

Participant Input and Discussion

Day One, Afternoon

Chair: Jake Werksman

Presenters: Hans Petter Buvollen, Sandra Oxner

Chair

I notice from Hans' presentation there were a number of things that drew together issues that were raised earlier – for example, linking formal and informal; and Sandra, not just to run through the issues of judicial education, but judicial reform too.

Is there anyone who would like to make an intervention on these presentations:

Inputs

Michael: A piece of information that USAID have published, a comprehensive book on doing judicial reform; it's on their web page; rather long at 150 some pages, but really covers all aspects of promoting impartiality and independence in the judiciary.

My question is, what can one do with the judiciary, to make it more effective, if it turns out that case management doesn't do very well, organizing trials doesn't do very well, where does one start? That's for Sandra.

Sandra: I have misspoken; the forcing of the judges is not as successful ... but there's a lot of storing records properly, case load management, those are all entry points. I think it's a necessary stage, but not the place to start because it's so difficult. My own province in Canada, when we have financial problems ... how can we expect developing countries.

Don't be daunted. Judicial reform is rooted in the legal and social, political cultures. Reforms that fail one place might well succeed in another. Don't take one country's success or failure as a reason not to do it – look at the legal culture. Uganda – one party state, lawyers have no legal clout; it's easy to do this kind of reform because lawyers have no cudgels against the judge; they're not going to interfere with their promotions, or give them any misery. It's impossible in the Philipines or Pakistan to do that, where lawyers are very political and have good access to power that can interfere with a judge's career and life.

Adam: I want Sandra to elaborate a little bit on curriculum development. We're wrestling with that issue. Are there core subjects you're recommend definitely be of some universal

Sandra: It's important not only to get the information, through a survey, but judiciary cares =- ultimate goal is to build confidence of the community; in my experience, they always do, ultimately, but you have to get someone who they trust, someone who can work with them to suggest this, and get them to do it. It's not hard to do, but it's a matter of getting the judges to do it – the UNDP can't do that survey .. Chief Justice usually will after a little education in some cases be agreeable to doing a survey in the name of the judiciary; but you have to – if you take

those four categories (from the presentation) you're going to have to have something for each of those, and you need a 3-5 year plan for judicial training. One training is actually doing this – everytime there's a newly appointed judge, the judicial education body sits down with that judge, and actually develops a personally designed judicial programme. There's a lot the new judges don't new.

Judicial education is desperately costly. In France, it's \$32 or \$52 million a year. In the US, for the federal court, \$19 million a year; Canada \$15 million a year. Netherlands, a lot is spend as well, higher than Canada and the US. They do career training, as many of your countries do; they take young lawyers and train them as judges. That's very expensive. I've spoken with several of you, newly emerging states, they're tending for that kind of academy; Mozambique may be doing that too. It's enormously expensive; does the state want to commit that amount of money to the judiciary? As far as curriculum development, take those tools and work with them in those categories; use a long-range plan; like recipe.

Chair (Jake): We'll pool some of the questions and then give Hans and Sandra a chance to respond.

Francesca: Once again, on Mozambique - as I mentioned this morning, there are very few professional lawyers – attorneys, avocats. In this case, in this particular context, shouldn't the training of judges also be directed at a kind of proactive role within the proceedings? Mozambique is going through a reform of a penal system. According to the civil law system, it's moving to adversarial procedural system, where rights of defence are more guaranteed than in other kinds of penal procedures; but what is right for the defence in theory can be put in a total equality with the prosecutor? In practice, it can be turned the reverse, because the defendants have no representation or legal defence. In this case, shouldn't the judges be instructed or sensitized to have a proactive role, to substitute

(Participant) On Guatemala - this is a large question. Some attention has to be given to constitutional reforms, guaranteeing the cultural rights and rights of minorities. There's a whole host of issues involved; it's not just dispute resolution. Adam used the phrase that we approach these cultural institutions with "critical deference". The problem with many traditional systems is that they are a complete ... whole; we can't say, we like this part, we'll keep it, we don't like that part, we won't. You either live by the whole court or you don't. It's not a static tradition. No tradition is static. We need critical insiders, who are able to reform these critical institutions, and bring in universalist values. Whether it's UNDP or anything that has UN in it – it has to be committed to those values, to human rights. Indonesia is a very good example. There are intellectuals there who interpret Islam, in a very creative, aligned way. It transmits to the general public, through a variety of traditional schools; it's a very living tradition. Supporting critical insiders who are aware of the universalist premises of human rights, in these contexts, would be useful. It's important to engage in it with these institutions, because they're much more meaningful to people. We also have an obligation about these values. We need to look at it as a problem of devising forms for governing multicultural policies.

I have one question for the judge; many judges think that if anyone comes to advise them, on how to manage or how to run, the quality of justice would be tainted. Judges, like teachers,

doctors, make poor managers, and if you suggest somebody else will manage them, ... doctors get up tight, so do judges, anyone who says anything that smacks of management. They consider it to be inclusive, giving our justice in what they do.

Amin. I was interested to get to know more about – you mentioned the issue of development of teaching plans and tools for judges. I would like to know what kind of tools are you referring to, especially in countries where judges are drawn from Prosecutors, where this is the only way to become a judge (get away from law school, go to prosecutor's office, then you become a judge). What do you mean by tools?

Thomas: I have a short question to Sandra; Sandra you did not mention the prosecutors at all, while in Serbia we have been trying to get them on board. Is there anything to watch for?

Ahmad: Hans Petter; you mentioned Mayan customary mechanisms for dispute resolution – what are the sources of these customary mechanisms? You're an anthropologist, and if you look at the history, the Mayan were not, contrary to the public perception, they were not peace-loving people as one might expect. There are cases where there was extreme brutality happening in their societies. Aren't we romanticizing this a bit, when we talk about customary conflict resolution in societies?

Rajesh: The High Supreme Court in West Australia was given the task of backlog, sorting it out – and the same in South Africa. Apart from getting a system in place, the system was “name and shame”. Find out why there's a delay, call the solicitors and barristers, in presence of the client, and the client is told, very clearly, that the cost from the adjournment are not to be paid by you, but by your attorney/barrister.

Regarding judicial training in South Africa, on another point, most of our judges are overwhelmingly white male appointees from the old era; judges were asked to make available a nominee, sensitize the judges to gender issues – and also cases involving rapes. Most judges said we've been dealing with this forever, and no-one's going to teach us anything. A progressive senior judge took the task of going from division to division and delivering a training programme, in conjunction with the judge president, so the judges felt ashamed that that kind of step was needed to bring them out of their shells. It's seen as an interference with age old traditional discretion.

Responses to the Previous Questions

Hans: *There were a couple of comments and one question. In the efforts to make better use of customary law in the Guatemalan case, there are interesting efforts being made to systematize experiences. It's very community-based, and there are now several of these efforts to exchange these experience. Some of them are making books, guide books etc. for this.*

In many ways, it's also an effort to recuperate a tradition that had a dramatic break for several decades. Many persons who have traditional knowledge, the elders, are also lost during the war or they went into exile, so there hasn't been continuity of delivering the knowledge.

I do agree there is a tendency to romanticize, especially on part of young Mayans, who try to do that too much, with their traditional concept, and other expressions of Mayan culture, which of course should be taken with some scepticism. It is important at the same time that the young people are increasing their interest in this. I think a lot of the brutality you mention in history of Mezo-American Indians had a lot to do with religious sacrifices and war efforts between different tribes. It is also without doubt that some of these have also been romanticized, especially by Spanish history. But both of your comments and questions are relevant. It's not a question of romanticizing this, saying Mayan justice system is utterly positive, and formal justice is bad – I think it's a question of being realistic, and to give this population the possibility of deciding what makes more sense for them in their judgement, and what is corresponding more to their moral sense of justice.

Sandra: These are wonderful questions, really, so interesting. Can I start with this one – name and shame; you'll remember that. It's very confrontational; it's not acceptable to a lot of cultures. The Australian judges, they're very well paid. Few of us have the luxury of having that kind of funds. For many judges, to put them in that confrontational position with members of the bar - judges are not well paid, they're abysmally paid, and are you going to add to their life misery by forcing this on them right at the beginning? You have to come to it, but maybe in ten years, and you can eliminate half of the delay by not using the confrontational techniques, and maybe by that time the culture will have changed.

One thing that does work is if the chief justice circulates a list of all judges with outstanding judgements beyond a certain time – you don't want to be on that list.

That was a wonderful question from Francesca. It's part of my recent learning experience. I'm almost ashamed to tell you, when I was young, one question hotly debated was ... whether ... or not in a criminal matter ... generally speaking, a judge determines fact; we used to debate whether in a criminal case, if the Crown Prosecutor neglected to ask an important question on which the case would rise or fall, had we the right to ask the question like "Did this take place in Nova Scotia?" – in a murder case. We actually debated that, up until the early 1990s. That is the essence of what you're asking. The investigatorial system gives so much better service to the people. It's fascinating for me to work with UNDP in Nepal; they had a system which was indigenous, then switched to investigatory, and the new constitution imposed a kind of adversarial; shining through this adversarial process is this wonderful investigatory holdover of the judge looking at the file and if there's missing evidence, sending for it.

Blending the investigatorial and the common law – this is a much better system. The Nepal system has such strengths; and they have no vacancies. I'm not saying they don't have problems. But for me to uncover this immense strength, when one of the prosecutors in the war crimes saying that was his view, you need a blend to achieve fairness. The adversarial system is only fair if both sides are equal, and in 25 years on the bench, I never saw that kind of equality. I hope that will be developed more. The European court of Human Rights is bringing together the two systems of law.

A manager for courts – let me tell you, that was such a good question. Judges are such terrible managers – why would we be good managers? We're listeners! That's our main function. So

it's throughout the world, judges are poor managers, and we need court administrators who report to the chief justice, not to the executive. How do you convince them to have them? Court administrators control the money – whether a judge can go on a trip or not! If you can separate it from the rest, you might get further.

Judicial reform is mainly details; it's so practical ...

About tools - there are so many free tools available. We use hypothetical fact situations done by a Justice from Malawi. That's a good judicial tool, getting judges to work through problems. Judges do them themselves .. we're capable of using them. One sat up to 4:00 am doing powerpoint presentations on judicial stress in Botswana. It's so funny – you have no stress left when you watched it. I have it with you, I'll give you

To anyone who asks, judicial education tools are sent – they pay the postage; no-one believes this, but we give out these checklists, a video your first year on the bench, wonderful audio tapes, hypothetical situations, free, post-paid.

Our institute; we have all kinds of teaching tools and our purpose is to exchange them so we don't reinvent the wheel. I'll put you on the mailing list. We send you one copy, you pay the photocopying, or we'll e mail them.

The tools are there, and available. There's an electronic bench book. We're sensitive about electronic things; we trained a judge to be a good computer person and he shot the whole budget on internet searches ! You have to be careful about too much electronics.

Everybody's doing these bench books, you don't have to reinvent these. Get a judge's committee and make it applicable to the country.

As for Codes of Ethics; the most corrupt countries have the best codes of ethics. There's a strong relation, the wrong way. What you need is ANNOTATIONS, very detailed hypothetical ones. Once you get the open, accessible, complaint process, you can summarize those and put them in as annotations.

In the Pinochet case; one distinguished judge got muddled. How can we expect a magistrate, a young judge, in one of our countries, to be up on everything, and to know when there's a conflict?

We have one or two floating around – they can all be used, explaining what those fine sounding ethical statements mean. A very specific fact situation needs to be described – can your daughter receive a wedding present from a person heard in your court three months ago,