# CONTINUING JUDICIAL EDUCATION

**Chaudhry Hasan Nawaz**

The need for a distinctive approach to the continuing education of judges is the basic consideration for the subject of continuing judicial education.

2. Lawyers don't become good judges by the wave of a magic wand. Not even the best lawyers. {Catlin DW, "Michigan's Magic Touch in Educating Judges," The Judges' Journal, 1986, 25, 6, 32-45}.

3. The increase in judicial education might well be described without exaggeration as an explosion of activity in the field in the last decade. {Sallmann PA, "Comparative Judicial Education in a Nutshell," Journal of Judicial Administration, 1993, 2, 245-255, (hereafter, Sallmann 1993), 252}.

4. Judicial education is now an accepted part of judicial life in many countries. It is an enhancement of the mental qualities necessary to the preservation of judicial independence....Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate. {Nicholson RD, "Judicial Independence and Accountability: Can They Co-exist?" Australian Law Journal, 1993, 67, 404-426 (hereafter, Nicholson, ALJ, 1993), 425}.

5. This approach should build on the foundations of adult and professional learning theory. But, more importantly, this approach should accommodate the specific learning needs and practices of judges, and preserve judicial independence.

6. In the process, the study addresses a number of issues which underpin endeavour. This includes the questions: Why educate judges?, Is continuing education needed?, What makes a good judge? What role can education play?, How should judicial education be provided?, and, How can benefits be measured? The study explores the application of educational theory and critiques the practice of judicial education which has developed in various countries. Premised on Australian experience, the study surveys the United States and Britain in detail, with added reference to Canada and New Zealand. Assessment of the civil or "continental" approach to a career judiciary, where law graduates nominate to enter the judicial profession from the outset, falls beyond the ambit of this work. They study identifies a number of deficiencies, and proposes a model of continuing judicial learning which can serve as a template to assist judges operating in common law systems.

7. For any proper understanding of the introduction of continuing judicial education, and its significance to the judiciary, it is necessary to recognize the overarching importance of the process of professionalization, and the significance of two themes in that process, namely the pursuit of competence and the provision of accountability. It will be seen that there is a need for the judiciary to formalize a means to enhance its performance in the light of public criticism, and to demonstrate its concern for improved performance to the community in an appropriate way.

8. Study of the introduction of judicial education is as timely as it is inevitable. It is no coincidence that the early 1990's marks a period of soul-searching for judiciaries in many countries confronted with often virulent criticism and diminishing social credibility.

9. This is a period of intense critical public scrutiny of the judiciary. There is nothing either unusual or incidental about this scrutiny; rather, it is a predictable part of refining the role of the judiciary in society. Professionalization is an essential element of this evolving relationship, and provides the judiciary with an important means to demonstrate its competence while preserving the integrity of its independence.

## PROFESSIONALIZATION

10. The process of professionalization describes the response of professions to recent and continuing public criticism generally, and to increasingly vociferous demands for accountability. For the judiciary, this criticism centered, for the most part, not on ignorance of the law, technical deficiency, ethical misconduct or individual behaviour, but on the performance of the judicial system at large and on a perceived failure of the judiciary to reflect the society over which it was seen to preside.

11. Public criticism of the professions became increasingly vocal throughout the western world during the 1960's. Houle describes this criticism as relating to inadequate service systems to care for the needy, and to what he describes as excessive self-interest, incompetence and malevolence. The professions were criticized by their own members (both within and between branches of the profession), by consumers (the revolt of the client, citizen and special interest group advocates), by the mass media, and by government.{Houle, "Continuing Learning in the Professions", San Francisco: Jossey-Bass, 1980, 14, 271 and 273}. This criticism has imposed pressures on all professions to carry out their duties at the highest possible standards of competence. Houle postulates that it is within this context that the concept of systematized continuing professional education evolved:

> Until then, it was almost universally taken for granted that the acquisition of general or special competence coupled with the expectation that every professional would voluntarily maintain, apply and advance his or her knowledge and skills throughout a lifetime would be sufficient guarantees of continued excellence of performance. But...it is now widely accepted that there should be periodic reassessments of competence to ensure to the individual professional, the people he or she serves, and society in general that a high level of performance is being maintained.{Houle, 279}.

12. This criticism, bringing with it threats of governmental regulation and intrusion into their privileged domain, led the professions to take steps to consolidate their identity in order to maintain their continuing existence. These steps included the introduction of a panoply of formalized requirements relating to entry standards, codes of conduct, rules of membership and discipline, and involved the linking of professional performance with continuing education. Continuing education became seen increasingly to be a means for professions to improve performance, disarm criticism and thereby to resist pressures to impose external standards on the professions. The incorporation of education services became an integral part of this institutional

response to public criticism. From the profession's perspective, these education services provided a means of, first, implementing progressive and preventative measures to redress any public criticism of professional incompetence, and second, to visibly demonstrate measures of self-help as a disincentive to external regulation by government. Continuing professional development became recognized as an important response to establishing patterns of growth within the professions, and a means of managing both personal and systemic change. In this sense, the introduction of continuing education is but one part of a broader strategy to improve professional performance.

13. While the formative role of the judiciary, and the metamorphosis of judges from legal practitioners, tends to obscure direct comparisons being made between the judiciary and other professions, the process of professionalization provides important insights on the judiciary and the changing nature of its role. First, it marks the transference of responsibility for competence and performance from the individual to the group, which reflects the on-going evolution of the judiciary as a social institution within society; and second, it is indicative that this group elects to see itself primarily as a body of professionals rather than as public servants or an arm of government. At a time when accountability is being demanded of all social entities in government, business and the professions, it is noteworthy that the judiciary chooses to see its role in professional terms. This choice sheds light on the deeper question "What is the judiciary?" It remains to be seen whether this self-perception is ultimately found to be appropriate or adequate.

14. Professionalization describes the evolving relationship between the judiciary and society; what is unique about this process for the judiciary is that it must find a means of enhancing competence while balancing the competing precepts of independence and accountability. For the judiciary, the introduction of continuing judicial education is demonstrably more appropriate then the spectre of intervention by the executive.

## CONCEPT OF COMPETENCE

15. The purpose of any program of continuing judicial education is to provide a process, which is more or less formalised, to promote the continuing learning of judges. It will be argued that the mission of judicial education is distinctive from other forms of occupational training or professional development in the extent to which it should promote learning and the pursuit of professional excellence which lie beyond the domain of technical competence. Ultimately, the purpose of this learning is to improve judicial performance and, thereby, the quality of justice.

## JUDICIAL COMPETENCE

16. The notion of competence, as the goal of judicial education, is central to this study. Competence is variously defined. For these purposes, it will be argued that judicial competence should be seen as the mastery of the knowledge, practical skills and disposition of judging. Competence is the ability to perform a range of tasks through the application of knowledge and skills to the resolution of particular problems according to certain standards, within a framework of rules of conduct and ethics of the judicial profession.

17. The notion of competence - while a fundamental concept in most professional development models - can be problematic. On the one hand, it can imply a minimalist threshold of capability towards which the education program is aimed. On the other hand, it can be seen as an ideal concept in terms of being a non-specific educational objective rather than any finite quality defined by quantifiable behavioural benchmarks. In this sense, it is synonymous with optimal states of proficiency, excellence or expertise. Commentators have variously described the application of these qualities as professional artistry and judicial authenticity.

18. This duality of meaning raises two important questions for judges and educators alike: first, whether judicial competence should be seen as a bench-mark or as an aspirational standard? Second, should competence be seen as a static concept, or as a dynamic phenomenon which increases with experience throughout the judicial career? The answers to these questions are hardly polemic, and influence the nature of any program of judicial education. If the answers to both questions are the latter choice - as it will be argued that they should be - then judicial education is fundamentally distinguished from prevailing models of continuing education and occupational training. To support this distinction, it will be argued that judges generally posses unusually high levels of pre-existing professional competence by virtue of the process of merit selection. It is within this context that the mission of continuing judicial education should be seen to extend beyond conventional notions of technical proficiency to embrace professional excellence or artistry.

19. Assessment of judicial competence is difficult.[1] While the competence of professional is normally assessed through the quality of their performance, any qualitative assessment of judicial performance is fraught with both practical and doctrinal difficulties. It will be seen that the essence or artistry of judging is too complex to be readily amenable to predetermined behavioural criteria; moreover, quantitative assessment provides an incomplete and clumsy measure of performance at a personal level. More significantly, measurement of the quality of a judge's work performance other than through formal appellate procedure has the potential to subvert the integrity of the trial process and thereby the independence of the judiciary. For these reasons, few useful examples can be found to illustrate consensus on satisfactory means of measuring judicial competence using conventional procedures. Measurement tends to be proffered in quantitative terms, however arbitrary. Overcoming these difficulties remains a challenge for judicial educators.

## INCOMPETENCE

20. An alternative means of defining the notion of judicial competence is provided by an assessment of its absence, that is, from a review of the indicators of incompetence. Owing to the doctrinal and practical obstacles already discussed, there are limited opportunities and highly formalized mechanisms for any such review. Assessment of judicial performance is, however, a normal part of judicial administration and is constantly undertaken through a number of means which include formal complaints, appeals and the scrutiny of the public media.

21. Formal complaint procedure may or may not be provided, but tends to be complex, clumsy and potentially politically charged. In practice, the most obvious and usual means of

review of judicial performance is to be found within the court structure itself, in the ordinary appellate processes. Gleeson remarks that,

The working of the appellate courts is the primary means which the system provides for identifying and correcting judicial error. In this context the word "error" is used in the widest sense.... The possibility that a judge at first instance, or an intermediate court of appeal, will ultimately be held to be in error is an inescapable part of our system of administration of justice.{Gleeson AM (now, Chief Justice of New South Wales), "Judging the Judges," Australian Law Journal, 1979, 53, 338-347, 344}.

22. In addition, the competence of the judiciary is constantly reviewed by public scrutiny, frequently through the media. Of this public scrutiny, Bentham remarked:

Where there is no publicity there is no justice... Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.{Bentham cited by Lord Shaw of Dunfernline, Scott v Scott, 1913, Appeal Cases (House of Lords), 417, 477}.

23. It follows that while the notion of judicial competence is complex, problematic and resists ready translation to conventional measurement, a variety of mechanisms do exist and operate to measure judicial performance at a number of levels. From the perspective of judicial education, it will be argued that compelling reasons exist to extend the measurement of judicial competence to integrate these mechanisms which operate at a systemic rather than a personal level.

## QUEST FOR ACCOUNTABILITY

24. It has already been foreshadowed that the introduction of judicial education should be seen within the over-arching context of the need to demonstrate judicial accountability. Accountability is another complex and problematical issue for the judiciary.[2] For judges, the question is not whether there should be judicial accountability, but how accountability should be balanced with independence.{Shetreet S, "The Limits of Judicial Accountability: a Hard Look at the Judicial Officers Act 1986," University of New South Wales Law Journal, 1987, 10,4,7}. As Lord Hailsham has put it,

> The problem is how to reconcile the divergent and to some extent inconsistent requirements of public accountability, judicial independence, and efficiency in the administration of justice.{Lord Hailsham, "Democracy and Judicial Independence, " University of New Brunswick Law Journal, 1979, 28,7,8; cited by Nicholson, at 408}.

## PRECEPT OF INDEPENDENCE

25. Independence is a precept for any judiciary operating within the Westminster system of government. This precept has been defined as the capacity of the courts to perform their constitutional function free from actual or apparent interference.{Green G (Sir Guy), "The

Rationale and Some Aspects of Judicial Independence," Australian Law Journal, 1985, 59, 135-162, 135}.

26. For jurists, judicial independence is an essential element of democracy. Hailsham sees the independence of the judiciary as a bastion against the "absolutist theory of democracy". {Hailsham, 7}. Under the Westminster system, the separation of powers doctrine provides a system of mutual checks and balances between the executive, legislative and judicial arms of government, so that one branch of government is incapable of abrogating power to itself at the expense of the other two. It is within this context that jurists see an imperative for an independent judiciary to act as an impartial arbiter of disputes between citizens and the state.{Nicholson, 410}.

## JUDICIAL ACCOUNTABILITY

27. At the same time, judges find themselves torn between preserving the need for judicial independence while increasingly having to provide accountability to the community.{See, for example, Basten J,"Judicial Accountability: a Proposal for a Judicial Commission," The Australian Quarterly, 1980, 468-485, which presaged the introduction of the Judicial Commission in New South Wales six years later. This accountability is, according to Nicholson, manifest in many ways:

The business of all courts is, except in extraordinary circumstances, conducted in public. Judges resolve disputes under the obligation to publish full reasons for their decisions. Each decision... is subject to being appealed. Appeal court criticisms may be published without limitation. Academic lawyers are free to criticise judicial reasoning. Media attend hearings...{Nicholson, 413}.

28. Ultimately, the judiciary is confronting an ever increasing need to provide accountability, to justify and demonstrate its value and effectiveness. Nicholson, continues:

> Despite these structural guarantees of exposure of the business of the courts to the scrutiny of legal examination and the glare of public scrutiny, it is sometimes considered that the judicial branch needs to become more accountable.{Nicholson, 413}.

29. This problem of providing justification is described by the Chief Justice of Australia, Sir Anthony Mason:

> The defence of existing professional structures and professional practices on the basis that they contribute to the just and efficient disposition of litigation is likely to be greeted with a degree of robust scepticism unless the soundness of that basis is clearly demonstrated.... The plain fact is that, in contemporary society, people are not prepared to accept at face value what professional people tell them.[3]

30. The key to reconciling this dilemma is provided by Nicholson who relates the need to provide increased accountability with the issue of continuing judicial education:

> Judicial education is now an accepted part of judicial life in many countries. It is an enhancement of the metal qualities necessary to the preservation of judicial independence... Judicial independence requires that the judicial branch is accountable for its competency and the proposition is now accepted as beyond debate.{The relationship between judicial education and the preservation of independence has been recognized for some time in Canada, and is enshrined in the rationale for continuing education. For example, the charter of the National Judicial Centre declares its mission to be: "To foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth; to engender a high level of social awareness, ethical sensitivity and pride in excellence, within an independent judiciary; thereby improving the administration of justice." National Judicial Institute (formerly, Canadian Judicial Centre), Annual Report 1991 - 1992, Ottawa, 4}.

## DISTINCTIVE APPROACH TO JUDICIAL EDUCATION

31. It may now be taken as well settled that there is a need to develop a distinctive model of judicial education which is designed to address the specific learning requirements and practices of judges while preserving judicial independence. The question of the need for judicial education is increasingly recognized within the judiciary itself. While it has been the subject of vigorous debate throughout the judiciary, a consensus is now emerging among judges, which acknowledges both the need and the benefit of continuing education in enhancing competence and consolidating independence. Since different modes and practices for selection of judges give rise to different needs, the judges participate in continuing education for reasons, altogether different from these applicable to other adults or professionals and when taken in conjunction with other features of judges as learners, give rise to the need for the development of a distinctive approach to judicial education.

32. The foundation of any programme of judicial education must lie in the theory of adult and professional learning. The prevailing process of providing judicial education is lacking in any consistent approach or direction and there is a need to develop a policy-based orientation to the process of judicial education, and a more useful means of assessing the value of this educational endeavour in terms of its impact on judicial performance. The challenge of Judicial education is to devise and provide a means to promote the continuing improvement of judicial competence. Once the formalizing requirements of professionalization have been met, it remains the task of educators to facilitate a process of meaningful learning. In essence, this is the challenge to promote and develop a process of continuing learning for those who are already the most expert and able in their field, who are charged by reason of this expertise and ability to both lead and reflect the community's values and yet retain their independence. We are in need of developing a more or less formalized process which retains these elements in harmony.

**BACK LOG PROBLEM**

33. In most of the developing countries in particular, the biggest problem is that of heavy back log of cases which is causing delay in disposal. Back in my country, most of the Presiding Officers of Courts have 120 to 150 cases on their daily cause lists and it hardly requires emphasis that they find it physically impossible to deal with each one of those cases. The result is that adjournments are granted for as a situational imperative and not necessarily on the request of the parties or their counsel. I would say that granting of adjournments, under the circumstances obtaining in large number of courts, is far from being voluntary. While realizing that it is one of the reasons for delay, it has to be maintained that the obtaining situation hardly offers any other option. We are, therefore, in need of a judicial culture and an environment for a sound and successful judicial administration system, involving not only the judges but also the members of the bar and litigant public.

34. In the context of these consideration, I am of the considered view that continuing judicial education should address itself to questions, such as caseflow management which is the conceptual heart of court management in general. We can fully understand courts as organizations, only it we understand the requirements of case flow management. The concept of continuing judicial education should, therefore, have one of its main objectives to bring about necessary skills in the judges for effective court management which may be of some help in reducing the backlog and ridding the civil society of the curse of `laws delay' which Shakespeare's Hamlet cited as a reason for preferring suicide to continue life.

35. A cultural of managerial judges is now well established in the Subordinate Courts. In England and Australia, the move towards judicial control is more recent, but it is equally dramatic. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of criminal and civil litigation. The contemporary dominant view is that the self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and prevents disruptive tactics. This proactive judiciary can be put in place only by purpose oriented and will planned judicial education.

36. In order to provide the best possible public service, the Subordinate Courts must continue to modernize judicial administration practices. Advanced information technology efforts should promote greater efficiency, economy, and convenience to the public. These include the best case management practices and systems, voice response systems, document imaging systems, records management retrieval systems and speedy access to both local and foreign cases and legal literature.

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[1] There has been limited comprehensive work on defining judicial competencies, but, see: Gold N, "Towards a Curriculum for Continuing Judicial Education - Establishing Judicial Competence: Professionalisation, Quality and the Public Interest," 1994, (as yet unpublished article). There has been more work in relation to legal competencies, which may be applicable to the judiciary; see, most recently, ABA, Legal Education and Professional Development - an

Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Chicago, 1992 (MacCrate Report); also, Blasi G, "What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory," Journal of Legal Education, 1995, 45, 313-386.

[2] See, McGarvie RE, "The Foundations of Judicial Independence in a Modern Democracy," Journal of Judicial Administration, 1991, 1, 33; McGarvie RE, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence," Journal of Judicial Administration, 1992, 1, 236-277; Gleeson M, Judicial Accountability, Canberra, 1994 (Conference on Courts in a Representative Democracy; as yet unpublished paper); and Nicholson RD, "Judicial Independence and Judicial Organization: A Judicial Conference for Australia?" Journal of Judicial Administration, 1993, 2, 143-161 (hereafter: Nicholson, JJA, 1993); and Nicholson, ALJ.

[3] Mason A, "The Independence Of The Bench; The Independence Of The Bar, And The Bar's Role In The Judicial System," Australian Bar Review, 1993, 10, 1-10,1.