purposeful, practical, and expeditious style that helps to bring about their timely and efficient conclusion. This approach has significant implications for how a judge manages the judicial agenda, court proceedings, etc.

The transition to proactive judging is, thus, a cultural shift, requiring judges to change their basic assumptions, thinking habits and practice, and to develop relevant new skills. Such changes in judicial practice are more effectively brought about through peer group consultation than by any other training or development method. The next section describes the reasons why this is so, as well as why PGC is most suited for the development of judicial expertise and know-how.

Part IV: The theoretical basis of the peer group consultation approach

The peer group consultation approach is based on an extensive philosophical, theoretical, and practical tradition concerning three interrelated issues: 1) the unique nature of professional knowledge; 2) the appropriate ways for it to be developed and disseminated; and 3) how should one go about building a comprehensive system-wide program for professional training . The primary theoretical arguments concerning these issues are as follows:

The essence of professional knowledge

One of the most important concepts to understanding the nature of professional knowledge is that of *tacit knowledge*, which was coined by Michael Polanyi, a professor of physical chemistry and social sciences who is considered one of the leading thinkers in the field of the philosophy of knowledge and science (Polanyi, 1967). Polanyi argued that tacit knowledge is the most important element of scientific thinking. He criticized the conventional positivistic scientific approach, which maintained that it is possible to create knowledge in a mechanistic, objective, and detached manner, and argued that all knowledge claims made by scientists are based on personal judgments and personal commitments. We are all connected to reality through a certain form of a broad and hidden consciousness - be it intuitions, orientation within the social environment, value commitments, basic premises - that we take for granted. This knowledge is tacit - not because it is hidden, but because it is

taken for granted, to the point where we no longer think of it.

This understanding of the essence of knowledge lay the groundwork for learning theories of many thinkers and researchers apart from Polanyi - including Charles Pierce, John Dewey, Kurt Lewin, David Kolb, Chris Argyris, and Donald Schon (Shields, 2003; Shapiro, 2010; Schon, 1983; Kolb, 1975; Wallace, 2007).

It was Schon (1983) who translated these ideas to the field of professional development. He argued that in the course of professional experience, the professional, spontaneously and unconsciously, develops a repertoire of tacit knowledge - that is, professional knowledge that is not conceptualized or coded in words. He called this *knowledge in action* - as it is directly related to the professionals' daily activity, arises from it, and influences it in return. According to Schon, this professional repertoire - which we often refer to as "personal experience" - is profound, rich, and largely determines how we make professional judgments and take professional decisions (Schon, 1983).

In recent years, two learning-anthropology researchers (Lave & Wegner, 1991) extended the concept of tacit knowledge to encompass not only the personal aspect, but the social aspect of knowledge, as well. Knowledge, they argue, is essentially the product of the social and physical context in which it is created—and therefore learning is a dynamic social process of knowledge creation. They called this approach *situated learning*.

The relevance of these assertions to the nature of judicial knowledge has been highlighted by Cervero, Azzaretto and Tallman (1990). In their view, the important form of knowledge involved in judicial development is *practical know-how* - namely, examples, metaphors, images, practical principles, scenarios, and rules of thumb that judges accrue in the course of their work. This knowledge has less to do with *problem-solving* than with *problem setting*. In other words, as Cervero, Azzaretto and Tallman (1990) point out, tacit knowledge is precisely the kind of knowledge that characterizes judicial professional expertise (see also Armitage, 2015; Pacurari, Hirvonen & Hornung, 2015; Dawson, 2015; Ronsin, 2015).

This begs the question: **If tacit knowledge forms such a fundamental component of professional knowledge, and if this knowledge is inherent and integral to its physical and social context, how can it be surfaced, articulated and disseminated?**

Schon's answer to this question is based on the notion of reflective practice. He studied the learning processes of professionals such as architects, and tried to establish how they create and pass on knowledge. His conclusion was that there is only one

way of obtaining this knowledge, and that is by establishing processes of reflection - whereby the professional himself examines his own work, and thereby derives the professional repertoire that has accrued within it (Schon, 1983).

Further support for this approach was given by Kolb (Kolb & Fry, 1975), who saw the processing and transforming of a professional's accumulated experience as the basis of professional development. He suggested that learning be founded directly on experience, and developed accordingly a learning method called experiential learning, consisting of recurring circles of experiencing, observing, and conceptualizing.

We learn more about the nature of reflection from the writings of the physicist and philosopher David Bohm, who defined dialogue as a process in which people share with others their basic premises, pictures and images, while suspending their professional beliefs and questioning what appears to them to be obvious (Bohm, 2004). In other words, in Bohm's view, reflection is a process of dialogic discourse.

Schon's notion of reflective practice was mostly congruent with a broader trend in the field of social psychology and management theory. That trend brought together the worlds of research and action developing research method like Lewin's action research approach (1946), and Argyris's action science (Argyris, Putnam & Smith, 1985). In addition, Mintzberg (2009) argued that management knowledge resides "within" managers, and that the only way to develop effective management theories is to extract this knowledge through reflection with the managers about their own experience. Academia, therefore, must focus its research efforts on developing methods of reflection with managers, rather than on traditional positivistic research methods.

The reflective practice approach has brought about the production of considerable theoretical and practical knowledge about reflective processes. This includes the development of various tools for developing abilities of observation, listening, feedback, and inquiry—including Bohm's dialogic discourse (Bohm, 2004), Kolb's experiential learning model (Kolb & Fry, 1975), and Scharmer's Theory U (Scharmer, 2009).

With regard to judicial training and development. Cervero, Azzaretto and Tallman (1990) embraced the *reflective practitioner* approach. They argued that *reflection in practice* is the best form of judicial training, making it possible to observe, process, and critically examine the judicial knowledge. However, their approach is individualistic, ignoring the issues of *on site group learning* and *learning communities in the field* (for more on this topic, see Armitage, 2015; Pacurari, Hirvonen and Hornung, 2015; Dawson, 2015; Ronsin, 2015).

Comprehensive, organization-wide professional training systems

As we have seen, numerous scholars and researchers created an infrastructure for professional development by redefining the notion of professional knowledge and by introducing, corresponding new methods for its acquisition. **However, what about organization-wide training systems? What does the corpus of knowledge regarding organizational development⁷⁴ have to say about the formation of comprehensive, organization-wide systems for professional development?**

The conceptual infrastructure described above is an integral part of organizational development theory — namely, that professional knowledge is *knowledge in action, tacit and situated*, and that it is acquired through *processes of reflection* by the professionals themselves (for review, see Cummings & Worley, 2005). Added to this basic premises are three principal assertions:

Although individual learning is a key part of learning, studies show that learning in small groups makes it significantly more effective (O'Keeffe, 2002; Gokhale, 1995; Lee, 2014; Senge, 1990; Argyris, 1999);

The closer the learning is to the field and to the context of the professional's daily work, the more effective it is (Cullen, Hadjivassiliou, Hamilton, Kelleher, Sommerlad & Stern, 2002; Lave & Wegner, 1991; Ericsson & Smith, 1991; Greeno, Smith & Moore, in press);

For the learning to be effective, it must be part of the organizational system as a whole, that is: learning must be a key value in the organization, it must be held in the field on a regular basis, embedded in the routine organizational frameworks and schedules, and supported by the organization's leadership (Nonaka & Konno, 1998; Senge, 1990; Schein, 1985).

Learning as a group-based and a community-based process

Among the first to point out that learning is a group-based and a community-based process were the philosopher and educator John Dewey (see Wallace, 2007) and social psychologist Kurt Lewin (Lewin, 1947). Over the years, group-based learning in experiential workshops became commonplace. In addition, it has been increasingly argued that to be effective, learning must be carried out at the workplace, within a group of one's peers who are engaged in the same daily endeavor scrutinizing together their common work practices (Senge, 1990; Argyris & Schon, 1978).

The 1980s brought further momentum to the field, when the discipline of quality engineering showed that workers at the lower ranks have a fount of

74 Organization Development (OD) is a discipline that studies organizations and management in order to build theories and methods for their development (see Cummings & Worley, 2005)

vital knowledge, and that the best way to improve processes is by having the workers themselves examine their own work practices (Deming, 2000). A further development in the field was made by Lave and Wenger (1991), two learning-anthropologists, who showed that the production of knowledge is rooted in a particular social and organizational context, and therefore learning is essentially a social and community-oriented process. They coined the term *community of practice*, and argued that learning must be carried out in the context of the community in which it is to be implemented (Lave & Wenger, 1991).

Roth and Lee (2006) pointed out that the *community of practice* approach has been widely adopted since the 1990s, both in academia and in the professional field. There is now broad agreement that knowledge and professionalism are cultural practices that are applied by practitioners in communities at the workplace.

This approach has given rise to the idea that shared reflection of judges on their own work, in their organic local peer group and within an established framework of meetings held on a regular basis, can contribute considerably to the development of their own judicial knowledge and expertise.

The organizational-institutional dimension: the organization as a learning community

The learning approaches described above have been expanded into comprehensive organization-wide systemic approaches in the work of prominent scholars in the field of organizational development (Nonaka & Konno, 1998; Senge, 1990; Schein, 1985; Argyris & Schon, 1978). Approaching this issue from different directions, they have all reached the conclusion that learning pertains to the overall organizational context. For this reason, they agree that it is not enough to deal with *tacit knowledge*, or to incorporate *reflection in action* processes, nor is it enough to construct *local, on-the-job, on site learning groups* - but rather the entire organization must be transformed into becoming a learning community. For such learning to become an integral part of the daily lifestyle, it must become an organizational value, supported by a range of organizational mechanisms, and led by the organization's leadership. Thus, for example, Senge (1990) argues that organizations must maintain continuous learning processes involving all members of the organization, and that the main role of the organization's leadership is to create conditions that enable the organization's members to maintain processes of collective learning, thereby collectively shape the organization's character.

The development of computerized information systems and the dramatic rise

in the pace of knowledge growth have, in turn, resulted in the rise of theories of *knowledge management* and *knowledge development* within organizations. One of the leading researchers in this field is Nonaka (Nonaka & Konno, 1998). Nonaka's model underlines the pivotal role of tacit knowledge, and the social and institutional aspect of its production, dissemination, and institutionalization within an organization. His unique contribution has been the introduction of the Japanese concept *ba*. This was developed by the founder of modern Japanese philosophy, Kitaro Nishida (Rivadavia & Chun Wei Choo, 2010), and might be loosely translated as the "*enabling context of conceptual development*". According to the *ba* approach, knowledge is dynamic, fluid, tacit as well as overt, socially integrated, embedded in the individual and in the group, and circumscribed by individual and organizational barriers. The production of knowledge is therefore a delicate organizational process, and to maintain it requires *ba* - namely, a dynamic space where people may share knowledge, interpret it together, and produce new meanings through the interactions between them. *Ba*, therefore, is a concept based on collective creation of meanings, rather than technocratic management processes, and the main role of the leadership of such an organization is to provide the context and conditions that enable these open and dynamic learning spaces to exist (Rivadavia & Chun Wei Choo, 2010).

With regard to the organizational or institutional aspect of judicial training, our experience in Israel's Central District was, that indeed - as predicted by the above theoretical arguments - a wide range of actions was required at the District organizational level, to enable the development of peer consultation groups. In Part V, we present this experience with regard both to the District system as a whole, and to the peer consultation groups in particular.

Part V: Judicial training through peer consultation groups and organizing a district as a learning community: the experience of the magistrates' courts of Israel's Central District

The establishment of peer consultation groups within the magistrates' courts of Israel's Central District was the culmination of a comprehensive process in which the district's judges and courts were organized as a learning community (Baltman-Kadrai, 2012). We start this section by addressing the overall systemic transformation process, followed by a discussion of the specific issue of peer consultation groups. The subsections are as follows:

The system level - the elements of systemic change at the Central District's

magistrates' courts

The group level - peer consultation groups

The issues studied by the peer consultation groups

The outcomes of the work in the groups as reported by the vice-presidents and the judges

The requisite conditions for establishing and developing peer consultation groups.

The use of Organizational Development (OD) consultatns

5.1: The system level: the elements of systemic change

The systemic change at Israel's Central District was made possible thanks to a general process of reform of Israel's entire judicial system ("the Quiet Revolution") that was initiated by the then President of the Supreme Court, Chief Justice Beinish, and the then Director of the Law Courts, Judge Gal (see *President's Address: The Management Approach of the Judicial System*, 2012). The systemic changes introduced in the magistrates' courts of the Central District comprised the following elements:

Development of a district directorship, led by the president and the vice-presidents (judges who manage the district courts), including the creation of a permanent and ongoing framework for directors meetings.

Directors training and empowerment - including an annual course in leadership and group facilitation

Definition of key organizational values, by the directorship in collaboration with the judges - including joint formulation of standards and codes of conduct

Creation and reorganization of a range of key work processes - including changes to how civil cases are decided; revamping the management of arraignment sessions in criminal cases; establishing professional forums; initiation of new judges; duty rosters; transition to a weekly day of writing; establishing professional departments, etc.

Reorganization of courts' oversight: dismantling the previous district oversight apparatus and rearranging and reassigning it to the vice-presidents

Instilling a learning community culture through community-based conferences facilitated by the vice-presidents – with the assistance of an organizational consultant

Establishing peer consultation groups in the courts and departments, as well as professional district forums

Developing a community-based, systematic and extensive initiation process for new judges

Reorganization of the courts in the district, with designated professional departments (arrests, small claims, transportation) and streamlined processes in many areas.

5.2 The group level - peer consultation groups

5.2.1 What does one learn in peer consultation groups?

As previously noted, the purpose of peer consultation groups meetings is to train the judges in judicial artistry, that is, judicial know-how and expertise or what Dawson (2015) calls ‘judicial art and craft’. Some of the meetings are devoted to preplanned topics or work experiences, prepared by group members or by the facilitating judge, and some are devoted to ongoing experiences from daily work that are raised by group members on a spontaneous basis. Issues that arise cover a wide range of subjects, from among those reviewed in Part III above, or derived thereof - such as how to handle various types of deferrals motions; problems in managing court sessions in various types of court procedures; unusual incidents in the courtroom; special motions involving procedural dilemmas; intervening in instances of inappropriate conduct by legal counsel; appropriate responses; relevant reasoning when tackling various dilemmas; enhanced awareness of one’s personal conduct as a judge; better understanding of what happens and what is heard in the courtroom; improved understanding of judicial decision-making processes; how to avoid common errors; and exposure to a range of best-practice methods.

The group participants analyze the incidents together, express opinions, and derive personal and collective insights from what is discussed.

5.2.2 Outcomes of work in peer consultation groups

Judges, court registrars and vice-presidents have reported a range of outcomes from the consultation group work. The first and most important of these is the learning that they acquired that is pertinent to their professional work, either immediately or after a time. Some of the spontaneous responses of judges who have taken part are cited in Part I of this article. Vice-presidents have also reported various practice-related learning outcomes. They report judges adopting best-practice solutions in many areas, and improving their ability in identifying, defining, and handling dilemmas. These include issues of proactive judging; minimizing court session deferments; encouraging settlements in cases; handling incidents of double-booked court sessions; streamlining procedures; dilemmas involved in dealing with belligerent or disrespectful behavior in the courtroom; when should judges recuse themselves from a case; etc.

Another outcome is identifying trends in courtroom practice - such as case transfers within the district by legal counsel due to variability in police prosecution policy across jurisdictions, or discrepancies in professional fee rulings.

Many of the reports highlight very significant outcomes beyond direct learning. For example, group participation has brought judges closer by allowing them to get to know each other better. Learning groups have also been found to be support groups, and an active method of relieving work loneliness and countering burnout tendencies. The groups have been found to relieve emotional burdens by allowing their members to share and air their thoughts, as well as providing judges a means of displaying their professional expertise, thus empowering them as professionals. Group facilitators, received personal reinforcement through their success in promoting professional dialogic discourse among colleagues.

Of particular note is the bonding that occurs within local groups of judges, and their joint formation and agreement of rules of group etiquette - including joint responsibility, mutual support, etc. In some instances, the group bonding and the training of the vice-presidents in facilitating team sessions have made it possible to raise sensitive issues about collegial relations, to discuss them openly, resolve them, and formulate agreed rules of conduct and practice accordingly. The groups have also made it possible to formulate agreed codes of work ethics with regard to the appropriate start time of court sessions, attendance time in court, dates for delivering decisions, etc. In addition, the group bonding has resulted in the formation of team spirit, has enhanced the participants' sense of belonging to the judicial system as a whole, and the judges' sense of satisfaction with their working environment.

5.2.3 Necessary conditions for the success of peer consultation groups

The group work is founded on the premise that everyone can learn something from everyone, and that the knowledge that anyone has acquired through experience is valuable to everyone else. Thus, each of the participants is able to hear about and learn from various solutions found by others for problems that they may be grappling with, to examine their own acquired assumptions and habits, and to compare them with those of others.

The effective learning takes place through joint examination of professional incidents, be they successes or difficulties, aiming to achieve improvement through identification of reasons for success, or causes for difficulties.

For all of this to happen, the following preconditions must be in place:

An atmosphere of mutual respect - Learning, as we have said, is a mutual process, and the members of the group must respect each other

An atmosphere of openness - Members must be willing to share their doubts, dilemmas and learning needs; to share success stories and receive comments; to admit to difficulties before the group; to learn from other participants; and to receive feedback from the group about their work practices

Complete trust between members of the group - The participants are more likely to give frank accounts, with full details of each relevant incident, and to participate fully if they know that what they say is kept in strict confidence within the group, and used only to benefit the mutual learning process. The consultation process works when the participants have complete trust in each other and in the confidentiality of the discussions

Non-judgmental attitude - The group encourages the participants to be fully forthcoming in sharing their thoughts and experiences for the purposes of joint learning, without criticism or “grading” by others. Comments about other members’ contributions in the group are made only out of a sense of solidarity and for the benefit of the shared learning process. All comments are considered important and contributing to the discussion, all opinions carry weight and are deemed legitimate. Criticism, where applicable, must always be related to the topic at hand, never about the person, and expressed on the assumption that all participants are respectable and worthy individuals

Businesslike attitude - The peer consultation group is expected to examine its own work processes. Given that peer group consultation is a new and unfamiliar form of discourse, there is always a tendency in the group to revert to what is familiar and comfortable - such as discussing purely administrative matters, or legal issues without reference to work practices, or simply treating the meeting as a social occasion. Effective learning does not occur if the group strays from its principal mission – it being that participants examine together

their own working practices

Putting the meetings and the group on a regular footing - Features such as trust, openness, security, the ability to share experiences and examine them together do not appear overnight, but emerge over time in the course of a continuous process. This process cannot occur if there is no established framework of meetings held on a regular basis - preferably once every two weeks - at mutually agreed times. Since establishing such groups involves a significant organizational change, it is important to institute such meetings at the organizational level - including appropriate oversight of the professional development and implementation by the vice-presidents

Holding meetings at the workplace and immediately after working hours

- To maximize participation, the meetings must be held at convenient times, at the workplace, during the workday or immediately afterwards

Allocating sufficient time for discussion - To ensure that the group can give due attention to a given personal experience, it must have: time to "warm up", a period of time without disturbances in which to describe the experience without interruptions and at a pace to suit the speaker, time for consideration and examination, time for comments, and time for closure of the discussion by the presenter of the experience. To ensure that this process takes place in an unhurried fashion and to fully unfold, and to give each judge his or her "turn at the pulpit," it is important to allow an hour or an hour and a half on each occasion

Facilitated discourse - Each discussion requires a facilitator. Peer group consultation is a form of discourse that requires suitable facilitation in order to: foster an atmosphere of openness, security, and mutual trust; enable all participants to express themselves and to give a full account of experiences; allow for due consideration and examination; steer the learning process; keep the discussion on point; enable the drawing of lessons from each experience; and summarize what has been learned in the group. Each of these requires a suitable facilitative skill. For this reason, it is important that the discussion is conducted by a senior judge who has the confidence of his or her colleagues. It is important that the facilitator undergo training in facilitating learning groups of this sort. A rotating roster of suitably trained facilitators who have attended several meetings and are familiar with the group's working style is one possible option. It is also recommended that the group is initially facilitated by a vice-president who is in charge of the hosting court. In addition, the vice-president's facilitation is required whenever the group discussion involves issues of rules of conduct, standards and etiquette between colleagues.

5.3 The use of Organizational Development (OD) consultatns

Assitance of OD consultants was required on the systemic as well as on the group level. At the systemic level, OD consultants assisted in planning and implementing the organizational and cultural aspects of the transformation of courts into learning communities. At the group level, OD consultants helped in designing the work settings and in training PGC facilitators.

Clearly, peer group consultation is characterized by a special atmosphere that is different from the traditional judicial culture. These differences are explored in the next part.

Part VI: Peer consultation as a cultural change

An organizational culture consists of the tradition, internal etiquette, set of habits, thinking patterns, fundamental assumptions, and practices that characterize relations between the organization's members. The discourse that occurs within peer consultation groups is based on a different culture from that which traditionally characterizes the judicial system. This new culture may provide considerable benefit to the legal system, but it entails a cultural change. In this section we explore a number of differences between the traditional judicial culture and the culture required for peer consultation groups.

The traditional culture is founded on the following characteristics: a clear and unequivocal hierarchy; segregation and detachment, to preclude foreign influences; the lack of dialogic discourse (judges deliver their decision in writing); clear and mandatory rules with regard to methods of communication concerning a case currently in proceedings (including outright bans on certain types of communication); a sanctity of tradition; and a tendency to conservatism. Many of these characteristics were initially conceived to protect judicial independence.

Implementing and adopting the peer consultation approach requires awareness of the existing barriers in the traditional judicial culture - namely:

The archetypal judge is seen as "omniscient" - Judges' self-image, for functional reasons, is of one who knows everything that is required to conduct the trial, and who has no difficulties whatsoever with regard to any professional aspect of their work (judges know that they must remain current of legal developments throughout their careers, and they do so - but not necessarily with regard to aspects of judicial artistry). Nevertheless, learning in a peer consultation group environment requires one to accept the need for one's continuous professional development with regard to judicial practice, as well as a willing-

ness to acknowledge difficulties, and being open to learning

Judges are conditioned to be judgmental, in every situation - Judicial work is judgmental by nature. Therefore, a non-judgmental discourse, which is fundamental to establishing trust and openness in the group, represents a real challenge for some

Judges are accustomed to expressing themselves in writing - Traditionally, verbal discussion between judges is not regarded as a legitimate form of professional communication - in part because it may be seen as infringing upon their judicial independence or on traditional etiquette between judges of different ranks or seniority. Conversely, in peer consultation groups, open and free interpersonal dialogue is at the very heart of the group's work

Detachment - Judging requires detachment: by distancing themselves, judges protect themselves from emotional involvement in the case and preserve their objective view of the issue at hand. Taking part in a peer consultation group however, requires engagement and intimacy - "muscles" that judges are not accustomed to use

Hierarchical mindset - The society of judges is a highly stratified and hierarchically-minded one, with teaching or mentoring occurring only in one direction: a senior judge teaching a junior one. A group culture, in which everyone learns from everyone else, is quite different

Lecturing, not listening - Judges are accustomed to handing down decisions, rather than listening, and are more inclined to seek out opportunities to trumpet their successes than to listen to the needs of their colleagues, or identify with them. In a group, however, judges are required to listen to their fellow colleagues' concerns, to accommodate them and to assimilate what is happening within the group in a non-self-centered manner

With regard to managing the group - judges are accustomed to conducting discussions in their courtrooms, and consequently tend to want to take over the discussion or direct it in a direction that interests them. A peer consultation group, however, requires equitable participation by all, with the facilitator merely offering guidance - and conducting such a discussion between a group of "managers" is often challenging.

In summary, the successful learning outcomes of peer consultation groups demonstrate that it is possible to tackle these characteristic barriers of traditional judicial culture and bring about a cultural shift that enables effective learning, as we are proposing.

The conventional method used today in judicial training is based on centralized training institutions. Peer group consultation, on the other hand, is characterized by group or community learning in the field, on the job, and

on-site. How, then, can these two training frameworks be brought together under one roof? The answers to this are set out in Parts VII and VIII.

Part VII. The advantages of community learning in the field

Israel's Institute of Advanced Judicial Studies has undergone substantial changes in recent years. One of the most significant of these is the transition to a workshop-based format of experiential learning in small groups, analyzing real-world cases. In addition, efforts have been made to make the topics more relevant, and to move from learning pure legal issues to developing *judicial competencies* (see the IAJS's course syllabus, 2016).

The existence of a centralized judicial training body is vital to any legal system, with the peer consultation model providing an important complementary role. In this section, we list the advantages of learning in a peer consultation group in the field. In the following Part VIII, we describe the role that a central training institute may have in steering, facilitating, constructing, and supporting a systemwide network of peer consultation groups at the courts, and in integrating the community-based learning within the overall central training framework.

One of the traditional challenges with regard to training systems is that of shifting the learning from a central training context to the context of daily work - an issue known as the *transfer of learning problem* (Sharan & Brendan, 2005). Thus, Awoniyi, Griego and Morgan (2002) note that ***out of billions of dollars invested by businesses and industry in training, only about 10% produce the required results—that is to say, produce an actual transfer of knowledge, skills or behaviors from the training context to that of daily work.***

The main problem springs from the physical distancing between the training and the field, that is, the distancing from the socio-cultural context, from the local pace of work-life, and from the timing of the appearance of the challenges that interest the professionals. Thus, for example, those who attend these centralized training courses generally do not work together on a daily basis; the issues being discussed are unrelated to what they encounter on a daily basis; courses are planned in advance, so participants have far less say on the issues that they raise; the learning is separate from the implementation; there is no close follow-up or feedback loop between the learning and implementation, etc. (In the conventional methods used today, the syllabus planning is carried out by panels that include field representatives. This method is very important, and yet it does not resolve the fundamental problem that workshop attendees

are not consulted in formulating the content of the workshop they are to attend, and therefore its offerings are often not synchronized enough with the ongoing requirements of real world work).

The PGC method offers a solution to these problems. The advantages of peer group consultation and learning communities, as revealed in the course of the experience accrued in the Central District, are as follows:

Learning is carried out at the workplace - which means that it is easily accessible in terms of venue and working schedule

Learning takes place shortly after the dilemmas have arisen

Learning in naturally-formed group that meets on a regular basis and tackles challenges that members of the group have in common (such issues that arise in local courtrooms, certain socio-economic trends, the particular characteristics of the local legal counsel community, etc.) ensures that the learning is relevant, current, and timely in relation to the encountered difficulties

A group that meets on a regular basis makes for a more relaxed atmosphere and learning, and fosters a sense of camaraderie and trust, as well as continuous learning, and a gradual and persistent improvement process

As previously noted, a learning group can be very flexible about the learning agenda - adjusting it to suit the needs and expectations of the participating judges, thereby also enabling them to have a say in determining the training agenda

Learning in an intimate and naturally-formed group that is run by its own members, who have also taken part in determining the syllabus, contributes significantly to the members' motivation to participate and to their learning process

Learning in this way allows the group members to immediately transfer their learning insights from the group context to their daily work; to gain a first-hand experience of the insights' relevance and implementation, and the improvements they bring about; and provides an opportunity to share learning outcomes with the group colleagues

The collaborative atmosphere fosters discussions of the group's codes of conduct - which in turn help to clarify the members' mutual expectations, and makes it possible to forge internal procedures for tackling common tasks and challenges

The prolonged nature of the group process offers further substantial benefits - such as a common organizational repository of questions and answers, shared experiences and trial-and-error attempts brought up by the group members in the course of their training - all of which become part of the group's culture

and serves its members when needed. Continuity also enables group members to follow each other's development through time, and to share their successes and lessons in implementing ideas

The creation of natural learning groups of judges has significant advantages at the organizational level, as well, in that they offer a solution to the phenomenon of judicial loneliness, with all that that entails. Judges who previously were accustomed to having to grapple alone with the challenges of judging - which, over time, engenders a sense of severe loneliness and possibly even alienation - find the peer groups a source of moral support. Not surprisingly, participation in a learning group that enjoys an atmosphere of trust, openness, mutual respect, and shared learning, brings the participants together and fosters a sense of intimacy and friendship. The group thus provides an opportunity to air and share difficult professional and emotional experiences, which members no longer need to wrestle with on their own. As members of a professional group that is constantly striving for self-improvement, the judges feel personally empowered, and their sense of professional status is enhanced.

Part VIII: The leading role of a national judicial training center in the formation, maintenance and development of peer consultation groups

The present article focuses on the experience gained within Israel's Central District magistrates' courts. Nevertheless, system-wide PGC implementation on a national scale requires the leadership and guidance of a national judicial training center, which in turn entails an expansion of the latter's traditional mode of operation.

A preliminary description of the leading role and functions that such an institute would adopt to operate peer group consultation method throughout an entire court system, is as follows:

The Institute's primary role is to establish the values that govern the system and the institutional policy regarding peer group consultation, and to integrate the PGC system with the traditional training program in a complementary manner. In this, the involvement and guidance of the Supreme Court would play an important role (on the issue of the Supreme Court's involvement in shaping the principles of judicial training, see Ronsin, 2015).

To develop a fully-fledged peer group consultation model - including a development model; implementation model; needed skills; training model; frameworks; roles; processes; subjects; methods; etc.

To cultivate the PGC learning culture throughout the court system

To initiate and establish the PGC system in close collaboration with the courts' presidents

To train all leading position-holders at the courts - presidents, vice-presidents, etc. - in building and guiding the peer group consultation system.

To provide professional support—for example, through facilitation training courses for facilitator judges

To manage the system in terms of the allocation and management of resources

To establish procedures for assessing, monitoring, and studying the system's progression, and drawing lessons for improvement

To manage the knowledge produced within the groups - i.e., collate, distill, formulate, document, and disseminate it among the various groups

This view of the IAJS not only expands its role, but adds a new dimension to it. Currently, training institutions throughout the world function as executive bodies that develop and conduct training-related activities - courses, education, information systems. However, we perceive the Institute as having the additional function of developing learning communities in the field. In that respect, its role is not only to operate the training, but to devise policy, and to provide guidance and professional support.

Part IX: Peer consultation and protecting judicial independence

In section II of this article, we noted how continuing judicial training initially sparked concerns that institutionalized training of judges might compromise their independence. However, the experience of recent decades, in which institutions and methods for judicial training have sprung up around the world, has shown that, if anything, continuing judicial training strengthens judicial independence and the rule of law, and consequently it is no longer regarded as raising difficulties.

Peer group consultation involves continuous consultation with a group of fellow judges. The very notion of judges seeking consultation - be it with other judges or with other entities (and some would say, even with themselves - see Heshin, 2009) has raised concerns that it may harm judicial independence. However, the accepted view today - as confirmed in a recent Israeli court ruling (see Cr App 344/99 Bashan v State of Israel, ruling 53[2] 599; and Heshin, 2009) is that consultation between judges is legitimate, provided that

final discretion is left with the presiding judge, and that the advising judge had not previously been disqualified from hearing the case at hand.

It might still be argued that, in view of the powerful impact of group dynamics, the consultation and discussion in such groups might unduly influence and compromise a judge's final discretion. However, this risk, to the extent that it exists, can be addressed by establishing a number of regulated and clear rules regarding the permitted boundaries of discussion during peer group consultation. These would be established in a covenant that is binding upon the peer consultation groups' members, included in the training of facilitators, and scrutinized in organizational assessments and control. Such a covenant would include several basic principles, such as: exclusion of all decisions on pending cases; no naming of the litigant parties of current cases - only general descriptions; no discussion of issues concerning cases that one of the participants has been barred from presiding over; and no discussion of a matter that may be the subject of an appeal before one of the group's members.

Thus far, we have described the various aspects of peer group consultation, and have also examined the issue of learning communities and how it relates to current trends in judicial training. In conclusion, let us return to the broader context.

Conclusion: Peer consultation and learning communities in light of the challenges posed by the contemporary environment of judicial systems

In the years 2010 to 2015, a systemic and concerted effort was made in Israel's Central District magistrates' courts to turn them into learning communities. To this end, the formation and development of peer consultation groups played a central part, proving to be an effective method of judicial training, of enhancing judges' professionalism, and of bonding them as learning communities.

The bonding of judges as a learning community appears to be of particular significance, given the challenges posed by contemporary environment to judicial systems throughout the world (Armitage, 2015), and in the Israeli context, in particular.

The Israeli judicial system has witnessed dramatic changes in its social and institutional environment in recent decades. It now faces a number of environmental challenges, such as - deepening divisions within Israeli society that have caused some to question the system's legitimacy; tensions between the judiciary and the political system over judicial intervention; increasing invasi-

veness by the media and disappearance of the notion of *sub judice*; offensive discourse in social media; declining respect for authority in general and for state authorities in particular; and normative changes in the legal counsel population, undermining their role as true officers of the court.

One of the main consequences of these processes is the very significant increase in the range of pressures brought to bear upon judges, in addition to the loss of intimacy that used to characterize the system when it was smaller (following the expansion of the system in the face of the dramatic rise in the demand for its services). If left unchecked and unresolved, these trends may ultimately compromise the judges' sense of security and significance, and endanger their judicial independence.

Among the many efforts being made to deal with these challenges, the reorganization of courts as learning communities has a pivotal role. In particular, organizing judges into communities of practice (Lave & Wegner, 1991) is one of the most effective answers to this range of pressures. Within that framework, peer group consultation plays a central role.

It is our hope that the experience gained in the initiatives described in this article will be beneficial to the judicial public as a whole, and that this article will help in disseminating this approach and the lessons learned by it.

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7. Social context and diversity training in England and Wales. The equal treatment benchbook

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In February 2018, the Judicial College launched the latest update of its Equal Treatment Bench Book ('ETBB') for England and Wales.⁷⁷ The ETBB is written by and for judicial office holders - judges, magistrates, coroners and tribunal panel members. In this article, we use the word 'judges' to cover all those groups.

The ETBB is a reference manual for judges. Its purpose is to help judges ensure that everyone coming before a court is given a fair hearing. The ETBB does not set out legal requirements, but judges are encouraged to take its guidance into account wherever applicable and its use is heavily promoted.

As the introduction to the ETBB states, fair treatment is a fundamental principle embedded in the judicial oath. It is a vital judicial responsibility. To ensure equality before the law, judges must be free of prejudice and partiality and conduct themselves, in and out of court, so as to give no ground for doubting their ability and willingness to decide cases solely on their legal and factual merits.

It is not simply a question of avoiding prejudice and partiality. True equal treatment may not always mean treating everyone in the same way. Effective communication is an essential part of the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed. Effective communication requires an awareness of an individual's background, culture and special needs, and of the potential impact of those factors on the person's participation in the proceedings. It applies to witnesses, advocates, members of the court or tribunal staff and even members of the public who intervene when they should not.

The ETBB aims to increase judges' awareness and understanding of the different circumstances of people appearing in courts and tribunals. More than that, it gives practical guidance on how to communicate effectively and it suggests

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⁷⁷ There is a separate Equal Treatment Bench Book in Scotland.

possible adjustments to the process to enable full participation.

The existence of the ETBB is therefore a central tool for social context training. Judges can develop their understanding and awareness simply by reading it. In addition, it provides a focus for equality training.

History of ETBB

Judges in the UK are appointed from legal representatives, ie solicitors and barristers.⁷⁸ Until the establishment of the then Judicial Studies Board ('JSB') in 1979, it was not considered necessary to train judges. It was assumed that those appointed could easily transition from their role as legal representatives and would already possess all the necessary skills to carry out the judicial function.

The original JSB training courses dealt only with substantive law and procedure. At that time, no thought at all was given to judges needing to understand something of the social context for their work.

The precursor of the ETBB was produced in 1994 and related only to issues of race and religion. The idea was that this 'Handbook of Ethnic Minority Issues' should act as a resource for judges, nearly all of whom were then white men, to ensure they did not cause offence through ignorance or misunderstanding. An 'Ethnic Minority Advisory Committee' had been established three years previously to advise the JSB and to provide training materials.

In 1999, the Handbook was expanded to add chapters on gender, sexual orientation, disability, children and unrepresented parties, and it was renamed the 'Equal Treatment Bench Book'. At the same time, the 'Ethnic Minority Advisory Committee' was renamed the 'Equal Treatment Advisory Committee'.⁷⁹

The Judicial Studies Board later became the Judicial College. Under its auspices, the ETBB is updated broadly every 4 years. The most recent update was February 2018, when it transitioned from an essentially paper based manual to a fully interactive on-line resource.

The ETBB is now designed in a way which enables busy judges quickly to identify content they would find useful and access it in two or three clicks on the computer. The advantage of an on-line version is also that additional content can be added without overwhelming readers with too much paper. It

⁷⁸ We are not speaking at this point about lay Magistrates and non-legal tribunal members.

⁷⁹ This summary is taken from 'Equality and Diversity: Training the Judges' by Laura Cox QC, Chair of the Equal Treatment Advisory Committee 2003-2011. Publ: Equal Opportunities Review, 2011 or 2012.

is true that not all judges are yet comfortable with using on-line manuals. This has been addressed by detailed practical guidance on how to access the ETBB.

Over the years, the ETBB has been written and updated by committees selected from across the judiciary – criminal and civil judges, tribunal as well as court judges, coroners and magistrates. In addition, the review committee for the 2018 update was able to call on judges with special expertise in particular equality areas taken from a ‘panel of experts’ selected and maintained by the Judicial College. There was also extensive consultation with non-legal experts in the field.

Although it is written for judges, the ETBB has always been accessible to the public. The 2018 update is available as a pdf on the internet.⁸⁰ It is part of the ethos of the ETBB that judges are publicly accountable. It is also hoped that, at the same time, the ETBB will provide useful to professional representatives in their own interaction with clients from diverse backgrounds.

Current content - overview

The content of the 2018 edition of the ETBB falls into two categories: (1) information about various communities and disadvantaged groups and (2) practical advice on how people from such communities should be treated in court and enabled to give evidence and argue their case.

The ETBB is divided into these chapters: litigants-in-person and lay representatives; children, young people and vulnerable adults; physical disability; mental disability; capacity; modern slavery, gender, modern slavery; racism, cultural/ethnic difference, antisemitism and islamophobia; religion; sexual orientation; social exclusion and poverty; transgender people.

Although the chapters loosely follow characteristics which are protected by discrimination law (the Equality Act 2010), it is important to stress that the ETBB does not aim to set out what is legally required and is not restricted to those parameters. It is concerned with good practice across the spectrum.

The gender chapter covers topics such as caring obligations, domestic violence, sexual harassment, social media offences against women, and women in prison.

The racism and cultural/ethnic chapter includes sections on refugees and asylum seekers, Islamophobia, Anti-semitism, communication with people

⁸⁰ The latest version of the Equal Treatment Bench Book can be accessed by googling ‘Equal Treatment Bench Book 2018’. The current link is here: <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-v15.08.18.pdf>

speaking English as a second language, and treatment of black people in the criminal justice system.

The section on Islamophobia provides a good example of what the ETBB is trying to achieve. It reports key research findings in recent years regarding the attitudes of non-Muslim British people towards British Muslim people, and it also reports research into the perspective and experience of the latter. For instance, the ETBB reports that:

- Some Muslims feel Islamophobia has become an acceptable prejudice in Britain.
- 46% of Muslims feel that prejudice against Islam makes it difficult being Muslim in Britain. Young Muslims worry about being different and are unsure about whether getting on is compatible with their identity as Muslims.
- Polls of British attitudes suggest that terrorist attacks perpetrated in the name of Islam have created an increased hostility towards the religion itself and in turn, towards Muslim people.
- Those findings contrast with views expressed by Muslims themselves, which show a strong sense of loyalty and personal belonging to Britain. The overwhelming majority show positive orientations both towards their own ethnic culture and towards integration into British society

The purpose of this is to raise awareness of what it is like to be a British Muslim. That in turn raises questions as to what a British Muslim might feel attending a court where judge, representatives and jury might consist of few or no Muslim people. How much confidence will they have in a fair hearing? The ETBB gives some practical tips:

Extract from ETBB:

As in all cases, it is important to demonstrate respect for cultural difference. This includes:

- Taking trouble to get a person's name right.
- Showing understanding regarding correct practice on taking the oath.

- Showing awareness of fasting practice if the hearing takes place during Ramadan and making any necessary adjustments, eg offering additional breaks.
- Showing understanding of any issues regarding times when a Muslim person cannot attend court, eg because of an important holy day, or because they need time off or facilities to pray.

Not making any unnecessary objections regarding dress Code.

The ETBB has Appendices giving practical guidance on how traditional naming systems differ around the world and religious practices as relevant to court – oath taking, holy days, dress requirements. There is also a detailed glossary with over 60 different disabilities (mental and physical). In each case, the ETBB highlights some difficulties which people with that disability might have with the legal process and makes suggestions for helpful adjustments which a judge might think appropriate. For example, the entry on Autism Spectrum Disorder points out that an autistic person may have difficulties with sensory overload, anxiety, difficulty answering hypothetical questions, knowing when it is appropriate to speak and what language to use, and difficulty working out the chronology of events. Potential adjustments, depending on the difficulty, could include

- Allowing the person to choose where to sit
- Ensuring a clerk is available to guide the person around the court building
- Checking and adjusting light, temperature and sound
- Explaining the procedure in advance
- Giving precise instructions
- Watching out for signs of increased anxiety (raised voice, swearing, fidgeting).

Where relevant, each chapter gives guidance on acceptable terminology. Terminology changes all the time and it is important to keep up-to-date. Otherwise judges can appear out-of-touch, uninterested in equality or even worse, prejudiced.

Each chapter also has a references section linked to research reports and fur-

ther guidance for those who want to research further or find more details materials on which to design training around.

Promotion of the ETBB

The most recent update of the ETBB has been heavily promoted. There is no point in having such a resource if it is not used. Judges need to know that the ETBB exists and that it has been updated. They need to have a good idea of its content, and that it has been written in a way which they may find practically useful. They need to know how to access and navigate it. And it needs to be kept at the forefront of their minds.

A number of strategies have been used to achieve these aims. The ETBB was launched with an individual email to every judge. The Presidents of each jurisdiction followed up with emails to judges within their own jurisdiction. Articles were placed in judicial magazines. At the same time, there was an external press release which was widely picked up on. Access points to the electronic guide were placed on the judicial intranet, the judicial law library and the judicial college learning management system.

A key tool in publicising the ETBB and keeping it alive in judges' minds has been the creation of email alerts which are sent to judges every 6 weeks. These are very short alerts based on a topical equality subject of interest, with links to the relevant part of the ETBB and also, importantly, a link to instructions for accessing and navigating the ETBB. Topics so far have been litigants in person (linked to a recent case), Ramadan, autism (linked to a recent case), transgender (linked to a government consultation) and dyslexia (again linked to a recent case where adjustments were made). As an example, this email alert was sent out on Migraine:

EQUAL TREATMENT BENCH BOOK E-ALERT: MIGRAINE

This week has been designated by the Migraine Trust 'Migraine Awareness Week'. In a 2002 report, the World Health Organisation ranked migraine amongst the world's top 20 disabling conditions.

The Migraine Trust estimates that nearly 8 million people in the UK get migraines. More than 75% of people with migraines experience at least one/month and more than half say they experience severe impairment during attacks. Odds are, you will have witnesses, parties, representatives (and even colleagues) who are struggling through a court hearing with a migraine.

The Equal Treatment Bench Book sets out some of the difficulties and how you can help. [LINK]

It was considered that 6 weeks was just about the right length of time between email alerts to keep the ETBB alive in judges' minds without boring them. We were initially concerned that judges might find these alerts an overload given other emails they receive on judicial business. However, feedback has been that the interval is exactly right and the alerts have been very popular.

The email alerts are not only useful in reminding people of the ETBB and what it contains. They also provide equality content in themselves and as such, can be seen as part of a training strategy. As well as links to the ETBB, the alerts often provide direct links to the interesting cases, consultations and reports to which they refer, which makes them an ongoing resource for trainers as well as for readers.

Training

The Judicial College believes that the most effective way to encourage equality training is generally not to have self-contained courses purely on equality, but to include small inputs on all mainstream courses. This then attracts the attention of judges who would not otherwise choose to attend an equality course.

The different jurisdictions have their own training leads and design their own training. To encourage them to introduce an ETBB element to their courses, the College has designed a guide with model ETBB exercises than can easily be adapted to different types of court and law. One of the most effective exercises is simply a quiz, which stimulates discussion.

E-learning modules

The College is also developing e-learning modules on certain aspects of the ETBB. A large project has been the development of a set of modules on communicating with non-native speakers of English who are speaking English as a second or third learned language in court, or through interpreters. These can be watched privately by judges or used to stimulate group discussion exercises.

A proxy for equality

Many of these exercises can be designed without the link to any resource such as the ETBB. In reality, the ETBB and email alerts are a proxy for training on equality. But the link to the ETBB has many uses. It provides an anchor based in the collective thinking and practical advice of many judges around equality issues. It is skills based rather than overtly attitudinal based, which judges can resist. And by being available to the public, there is an incentive for judges to make themselves informed of its content in case it is quoted back at them.

OTHER SOCIAL CONTEXT TRAINING

The Employment Tribunals in England and Wales have for many years included in their compulsory national training programme a two – three day course on equality awareness. In the last few years, this has become a more general course on the ‘Social Context of Judging’. The content currently includes

- ‘Views from the waiting rooms’ – a behind-the-scenes insight into the perspective of claimants (employees) and respondents (employers) on employment tribunal hearings. The speakers are well known representatives on each side.
- Cognitive Bias – this covers the latest science on bias in the way people think and how reasoning takes place. It includes ‘confirmation bias’ – unconsciously looking for evidence to support an already-reached conclusion.
- Resilience and Mindfulness – this is about Judges’ own coping mechanisms given the stress of workload and hearings.
- Psychology of memory - this covers the latest science on how memory works and its inherent unreliability. It is followed by groupwork examining the various ways in which judges can make fact-findings which are not solely memory-dependent.
- Communication with parties and witnesses with learning disabilities.

- Common mental health problems. This includes experiential exercises, eg trying to answer questions while having someone else talk on a different theme in your ear (to mimic the effect of auditory hallucinations). In past courses, there have been experiential exercises on different kinds of visual impairment.

The course uses an expert external presenter on each theme, followed by some groupwork discussion. On all themes, the training aims to link the theme to what happens or might happen in court.

In regional training topics such as the experience of autistic tribunal users (speaker from the National Autistic Society), trans gender identity (expert visiting speaker)

CROSS JURISDICTIONAL COMMUNICATION SKILLS TRAINING

“Between what I think, what I want to say, what I believe I say, what I say, what you want to hear, what you believe you hear, what you hear, what you want to understand, what you think you understand, what you understand... They are ten possibilities that we might have some problem communicating. But let’s try anyway”

Bernard Werber

The Faculty of the Judicial College runs a number of cross-jurisdictional skills-based courses. These do not deal with any law but instead bring together judges from all jurisdictions to encourage them to learn from each other's experiences in the development of a number of key judicial skills.

One such course is 'Judge as Communicator'. The title of the course speaks for itself – its aim is to encourage judges to become effective communicators in court. As the introduction to this chapter sets out: effective communication is an essential part of the entire legal process. It is vital to ensure that everyone involved understands and is understood and there can be, as the Werber quote indicates, many problems to overcome in ensuring that effective communication has taken place.

In Judge as Communicator courses, judges are assisted in identifying and mitigating the effect of biases and understanding and managing the dynamics of communication in the court room. They are introduced to a Transactional Analysis of communication styles and the Drama and Winner Triangle; they

are encouraged to see that they can adapt their own default communication styles to best meet the dynamics and needs of the particular parties in their courtroom.

The judges attending the course are asked to role play a number of scenarios and are encouraged to give each other feedback on communication styles. The judges are encouraged to consult the sections of the ETBB that might assist them in finding the best style of communication in any particular case. For example, in one of the role plays, a party is autistic, and reference is made to the parts of the ETBB that suggest what adjustments might need to be made and some of the communication issues that might arise.

