

Searching for Success in Judicial Reform

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Searching for Success in Judicial Reform

Voices from the Asia Pacific Experience

Asia Pacific Judicial Reform Forum



OXFORD
UNIVERSITY PRESS

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YMCA Library Building, Jai Singh Road, New Delhi 110 001

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in India
by Oxford University Press, New Delhi

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This publication was prepared in partnership with
the Asia Pacific Judicial Reform Forum (APJRF)

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First published 2009

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ISBN-13: 978-0-19-806077-2
ISBN-10: 0-19-806077-7

Typeset in Giovanni Book 10/12.8 by Joy Philip
Printed in India at Pauls Press, Delhi 110 020
Published by Oxford University Press
YMCA Library Building, Jai Singh Road, New Delhi 110 001

Contents

<i>Preface by Antonio T. Carpio and K.M. Hayne</i>	ix
<i>Acknowledgements</i>	xi
<i>List of Abbreviations and Acronyms</i>	xiii
INTRODUCTION	1
Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience	3
<i>Livingston Armytage</i>	
1.0 The Purpose of this Book	3
2.0 Reform Context	4
3.0 Searching for a Theory	6
4.0 Experience from Practice	11
5.0 Overarching Themes: Ten Challenges	25
6.0 Conclusion	35
1. SECURING JUSTICE	43
Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries	45
<i>Mohan Gopal</i>	
1.0 Key Messages	45
2.0 Analysis of Judicial Reform Experience Worldwide	47
3.0 Description of Reform Experience: Justice- centred Judicial Reform—The Case of India	70
2. CASE MANAGEMENT REFORM AND DELAY REDUCTION	79
Case Management Reform—The Philippine Experience	81
<i>Zenaida N. Elepano</i>	
1.0 Key Messages	81
2.0 Description of Reform Experience	86

3.0 Analysis of the Experience	100
Backlog Reduction—The Indonesian Experience	110
<i>Paulus E. Lotulung, Aria Suyudi, Rifqi S. Assegaf, Wiwiek Awiati</i>	
1.0 Key Messages	110
2.0 Description of Reform Experiences	113
3.0 Analysis of the Experience	125
3. PROMOTING ACCESS TO JUSTICE THROUGH JUDICIAL REFORMS	135
Barriers to Accessing Justice—The Vanuatu Experience	137
<i>Anita Jowitt</i>	
1.0 Key Messages	137
2.0 Description of Reform Experience	142
Shared Challenges in Securing Access to Justice— The Indian and Sri Lankan Experiences	164
<i>Ayesha Dias</i>	
1.0 Key Messages	164
2.0 Description of Reform Experience	167
3.0 Analysis of the of Experience	180
4. ETHICS, INTEGRITY, AND JUDICIAL ACCOUNTABILITY	185
The Evolution of the Judicial Council— The Nepal Experience	187
<i>Hari Phuyal</i>	
1.0 Key Messages	187
2.0 Description of Reform Experience	189
3.0 Analysis of the Experience	199
The Philippine Experience	206
<i>Myrna Feliciano</i>	
1.0 Key Messages	206
2.0 Description of Reform Experience	210
3.0 Analysis of the Experience	224

5. JUDICIAL EDUCATION AND SKILLS DEVELOPMENT FOR JUDGES AND COURT STAFF	233
The Cambodian Experience	235
<i>Sathavy Kim and Ly Tayseng</i>	
1.0 Key Messages	235
2.0 Description of Reform Experience	238
3.0 Analysis of the Experience	255
The Nepal Experience	263
<i>Ananda Mohan Bhattarai</i>	
1.0 Key Messages	263
2.0 Description of Reform Experience	267
3.0 Analysis of the Experience	279
<i>Annexure One: Glossary</i>	295
<i>Annexure Two: Country Context Background</i>	296
<i>A2-1.0 Cambodia</i>	296
<i>A2-2.0 India</i>	299
<i>A2-3.0 Indonesia</i>	301
<i>A2-4.0 Nepal</i>	308
<i>A2-5.0 Philippines</i>	311
<i>A2-6.0 Sri Lanka</i>	314
<i>A2-7.0 Vanuatu</i>	317
<i>List of Contributors</i>	324

Preface

Nations all around the world continually seek to improve their judicial systems. The word, judicial reform, like globalization, has entered the vernacular. Those of us who are judges, indeed all who are associated with courts everywhere, now actively pursue the goals of improving our individual work and improving our courts as institutions. We do this because we recognize that our judicial systems are defining characteristics of the way in which our societies are governed. The improvements we make in our judicial systems will have direct effects on fundamental aspects of national stability and on social and economic progress.

The movement for judicial reform has gathered pace over recent years. At least in part this has been a response to increasing demands for the highest standards of integrity, accountability, professionalism, and efficiency to meet the imperatives of global trade and interaction. In part it has been urged on by wider and more informed discussion of human rights, access to justice, and good governance. Judicial reform is now, and must remain, at the centre of the stage when there is discussion about progress.

The Asia Pacific Judicial Reform Forum is a network of 49 superior courts and justice sector agencies across Asia and the Pacific. It is united by a shared commitment to respond to the challenges of judicial reform. It was established pursuant to the *Manila Declaration for a 21st Century Independent Judiciary* in 2005 and it provides the means by which challenges, ideas, and experiences can be shared and explored.

Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience is the fruit of the Forum's first project. Its chapters reflect the priorities which the members of the Forum defined. It is a resounding achievement for our region to have drawn together the collective reform experience that is reflected in these pages.

Searching for Success draws these experiences together to present a unique, practical guide to reform and development of courts across Asia and the Pacific. The chapters draw on the expertise of some of the region's most skilled justices, court administrators, and scholars. They offer a broad cross-section of case studies and reflections.

Those who seek to develop and execute reform strategies will find in these chapters new perspectives from which to view the challenges before them. They will find an account of the ways in which issues have been dealt with by others. But more than this, they will find in *Searching for Success* the inspiration to continue pursuit of the goals of improving the work that each of us does, and the judicial institutions wherein each of us serves.

Justice Antonio T. Carpio
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Chair, Project Board

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Acknowledgements

The Asia Pacific Judicial Reform Forum was established by the *Manila Declaration on Judicial Reforms* framed at the International Conference and Showcase on Judicial Reforms hosted by the Supreme Court of the Philippines in 2005. The Forum's mandate is to promote improved effectiveness in judicial reform by facilitating and coordinating the exchange of reform experiences, ideas, and issues from throughout the region.

Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience is a publication by and for the region. The publication was led by a Project Board. We are grateful to all of the board members for their ongoing support and guidance: Justice Antonio Carpio, Philippines (Chair); Chief Justice Vincent Lunabek, Vanuatu; senior judge Zhang Genda, China; Justice Kenneth Hayne, Australia; Dr Faqir Hussain, Pakistan; Mr R. Sudarshan, UNDP; and Justice Phattarasak Vannasaeng, Thailand. We are also grateful for the active support of the Forum's Secretariat comprising the High Court of Australia, the Supreme Court of the Philippines, the Federal Court of Australia, the Supreme Court of New South Wales, and the Judicial Commission of New South Wales.

The project was generously funded by the United Nations Democracy Fund, with the Forum's Secretariat and United Nations Development Programme's Regional Centre partnership turning the concept into reality. The Forum is extremely grateful to the United Nations Development Programme for the provision of staff and financial resources, in particular: Ms Marcia Kran; Mr Jak Jabes; Ms Emilia Mugnai; Mr Arusha Stanislaus; and Ms Panvirush Vittayaphakul. The Forum is very grateful to the Network Facilitator and co-editor, Mr Lorenz Metzner and the Technical Editor and co-author of the publication, Mr Livingston Armytage. Their tenacious aptitude and commitment to produce an analytical, evaluative,

and informative text has ensured that this publication provides a meaningful contribution to the literature on judicial reform.

The publication comprises thought provoking analyses of recent judicial reform programmes undertaken by a cross-section of Forum countries. Special thanks go to the following authors: Deputy Chief Justice Professor Dr Paulus Lotulung, Indonesia; Justice Dr Ananda Mohan Bhattarai, Nepal; Justice Sathavy Kim, Cambodia; Professor Dr Mohan Gopal, India; Professor Myrna Feliciano, Philippines; Ms Ayesha Dias, India and Sri Lanka; Ms Zenaida Elepano, Philippines; Ms Anita Jowitt, Vanuatu; Mr Ly Tayseng, Cambodia; Mr Aria Suyudi, Indonesia; and Mr Hari Phuyal, Nepal.

We are grateful to the contributions for the content and quality of the text by respected peer reviewers, including: D'ato Param Cumaraswamy; Chancellor Ameurfina Herrera; Fr Ranhilio Aquino; Justice Michael Kirby; Ms Lynnsay Rongokea Francis; Mr Warwick Soden; and Ms Sara Hossain. Thanks also go to the experts who supported the drafting and review teams: Ms Radhika Behuria; Ms Helen Burrows; Ms Elain Chan; Ms Elizabeth Fong; Mr Paul Green; Ms Roohi Metcalfe; Ms Mary O'Shea; and Ms Chandra Roy.

External support was provided by several institutional partners, including: the Australian Agency for International Development; Indonesia-Australia Legal Development Facility; International Commission of Jurists; International Development Law Organization; LAWASIA; and Transparency International.

The Forum is indebted to all those who are not mentioned but gave their time, expertise, and commitment to the publication, without whom it would not have been possible.

Abbreviations and Acronyms

ADB	Asian Development Bank
APJR	Action Programme for Judicial Reform, Supreme Court of the Philippines
AusAID	Australian Agency for International Development
Blueprint	2003 Reform Plan Developed for the Supreme Court of Indonesia
CA	Court of Appeal
CAMIS	Court Administration Management Information System
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CFM	casflow management
CIAA	Commission for Investigation of Abuse of Authority (Nepal)
CIS	case information sheet
CLC	community legal centre
CLE	continuing legal education
CLJR	Council for Legal and Judicial Reform, Cambodia
CLT	customary land tribunal
CLTA	Customary Land Tribunal Act
CMC	Court Management Committee
CoC	codes of conduct
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organization
CTA	Court of Tax Appeals
DC	District Court
DCM	differential case management
DVPO	domestic violence protection orders

ECCC	Extraordinary Chamber within the Courts of Cambodia
ENM	Ecolé Nationale de la Magistrature
EU	European Union
EWMI	East-West Management Institute
FEDEF	Freedom; Equality; Dignity; Equity; and Fairness
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (German Technical Cooperation)
HRD	Human Resource Development
IC	Interim Constitution (Nepal)
IDPs	internally displaced persons
IDR	Integrity Development Review
IO	international organization
IT	information technology
JBC	Judicial and Bar Council (Philippines)
JICA	Japan International Cooperation Agency
JRT	judicial reform team
JS	Judges Society
JSTC	Judicial Service Training Centre (Nepal)
LPGs	Law-dependent Public Goods
MCTCs	Municipal Circuit Trial Courts
MeTCs	Metropolitan Trial Courts
MISO	Management Information System Office
MOCA	Ministry of Constitutional Affairs and National Integration (Sri Lanka)
MoJ	Ministry of Justice (Cambodia)
MTC	Municipal Trial Courts
NCR	National Capital Region
NGO	non-government organization
NJA	National Judicial Academy of Nepal
NRs	Nepalese Rupee
OCA	Office of the Court Administrator of the Supreme Court of the Philippines
PHILJA	Philippines Judicial Academy

PIL	public interest litigation
RAJP	Royal Academy of Judicial Profession
REPI	review and enhance of performance and integrity
RGC	Royal Government of Cambodia
RSCC	Royal School for Court Clerks (Cambodia)
RSJP	Royal School for Judges and Prosecutors (Cambodia)
RTC	Regional Trial Court
SAL	social action litigation
SCI	Supreme Court of Indonesia
SCM	Supreme Council of Magistracy
SCN	Supreme Court of Nepal
SCP	Supreme Court of the Philippines
SWAp	sector-wide approach to planning
TNA	training needs analysis
ToT	Training-of-trainers
TQM	total quality management
TWG	Technical Working Group
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNICEF	The United Nations Children's Fund
UNTAC	United Nations Transitional Authority in Cambodia
US	United States of America
USAID	United States Agency for International Development
USD	United States Dollar
VWC	Vanuatu Women's Centre



Introduction

Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience

LIVINGSTON ARMYTAGE

1.0 THE PURPOSE OF THIS BOOK

The purpose of this book is to promote development of know-how and refinement of understanding of judicial reform through a critical reflection of actual experience across the Asia Pacific region.

Searching for Success gathers the emerging experiences of judges, court administrators, lawyers, and researchers engaged in judicial reform in a collection of case studies that address many of the modern challenges of justice: exclusion, delay, corruption, and incompetence. The collection focuses on the experience of practice, rather than theory, to develop insights which build from authors' learning from their work as judicial reformers. In each chapter, the authors examine aspects of judicial reform and offer analysis of its strengths and weaknesses for the purpose of helping readers increase their level of understanding of the issues. Learning by doing; as success is sometimes qualified. This book provides a wealth of experience and insight to adapt and use across the region.

Analysis of this experience indicates the existence of ten themes, or overarching challenges, which have confronted the passage of judicial reform over recent years. These challenges are often interrelated and in any particular context may warrant consideration in a variety of configurations. For the purpose of this introduction they may be described as relating to goals, leadership, and independence, capacity for change, training, integration, community, donors, data, and results. In essence, this experience suggests that from the outset there is a need for a clearer refinement of purpose to untangle the existing

conflation of goals, some of which are over-ambitious and may conflict with each other. This will then enable tighter linkage with and a sharper focus on development results. This, however, rests on a more serious investment in data, research, performance monitoring, and evaluation by donors to guide ongoing endeavours.

The experience contained in this book provides a number of useful lessons. Ultimately this experience suggests that it is the nature and quality of leadership which is critical to the success of judicial reform. Invariably, authors find the proactive leadership of the judiciary to be central to success in their reform endeavours. Moreover, home-grown leadership—epitomized in the Indian experience—builds ownership and co-opts the participation required for sustaining change. The quality of this leadership is critical, and requires the judiciary to build relationships with other reform stakeholders in the executive, community, and with donors, each of which requires nuanced management. Integrating judicial reform initiatives with higher-level national planning may now be recognized as essential for effectiveness, yet this calls for collaboration, proximity, and engagement with the executive that, at first glance, may sit uneasily with more traditional notions of independence. Calibrating appropriate proximity with the executive requires considerable sensitivity. Similarly, it is not always easy to engage closely enough with the community to hear its needs, while differentiating the needs for even-handedness and insulation from the lobbying of interest groups. Perhaps, the most challenging is balancing the relationship with donors who, on the one hand, have a legitimate interest to facilitate reform yet, on the other, risk subsuming local ownership of its agenda.

2.0 REFORM CONTEXT

Judicial reform is important because it is concerned with improving the quality of justice. Justice, embodying fundamental notions of fairness and equality, is elemental to social well-being and lies at the foundations of human civilization.¹

Over the past fifty years, recognition of the significance of this reform has grown. The field of judicial reform in international development assistance has developed substantially and rapidly in various iterations. Commencing with the reconstruction of post-war

Europe, judicial reform contributed to the 'law and development movement' of international assistance in Latin America in the 1960s and 1970s. It then played a significant role during the Washington Consensus-era of support to market economies in the post Soviet bloc during the 1980s and 1990s. Judicial reform has more recently spread in what has been termed 'the rule of law revival' across the developing world to Asia and the Pacific as a means to promote human rights, good governance, and poverty reduction.

The development rationale for judicial and legal reform has been variously conceptualized across this period to include promoting economic growth by strengthening legal frameworks to secure market dealings; building governance and democracy through the rule of law and judicial independence; consolidating the capacity of state institutions to provide public goods, notably public order, safety and security; and reducing poverty by increasing empowerment, human rights, and access to justice. For these reasons—economic, political, and social—policymakers and development agencies have seized on the rule of law as what one commentator has described as '...an elixir for countries in transition...' because it promises to remove the chief obstacles on the path to democracy and market economics.² Judicial reform, a core element of the rule of law, has become a big business, supported by numerous multilateral and bilateral donors in hundreds of programmes and projects of steadily increasing size which are now valued in billions of dollars.³

Despite the evident importance of, and substantial growth in judicial and legal reform over recent decades, a review of the literature shows that there are strongly mixed views on the results and effectiveness of these endeavours. There is evidence that suggests that levels of procedural, or what is sometimes called 'thin' reform, can clearly be demonstrated in practice, as notably demonstrated in Chapter 2 in improving the efficiency of court procedures in Manila and Jakarta, respectively.⁴ Whether less court delay causes substantive improvements in justice or good governance is however another matter. Some argue that the attainment of these higher level substantive or 'thick' goals remains disturbingly elusive.⁵

Along with the growth of reform endeavours has come a mounting disquiet about aid effectiveness and what one commentator

describes as the spotty performance of reform efforts and its elusive and disappointing results.⁶ Jensen describes the story of judicial and legal reform as one of modest successes and frequent failures. He goes on to highlight significant gaps between theoretical understanding of legal systems and of project design and implementation that calls for greater appreciation of the complexity of political economy in reform endeavours.⁷ Effectiveness has been patchy and limited at best, with little compelling evidence of any discernible contribution towards reducing poverty or other development goals. Over the past decade, this has led to a mounting re-examination of the purpose, approach, methodology, and results of the prevailing approach to judicial reform, as is documented in the first chapter. Other authors address a variety of these concerns throughout the collection.

This lack of visible results is attributable to the existence and combination of two deficiencies. The first deficiency may exist in *development practice* which relates to the need to refine objectives, development logic, and implementation strategies to improve the linkage between purpose and results. The second deficiency may exist in *evaluation practice* which requires increased investment in improving performance data, monitoring, and evaluation. Many observers comment on the near absence of rigorous systematic evaluations, which one describes as disturbing.⁸ It is not yet clear whether this spotty performance relates to a lack of results or to a lack of reliable evidence of results.

Within this context, the experience outlined in this book will illuminate and provide insights on this concern for effectiveness. Authors analyse their experience in terms of its purpose, nature, method, and effectiveness. This analysis in turn stimulates and provokes reflection on the justification of the approach to reform and a timely reassessment of the robustness of its theory.

3.0 SEARCHING FOR A THEORY

A brief review of the literature indicates that there are in essence two competing schools of development thinking, or theories, of judicial reform. The first and prevalent school comes from the economic domain, defined by legal and economic philosophers who see the role of the state as being to support the market by providing key

institutions such as courts the ability to secure investments and property rights and to adjudicate commercial disputes.

Seminal to the formulation of this approach has been the work of Max Weber, which established the key developmental propositions that modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with strangers. These propositions have become intrinsic to the economic justification in promoting courts as key institutions of the state to protect the market. Weber saw the state as being the polity which possesses a monopoly on the legitimate use of physical force, and defined law as a precondition for modern political development. In his view, law and justice are assigned central roles in development because they provide the necessary certainty and predictability essential for entrepreneurs to pursue what he described as the 'profit-making enterprise'.⁹

More recently, Douglass North builds on this work to propose that economic performance hinges on institutions, such as functioning courts of law, that protect property and contractual rights. He defines institutions as 'the rules of the game' in a society that structure the human environment in order to reduce uncertainties in interaction. This thinking provides the theoretical justification for framing the instrumentalist approach to judicial reform as a neoliberal strategy for poverty reduction through market liberalization, enterprise privatization, and state deregulation. This has characterized the approach of the World Bank, the International Monetary Fund (IMF), and related agencies over recent years.¹⁰

A number of respected practitioners argue that this approach has brought about significant improvements to the courts through the provision of technical assistance, infrastructure, and information technology. Christina Biebesheimer, for example, argues that on the weight of this evidence it is possible to measure some positive changes made by criminal justice reforms to a variety of due process indicators. For example, preventative detention; speed of trials, and structural reform through lawmaking and organizational change.¹¹ Linn Hammergren agrees on the contribution of technical assistance, which she classifies as including changes to laws and procedural frameworks; measures to improve access to the poor; creation of new organizations, such as public defence, human rights ombudsman and

anti-corruption offices; case-flow management, and so on.¹² Judicial reform often coexists with legal reform, and makes up a package of three core components involving changing substantive laws; focusing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence.¹³ Many donors have focused on making formal judicial institutions more competent, efficient, and accountable, as we see from the experiences detailed in Chapter 5—training judges in Kathmandu and Phnom Penh—and the building of accountability mechanisms and practices recounted in Chapter 4.

The integrity of this theoretical approach has been challenged by scholars, such as Ha-Joon Chang who interrogates the role of institutions including the judiciary, law, and property rights in promoting economic development and good governance. He argues that the correlation between economic development and institutional variables is unclear, let alone causal, and concludes that it is historically more accurate to see these institutions as the *consequence* rather than the *cause* of economic development.¹⁴

Mounting concerns over the prevailing approach to judicial reform are building around the lack of compelling evidence that it achieves its goals, usually to promote justice or help the poor. Thomas Carothers, for example, critiques the practice of what he describes as ‘the rule of law revival’ as lacking a well-grounded rationale, any clear understanding of the essential problem and a proven analytic method. In essence, the rule of law makes possible individual rights which are at the core of democracy. A government’s respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy, such as property rights and contracts, are founded on the law and require competent third party enforcement. And herein lies the seeds for the conflation, confusion, and collision of economic and political rationale for reform practice.¹⁵ Erik Jensen, Thomas Heller, and others support these concerns and call for a renewed approach based on increased empiricism to understand what courts and their alternatives actually do.¹⁶ Some of these concerns are raised in the review of global experience in the Chapter 1.

More recently, an alternative theory is emerging to provide a more defensible justification and approach for judicial and legal reform. This approach is grounded in the thinking of Amartya Sen, who sees the role of development as providing capacity to the poor, the people who should have rights to opportunity. Sen argues that development should be seen as a process of expanding the real freedoms and rights that people enjoy. In his critique of what he describes as the more traditional rationale for development economics, Sen argues that development requires the removal of major sources of 'un-freedom': poverty as well as tyranny; poor economic opportunities as well as systematic social deprivation; neglect of public facilities; as well as intolerance or over-activity of repressive states. Focusing on real freedoms contrasts with the prevailing narrower views of development which measured development with the growth of gross national product, the rise of personal incomes, or social modernization. Sen sees justice as fundamental to the creation of social opportunities and the expansion of human capabilities because it contributes directly to the quality of life; and it links closely with his view of the state's role to supply public goods such as health, education, and effective institutions for the maintenance of local peace and order.¹⁷ This alternative theory for judicial reform is already becoming influential and, for example, impels the reform endeavour to improve access outlined in Chapter 3.

As we can see, this view of development builds from the foundational notion of justice articulated by Aristotle and, more recently, the work of John Rawls who is most significant for current purposes for his theory of justice that expounds the concept of justice as fairness.¹⁸ Rawls builds his work on the tenets of social contract theory, formulated on the work of Locke and Rousseau, among others, to describe the implied agreements by which citizens conform to establish the social order which provides the foundation for state authority and establishes the theoretical groundwork for democracy. He argues that the principles of justice form the basis of society and are the object of the original social contract.¹⁹ The central notion of justice as fairness is based on people in what he terms the 'original position', shrouded in a 'veil of ignorance', who are motivated by rational self-interest to collectively maximize the

greatest opportunity to attain the 'good life' by reference to principles of equal basic liberties. Justice as fairness rests on two principles, the first requiring equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example, inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.²⁰

Rawls' normative approach to 'rights' is foundationally important in providing a contemporary notion of justice that links to the previously separate discourse on human rights which is formulated in the work of Sen.

There is now inquiry beyond the 'rule of law revival' to develop this alternative thinking. Stephen Golub argues that rule of law reform is unlikely to produce changes that will contribute to a better life for significant numbers of people in developing societies. He characterizes this traditional approach, which is commonly adopted by multilateral development banks, as being 'top-down' and institution-centric. He sees this approach as flawed and incomplete, and proposes an alternative that concentrates on legal empowerment of disadvantaged persons, which builds on Sen's capabilities approach to focus on civil society as the best route to strengthening the legal capacities and power of the poor.²¹ Other examples of initiatives to operationalize Sen's freedom-centred alternative approach to judicial and legal reform are being variously developed in the emerging '*access to justice*' approach of the United Nations, and the '*justice for the poor*' approach of the World Bank. New waves of judicial and legal reform endeavours are now extending to more pluralistic approaches to justice, informal systems, and customary pathways for community-based dispute resolution. Most recently, David Trubek and Alvaro Santos crystallize this emerging body of new inquiry as a 'Third Moment', which is still in a formative phase. This inquiry contains a mix of different ideas for development policy and considerable experimentation in approaches to explore reform in the informal sector, non-legal normativity, the role of the enabling state and non-state actors in development, and rights-based empowerment approaches.²² Of potentially great significance, this 'Third Moment' presages a new scrutiny of the distributive dimensions of judicial reform, which

have largely been overlooked in the earlier instrumentalist approach to supporting economic development.²³

This is an exciting time for a reappraisal of approaches. This is becoming apparent in the literature, where commentators are refreshing our understanding of the theory for judicial and legal reform. This is a dynamic and healthy process which continues to evolve. For practitioners in the field, however, the key issue is not so much the existence of this theoretical discourse, sometimes truncated to 'top-down' versus 'bottom-up' approaches, but ascertaining how it will be resolved. The actual experience of practitioners from across the region provides a most timely contribution to refreshing our understanding of judicial reform by creating a bridge between theory and practice, enabling theory to inform practice and practice to refine theory.

4.0 EXPERIENCE FROM PRACTICE

The authors who have contributed to this work offer a sizeable body of case-studied experience and a substantial body of reasoned analysis with which to test, apply, and continue to build our understanding of reform endeavours to promote justice across the region.

4.1 DEVELOPMENT AND IMPLEMENTATION OF REFORM INITIATIVES

In a seminal conceptual overview to open this collection, Mohan Gopal, Director, National Judicial Academy, Bhopal, India; and former Chief Counsel, The World Bank Legal Department surveys the global experience of judicial reform over recent decades to observe that little consensus exists on the purpose or success of these endeavours, and to note increasing calls for a fresh approach. To address these calls, he marshals a number of lessons from the international judicial reform experience. He illustrates these lessons with a case study on India's experience, which has had a marked impact on improving the administration of justice that compare favourably to the international experience, with a view to improving reform initiatives throughout the region.

The paper highlights the notion that judicial reform programmes ought to be home-grown and internally driven, with a significantly minor role for external donors. Reforms have been developed

to enhance justice, adopting what he terms a justice-orientated approach. In this approach, justice is seen not in a traditional manner as, for example, the description of a just decision made by a court. Rather, justice is understood as a standard of human existence in which human conduct conforms to acceptable normative standards which comprise freedom, equality, dignity, equity, and fairness. Gopal offers, as an example, gender justice that exists not merely when a court renders a decision upholding equality for women, but rather, when women actually experience and enjoy equality because human conduct towards them conforms to standards of equality prescribed by law.

Thus the goal of the judiciary and of judicial reform initiatives should be to secure human conduct consistent with acceptable normative standards. These, he proposes, are the standards of conduct required in international treaties and in generally accepted principles of international law. To achieve this goal, the content ('what') and methodology ('how') of judicial reform programmes need a new approach that addresses six critical variables, which he describes as the 'judicial reform hexagon.' These variables include the role and responsibility of courts, organizational efficacy, knowledge of law, judicial method, management systems of courts, and access to justice. A most important consequence of this approach in India has been the emergence of public interest litigation that has had a profound influence not only on the judicial system but also on the course of national development.

India offers an example of a distinctive approach to judicial reform, one that has sought to transform its colonial adjudicatory system to a system that serves a democratic polity and a market-oriented economy. Gopal argues persuasively that the core function of the judicial system is to secure justice rather than, for example, merely settling disputes fairly, efficiently, and promptly as an end in itself. It follows that the effectiveness of judiciaries should be defined and measured on the basis of their effectiveness in fulfilling the core goal of securing justice.

Gopal showcases this experience to show that justice-oriented judicial reform which secures 'just' human conduct also enhances public confidence in the judiciary.

4.2 CASE MANAGEMENT AND DELAY REDUCTION

In Chapter 2, Zenaida N. Elepano, Court Administrator and Head (ret'd), Supreme Court of the Philippines; and Chair, Department of Court Management, Philippines Judicial Academy (PHILJA), reviews the experience of the Philippines in administering its judicial caseload and addressing the problems of delay that have beset courts around the world. In what may be termed a paradigm shift in judicial leadership, she describes the transformation to a more interventionist style of judicial management after 2003. The paper evaluates the experience of implementing a variety of differential case management techniques, calls for greater investment in, and a more integrated approach to information gathering and management processes, and advocates the introduction of technology to be considered from as early as day one of a reform programme.

This paper demonstrates that case flow management can work and is effective in reducing delay in the disposition of cases, but '...only if the court is genuinely committed to see that all the events or stages of the case happen within the designated timeframes so that undue delay is averted.' What makes up this genuine commitment? The author portrays the court as a learning institution, steadily lead from the top, committed to critically monitoring its progress and constantly refining its approach. In particular, sustained leadership is required to manage the human dimensions of the change process without which the desired change will be resisted. She recounts that resistance to change was encountered from older judges, court personnel, and litigants who found adjusting to the new timeframes difficult, causing complaints of burn-out and stress. Many of these concerns ultimately transpired to be based on misunderstandings that were redressed through more participatory planning and communication. So, coupled with leadership are other useful lessons on the needs for clear communication of purpose, providing incentives and sustaining the motivation of key actors, monitoring progress closely and regularly providing information on results, and adjusting approaches as required. It goes almost without saying that such reform endeavours demand vision, focus, time, and attention to be successful.

Resuming judicial control of the pace of adversarial litigation from lawyers has restored predictability of case events occurring as scheduled

and disposal within reasonable timeframes, though it was clearly not an easy transition. Elepano observes that this resumption of judicial control has enhanced trust and confidence in court processes which are now seen to discharge their adjudicative functions in a fair and timely fashion. While elimination of delay does not necessarily result in speedy justice, she argues that it does publicly signal that the courts are no-nonsense tribunals that mean business, and does encourage court users to seek relief free from the anxiety and fear of protracted, unpredictable, and expensive litigation.

Central to the Filipino experience, the case-management approach has focused on delivering timely justice by using a rights-based approach, where procedural law is used as a case-management tool for the attainment of substantive justice. Ultimately, she argues, the goal of case management in any conflict resolution endeavour is to see that justice is done and attained within a reasonable time and in a fair manner. If procedural law hinders or prevents justice, then it should be disregarded or altogether discarded. In this sense, the Philippine experience is testament to a purpose-driven, (that justice is attained) rather than a rule-driven approach.

The next paper is written by Paulus Lotulung, Deputy Chief Justice of the Supreme Court of Indonesia and Aria Suyudi, Member of the Supreme Court's Case Management Working Group, who analyse the Indonesian experience of case management in redressing the problems of chronic delay, and offer a number of practical lessons for readers across the region. During this period, the Supreme Court has succeeded in reducing its backlog of aged cases (defined by the court as all cases of more than two years from registration) by almost 35 per cent. Prominent from this experience are three key messages. First, for case management to be successful, a dual strategy for backlog reduction and new case management procedures is required. These must address the problems of accumulated backlog and the causes of ongoing delay simultaneously; ensuring backlog will not reoccur upon completion of the last intervention. Adding resources is not sustainable; what is required is implementation of procedures that manage the passage of cases effectively from the outset.

Second, case management can—and should be—simple and cost-effective. While it may be inevitable for courts which have many cases to need computer-aided systems and Information Technology (IT)

to effectively manage high volumes of case data, the Supreme Court of Indonesia demonstrates that IT-based solutions do not need to be sophisticated. The Court successfully used a generic spreadsheet application, such as Microsoft Excel, to improve its capacity to manage case information. The court intentionally selected this approach to manage a significant internal transition process in an environment of limited resources because it was sustainable and avoided becoming chronically dependent on external consultants requiring funding through donor-assistance.

Third, information management is the foundation for case management. The Indonesian experience demonstrates that accurate information is an essential prerequisite to establishing any effective case management approach for any court. Introducing an information management system provides reliable data on which judges can understand the actual logistics of service delivery, possibly for the first time. It identifies delay which then becomes a visible symptom of institutional inefficiency that can be redressed. It also enables timely monitoring of the court's performance in attaining its time standards and addressing delay reduction goals, on which refinements can be made. In any effort to reduce backlogs, improvements in case management must be a high priority. It is interesting to note that the authors attribute much of the success to date to the cultural change in judicial attitudes which has resulted from the regular communication of detailed information on court performance. This has provided judges with an incentive to perform well in comparison with their colleagues. This has incentivized judicial performance. They now expect detailed information on the exact distribution and age of cases, and have more recently started to use this information as a monitoring tool for the management of their lists. Showing the tangible benefits of reform initiatives, they conclude, encourages further organizational change.

Fourth, the Indonesian experience also affirms the critical existence of judicial leadership and the contribution of stakeholder participation in the reform process.

4.3 PROMOTING ACCESS TO JUSTICE THROUGH JUDICIAL REFORMS

In Chapter 3, Anita Jowitt, Lecturer, School of Law, University of the South Pacific, Vanuatu; and a legal reform practitioner, presents two

case studies of the experience of courts in Vanuatu to improve the access of marginalized groups to exercise their legal and customary rights. The first examines the courts response to improving access for women suffering from violence in the home; the second examines the courts' response to improving access for those living in rural areas by renovating the island court system and introducing a customary lands tribunal. These reforms have met with varying success, from which a number of useful messages may be drawn.

Most importantly, this experience demonstrates that judges can seize the initiative as reform leaders by proactively improving the operation of the courts. This need not be confined to a reactive role. Moreover, judges can adopt a broader standard-setting role that extends beyond the courtroom to society when so warranted. As Jowitt observes, creating the climate for judges to see that leading this change was a legitimate judicial role was critical, as was promoting ownership of the process at large. Changing the operation of the courts to make them easier to use by marginalized groups can then influence, support, and flow on to leading changes in other areas of society. The study on domestic violence protection orders, in particular, offers a powerful example of how the judiciary can initiate feasible change that promotes the exercise of legal rights, even in the face of a parliament that may be reluctant to implement laws that protect women.

Essential in any strategy to improve access to justice is the involvement of the community, starting by listening to the voices of those directly affected. Not only is the community central to identifying the problems and developing solutions, it is also critical in sustaining implementation and monitoring results. The Vanuatu experience indicates that active participation in the change management process is critical for success. Judicial ownership of the new approach to domestic violence ensured the successful introduction of new court rules, but the non-participation of police caused misgivings and created obstacles in the enforcement of their orders.

Similarly, suspicion greeted separate efforts to develop the customary land tribunal. Many resisted its implementation as it was seen as being externally imposed and consequently widely distrusted as a mechanism to weaken community control of the culturally sensitive issue of resolving customary land disputes. The lesson

of these experiences suggests that stakeholders must be centrally involved as reform partners and have a real sense of ownership in developing access to justice solutions.

The nature and extent of home-grown initiatives and local-ownership in both harmonizing and integrating customary and formal justice systems have been critical factors in the success of judicial reform endeavours in Vanuatu, where there is a latent risk of collision between those systems. In this sense, successful change has been demand-driven jointly by the judiciary and the community. The experience gained by rehabilitating the island courts by appointing influential local leaders as judges is instructive of how the state court system can work more closely with non-formal dispute resolution mechanisms; not only did this avoid the erosion of traditional authority, but it positioned the formal and informal justice systems to complement each other with the effect of enabling more people in remote communities to access the courts to uphold their rights. Other factors key to success included the extent of public consultation and training, and the selection of court clerks who exercise a key 'gatekeeper' role and have proved essential in promoting public accessibility in day-to-day operations.

Ayesha Dias, Programme Director, Human Rights and International Natural Resources, Industry and Corporate Social Responsibility, University of Dundee, Scotland; and legal reform consultant and academic, then argues that promoting access to justice in the national/regional context is a key task of judicial reform, mandated by the *Manila Declaration for a 21st Century Independent Judiciary*. She considers the experience of two case studies of rights' realization in *India* and access to justice in *Sri Lanka* to demonstrate that judges are uniquely placed to proactively enable human rights at the national level by applying the standards contained in international human rights treaties.

The Indian and Sri Lankan experiences underscore that providing access to courts may not be a sufficient measure in itself to secure access to justice for all. Drawing in particular from the experience of social action litigation (SAL) in India, the author highlights the need to ensure that reform measures aim at both improving *access* to the courts as much as measures improving access to justice *through* the courts. The experience with SAL goes a step *beyond* public interest

litigation as discussed in Mohan Gopal's paper. It is more orientated towards enhancing justice, and goes further to envisage social action by victim groups together with civil society and the courts to bring about reform through implementing the orders and directives issued by the courts, applying human rights standards in litigated cases. It requires the justice *system as a whole* to be reformed to enhance the ability of courts to secure accountability of power-wielders.

Such reforms may take the shape of a formal process, carried out in a phased manner. Or, as the Indian experience shows, it may be initiated through judicial activism and support from civil society. Driven by apex courts issuing a number of judgments against governmental actions, she points out that SAL has filled gaps in the legal framework and expanded the concept of right to life under the Constitution to include the right to fresh water and air, the right to a clean environment, the right to education, the right to shelter, the right to health, the right to free legal aid, and the right to speedy trial and justice. This Indian experience, in combination with an outlook of judicial activism within the existing constitutional structure, has made significant contributions towards enhancing access to justice. This has led to an enhanced perception and effect of the rule of law, which may serve as a persuasive approach for judges elsewhere in the region.

Many authors in this collection observe the importance of judicial leadership in championing the reform process. Dias adds an additional dimension to these observations to stress the role of other participants external to the courts and their contribution to strengthening the sustainability of the reform process through the pressure of their advocacy. She highlights the value of civil society groups forming coalitions with the courts to improve access to justice. In this sense, 'top down' national or regional level reform measures can be complemented from the 'bottom-up' to address specific local needs.

4.4 ETHICS, INTEGRITY, AND JUDICIAL ACCOUNTABILITY

In Chapter 4, Hari Phuyal, an advocate to the Supreme Court of Nepal; and Consultant to the International Commission of Jurists, Kathmandu, discusses Nepal's recent experience in strengthening judicial integrity and accountability, in particular, through the

establishment of a Judicial Council. This is a positive and important step towards ensuring the independence and accountability of the judiciary, which he commends as a substantial achievement. It provides the judiciary with a mechanism to address unethical conduct as well as protection from arbitrary interference from the executive during a transitional period of massive constitutional and political change.

While it remains premature to fully evaluate this experience, the author offers a number of observations. Perhaps most important, the introduction of institutions like the Judicial Council will not be effective in themselves without sustained support for implementation measures. Creating new institutions, however mandated, is inadequate so long as credible reports of corruption in the judiciary persist. In this sense, Phuyal argues, Nepal is still struggling to fully realize the potential of the new Judicial Council. He identifies a number of steps to be taken to complete the reform agenda and operationalize this judicial accountability mechanism. Significant among these are the streamlining of complaints procedure, and extending the training to judges, court staff, and the public. But further training alone is insufficient. Additional steps include: sustaining visionary leadership; establishing a full-time secretariat and staff and building its professional capacity; adoption and implementation of codes of conduct; expansion of the supervisory jurisdiction to include court staff; broader law reform and practical corruption control measures; developing standard operating procedures and practices including formalizing the decision-making process; improving coordination across the justice sector; and fully embracing transparency as the basis for accountability.

In effect, the Nepali reform experience demonstrates the need for a more integrated and comprehensive reform agenda, one that is iterative and amenable to ongoing refinement. This, in turn, calls for recognition that effective change requires both planning and time for all steps to be completed, and raises the need to constantly monitor and refine the implementation approach to ensure attainment of its objectives. In Nepal, he observes, it takes time to develop lessons learnt and establish workable concepts and mechanisms—as elsewhere, we might add. These observations need the ear of international donors who fund the establishment

of worthy institutions such as the Judicial Council but then, all too often, move on to other matters and abandon them to struggle unsupported through the critical challenges of implementation. Why this happens is understandable, even unavoidable, within the project-based framework of development assistance; but, why it must continue to be repeated is difficult to justify as an effective approach to development investment.

Myrna Feliciano, Chair, Department of Legal Method and Research, Philippines Judicial Academy; and former Executive Director of Mandatory Continuing Legal Education Committee, Supreme Court of the Philippines, then moves on to consider the experience of the judicial reform programme of the Supreme Court of the Philippines to improve accountability, transparency, and complaints procedures, to offer readers a number of practical observations.

Explaining that the judiciary in the Philippines has not been spared the widespread public perception of corruption in government, Feliciano first advocates for the introduction of defined codes of ethical standards to guide judges against which they may be held accountable. The Philippines' experience indicates that compliance with an enforceable and defined code of ethics will not only entail greater accountability, it will also enhance the individual integrity of judges and engender respect and confidence in the judiciary.

Secondly, she calls for transparency in judicial appointments by opening the exercise of the political power of appointment to public scrutiny. Transparency in judicial appointments protects the integrity of the judiciary by opening the exercise of the political power of appointment to public scrutiny. The author cites two specific examples: the case of *Kilosbayan* as a landmark example of judicial activism to demonstrate the judiciary asserting its independence and offering a concrete example of transparently challenging the arbitrary exercise of presidential nominations to the Bench. She also addresses the culturally sensitive issue of how courts should deal with political influence in judicial appointment which in the context of the Philippines is the tradition of '*utang na loob*' or debt of gratitude. This tradition pertains to the belief that an appointed public official is perpetually indebted to the appointing power and whoever endorsed the appointment. Since courts ultimately resolve

political contests, some politicians exert means to influence the appointment of judges and justices, with a view to collecting such a 'debt of gratitude' at a later, more opportune time. The solution she offers is to insulate the appointment process from executive discretion and expose it to the light of day.

Thirdly, she recommends the need to streamline judicial conduct complaint procedures to ensure that administrative cases are heard and decided fairly and expeditiously. In recent experience, she argues, this has become imbalanced in favour of complainants, encouraging often frivolous or vexatious complaints, with 95 per cent of complaints being dismissed without even reaching the investigation phase that divert resources and cause the courts to become clogged.

4.5 JUDICIAL PERSONNEL EDUCATION AND SKILLS DEVELOPMENT

The final chapter opens with a review of Cambodia's experience grappling with the harrowing challenges of rebuilding the judiciary, where it has been estimated that just six law professionals survived the legacy of war and the genocide committed by the Khmer Rouge regime. Sathavy Kim, Justice, Supreme Court of the Kingdom of Cambodia; and former Director, Cambodian Royal School for Judges and Prosecutors, and Ly Tayseng, Secretary-General, Bar Association of Cambodia; and former Faculty Member, Cambodian Royal School for Judges and Prosecutors reflect on the steps being taken to rebuild not only the competence of the judiciary but, at the same time, to establish the capacity of the new training institution to perform this role.

With the benefit of hindsight, the resources required to support rebuilding the Cambodian judiciary have been underestimated by the internal community. It is now clear that the depletion of professional capacity across the entire justice sector persists after more than two decades in the post-conflict context, and the international community of donors is yet to fully diagnose and provide sufficient support to complete the required institutional capacity building, notably in establishing the faculty of trainers and creation of core training materials.

This paper describes the profound difficulties in restoring judicial competence after the obliteration of judicial and legal expertise. There

were almost no sources of judicial professionalism for the purpose of training novice judges. On the one hand, there was an acute shortage of competent judges in the ranks of the depleted judiciary or indeed any other suitable experts experienced in judicial training; and, on the other, international experts were generally unfamiliar with Cambodian law, culture, and needs. Moreover, judicial culture and standards were subsequently degraded in the post-conflict situation, when judges were appointed without the opportunity for formal legal training, supported at best by young western law graduates volunteering as mentors, and occasional donor-sponsored seminars. Most recently, in 2005, the first generation of law-trained but inexperienced judicial novices graduated and is undergoing assimilation with the remaining experienced but untrained judges. The transition to restore judicial professionalism and integrity is ongoing, but opportunities for appropriate role-modelling and mentoring remain constrained.

To address these needs, the new Royal School for Judges and Prosecutors (RSJP) has focused on developing a twenty-four-month curriculum for initial judicial orientation which is structured over five phases to develop judicial know-how including skills, knowledge in substantive laws and procedures, and judicial attitudes and behaviour. While this curriculum is still being developed and is yet to be formally evaluated, it is already recognized that there is a need to build a more skills-based training which extends beyond substantive law such as legal analysis, reasoning, judgment writing, and protection of human rights. As the result of conducting a training needs assessment in 2005, the school has now also launched a programme of continuing legal education.

The shortage of judicial trainers has created the imperative for the school to build its own capacity by conducting Training-of-Trainers (ToT) programmes. The authors describe this capacity building as having been useful but meeting with varying success owing to its ad hoc nature, the insufficiency of funds to pay trainers adequately, and the lack of ongoing support from donors. While it is clear that donors have certainly supported ToT, they have seemed reluctant to provide sufficient resources and incentives for local trainers to participate and also to develop much-needed course materials.

Additionally, it has clearly been very difficult for RJSP to coordinate donor support. Whilst the authors stress that all support has been of benefit, it is clear that this support has not always responded directly to the needs of the school but rather, as they put it, to respond to project designs of the development partners. Donors have often changed their experts and staff, making it all the more difficult for the school repeatedly dealing with newcomers who have little knowledge. The authors observe that the training approaches of one donor takes the training in different directions to that of another. There have been some instances where the content in different programmes overlaps. Trainers from common law and civil law jurisdictions sometimes adopt different training methodologies. Evidently, the coordination of donor support has significant 'hidden costs' which has required the allocation of precious resources to manage, which would otherwise have been available for the core business delivering training to judges. While this is doubtless a sensitive issue, it is also an important—even courageous—message to convey to international benefactors.

Finally, Ananda Bhattacharai, Justice, Appeal Court of Nepal; and Core Faculty Member, National Judicial Academy, Federal Democratic Republic of Nepal, completes the collection with a review of the experience in establishing the National Judicial Academy (NJA) in Kathmandu. The NJA has launched a professional development programme for judges designed to enhance judicial competence and improve the quality of justice during a transitional period of massive constitutional and political change. The conclusion of the debilitating civil conflict has left the courts depleted of resources and damaged in credibility. He describes the daunting but ground-breaking challenges of undertaking the first judicial training-needs assessment and establishing the inaugural faculty of judges to serve as trainers, acquiring and adapting the methodologies of adult learning as they proceed forward.

The paper explores the challenges and constraints that were confronted in establishing a new training institution; assessing the needs for training, developing a training faculty from scratch, conducting ToT, developing its curricula, and producing training materials. It discusses the slow but essential process of creating local ownership where initiatives may be donor-driven, developing

institutional capacity and momentum for change, the sensitive issue of lobbying for additional resources, and shifting judges' resistant attitudes. While judicial education is still in its formative stages in Nepal, the author calls for increased attention to monitoring and evaluating the impacts of training.

The Nepali experience casts judicial education into a particularly dynamic and instrumental role in helping a transitional society to restore a just, humane, and peaceful order, and to start rebuilding public confidence in the judiciary as a trustworthy and capable social institution. The author describes the perennially difficult decisions of managing limited resources, and having to focus on selected priorities in order to avoid stretching scarce resources too thinly across potentially overwhelming needs. Crucial to experience has been recognition of the need to find the right balance between rationalizing training resources for the benefit of all law professionals while avoiding erosion of judicial independence and the risk of being spread too thinly. This has resulted, most recently, in the NJA seeking a refinement of its mandate to concentrate its training on judges alone.

The paper recounts the active steps that were required to develop genuine local ownership of the training programme, where support was initiated largely through the vigour of donor assistance, and the challenge of avoiding dependence and resistance to something seen as being imposed from outside. In Nepal's case, leadership has been provided by the Supreme Court in steering the training programme and in seconding high-calibre personnel to ensure its success. Bhattarai notes that as this programme grows, so does credibility for the judiciary as understanding and confidence in its practical usefulness grows from the experience of training helping judges to perform their duties on a day-to-day basis.

Finally, the author calls for programmes to learn more from regional and global experiences. As recognition of the need for judicial education gains prominence in many jurisdictions, local efforts can be supplemented through the cross-fertilization of ideas. Every country, he advocates, can learn from comparative, regional, and global initiatives relating to internationalization of human rights values, and emergent international norms of trade, commerce, and services.

5.0 OVERARCHING THEMES: TEN CHALLENGES

A number of themes emerge from this body of experience in judicial reform that are recurrent throughout the contributions and may be seen as key challenges that warrant ongoing consideration. These challenges are separately listed below, in transactional sequence though not necessarily in order of importance, for ease of identification. They are found in the papers configured in various combinations indicating the multi-dimensional nature of their existence, and the need to consider their significance in an integrated reform approach.

5.1 GOALS

Many contributions seek to clarify the goals for reform and strengthen the relationship between purpose and results. In this sense, authors seek to illuminate the value of developing a clearer consensus on what we are trying to do, how we should set about doing it, and how to become more systematic in contributing measurable improvements to justice across the region. This collection reopens consideration of the big question: What are we trying to achieve in judicial reform? This may become obscured as we go about activities on a day-to-day basis. As we gain experience, so our answers become better informed.

At the conceptual level, Mohan Gopal argues from the Indian experience for a judicial-orientation approach to securing justice, which is normatively focused on improving human conduct as measured in freedom, equality, dignity, equity, and fairness. This reflects the current realignment in the theory for judicial reform which is being guided, as we have seen in the earlier discussion, by the thinking of Nobel Laureate Amartya Sen. The seminal significance of this realignment rests in its potential to evolve from the prevailing market-based rationale to an altogether more potent theory which is normatively rights-centred, and identifies the human being—rather than the state, the market, or the development agency—as the key actor in the reform process. In due course, this will enable a consideration of the distributional dimensions of judicial reform, which have been largely overlooked. The implications of this evolution are potentially profound both in terms of addressing the

challenge to contribute substantive improvements to justice which go further than the existing headway in promoting procedural reforms through delay reduction, and in providing the means to monitor their success.

At a more specific level, Zenaida Elepano advocates from the Philippines' experience a rights-based approach in case management which is compatible with this theory, and provides the rationale to ensuring that substantive justice is done by ensuring procedural delay is reduced to a reasonable time and in a fair manner. Similarly, Ananda Bhattari sees training as contributing to improving the quality of justice, as made up through deliberations built on designated standards of legal knowledge, judicial skills, and professional attitudes.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book demonstrates that clarification of goals configures with the nomination of intended results, the identification of relevant performance data, and the selection of indicators with which to evaluate the effectiveness of the reform endeavour.

5.2 LEADERSHIP

The importance of leadership is consistently identified by authors as one of the most significant factors for success in the reform process. Analysis of this experience invariably attributes success to the extent to which the judiciary actually owns and leads the reform process. At least two authors separately describe this leadership as needing to be home-grown. Anita Jowitt goes further to comment on the need for a culture shift in judicial thinking in Vanuatu to recognize the legitimacy of assuming a more proactive role.

Similarly, dispositions of judicial activism have variously emerged in India and the Philippines over recent years where judicial intervention in resuming control of the docket from lawyers has been transformational. Embedded in this paradigm shift is an evolving recognition of the environment to be changed. Central to the Indian and Vanuatuan experiences in access to justice, for example, has been the shift of focus from access *to* the court to access *through* the courts described by Ayesha Dias. This frames the focus of judicial reform beyond the courtroom and onto the larger

stage of securing justice in societal terms. While the extent to which judicial activism may be accepted by any judiciary is a matter to be determined by its own members, this experience does indicate that it has contributed to the success of reform endeavours throughout the region.

Managing the human factor is an important element of this leadership. The Indonesian experience of focusing on stakeholder relations and simple solutions is a valuable lesson for the region. Simple Excel spreadsheets offer greater feasibility than arcane hi-tech solutions. Leadership that focuses on keeping reform efforts simple by sustaining motivation and rewarding efforts has proved successful.

Other authors, notably Sathavy Kim and Ly Tayseng, remark on the need to ensure that the agenda is not taken over by donors, however keen they may be in their efforts to support reform, as this changes the ownership of the reform agenda and may lead to resistance to initiatives out of suspicion of donors' intentions. This is a difficult but important issue to balance in practice: on the one hand stimulating and enabling reform, but on the other respecting the integrity of local ownership.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that leadership and ownership of the reform agenda configures with issues of independence, the formation of key relationships with other reform stakeholders, and the sustainability of change.

5.3 INDEPENDENCE

Reform experience across the region suggests the need to find a balance between active engagement and the more traditional notions of judicial independence synonymous to isolation. In this collection, the theme of independence emerges in a multi-dimensional frame: on the one hand, there is a need for engagement with external partners, as outlined above while, on the other, there is the need to consolidate judicial independence.

While few publicly dissent on the importance of independence of the courts, this precept is often honoured by its breach in practice. More vexing in the reform context, is that the funding-stream of development assistance intended to consolidate judicial

independence often has the unintended effect of rendering the courts more beholden to external influence—be it from the executive or donors. How is it possible to address this conundrum? Experience from the region indicates that developing and integrating judicial reform plans with broader national change agendas is both desirable and necessary. These calls bring with them the unavoidable challenge for all interests, specifically including the judiciary, to depart from its traditional disposition to more actively engage in mature and collaborative partnerships for reform.

The practical experience contained in this book is useful in demonstrating how courts can preserve their independence through reform endeavours. Authors variously address the complex and sensitive issue of how judiciaries should engage with the executive, donors, and the community to manage their reform agenda. In the past, judges have often held back from contact with any in the executive, the community, or donors as the preferred means to avoid compromising their independence. Yet experience demonstrates the need for judiciaries to engage more closely with their reform partners in the executive, the community, and donors to manage considerably more nuanced relationships. This is evidenced in the positive progress attained in the working relationships between the courts and the executive in India and Cambodia, with the community in Vanuatu, and with stakeholders in Indonesia.

This also requires careful and rigorous balancing of the need to strengthen transparency and accountability, as evidenced in the judicial disciplinary procedures in the Philippines or the Judicial Council in Nepal, as an essential means to consolidate credibility and reduce corruption.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this collection indicates that judicial independence configures with issues of leadership, accountability, integration, and the formation of key relationships with other reform stakeholders.

5.4 CAPACITY BUILDING FOR TRANSITIONAL CHANGE

A number of authors usefully examine their experience of capacity building causing the reader to reflect on the important question: *what is capacity building, and how is it supported?* While this is a question

on which there has as yet been surprisingly little research by the international community of donors, it is clearly an important issue.

The experience contained in this book provides donors with a valuable opportunity to hear the voices of reform practitioners from across the region calling for a less truncated approach to capacity building in the future. From Nepal, the example offered by Hari Phuyal of establishing the Judicial Council clearly shows only partial reform pending the building of numerous aspects of institutional capacities that remain outstanding. This experience is mirrored through the narration of Ananda Bhattari in the establishment of the National Judicial Academy. Moreover, the under-assessment of capacity building needs, already discussed by Sathavy Kim and Ly Tayseng, was certainly also the case in Cambodia. A pattern is forming around a disturbing discrepancy between, on the one hand, the need for effective capacity building requiring adequate planning and sufficient time for implementation to be sustainable and, on the other, a consistently shorter-term perspective to capacity building assistance being part of standard reform initiatives. This discrepancy in the post-conflict situations of Cambodia and Nepal gives rise to other questions like why has it taken so long for the international community to diagnose and support the rebuilding of capacity, which requires support for transitions little short of generational change?

Here we pose the questions prompted by the authors' experience, rather than pre-empting the answer of the international community of donors. One may however speculate that the explanation will be found in donors seeing their role as being facilitative and essentially transient to avoid creating dependency. But, even so, how does one measure how long to assist counterparts? Any survey of the duration of donor assistance confronts the sometimes baffling reality that reform takes considerably more time than is usually provided in project-based frameworks.

Ultimately, it is argued that the experience of the authors suggests that alternative models of extended donor engagement are likely to yield more sustainable results. It may, for example, be significantly more effective for donors to consider their role in building capacity as being based on a longer-term *partnership* of reform engagement with counterpart institutions which is ongoing at least in the sense of not being arbitrarily discontinued at the end of an initial eighteen

or thirty-six month establishment project. It is hoped that these observations may find the ear of international donors who are interested in funding the establishment of worthy institutions such as the National Judicial Academy of Nepal or Cambodia's Royal School for Judges and Prosecutors which, all too often, seem to be prematurely cut-loose to struggle unsupported through the critical challenges of implementation.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that capacity building configures with reassessment of goals, integration of training among other approaches, and the formation of long-term relationships with reform stakeholders.

5.5 TRAINING

The lesson from this body of regional experience is to devise reform strategies that do not over-ask of training, and that seek to integrate a range of strategies with training and related capacity building endeavours to attain the proposed objectives.

Development projects almost invariably contain training components which are treated as the synonym for 'capacity building,' and the anodyne for all reform needs. Evidently, training may be a cross-cutting tool in many change management strategies. Equally, however, it is hardly an elixir that can transform any form of underperformance; and this is clearly evidenced throughout these papers. Many authors comment simultaneously on the need for training and the insufficiency of training alone to support required changes. Frequently, good training goes to waste because of the lack of integrated strategies: structural reform; incentives; and related measures to support and accompany the proposed behaviour changes. When courts do not improve performance, this may not be because the training did not work, but rather that other reforms should have accompanied it.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that in addition to training configuring with capacity building, a consistently more integrated change-management approach is required involving structural reform, and the provision of incentives among other strategies.

5.6 INTEGRATION

Experience throughout this collection testifies to the reality that as reforms become bigger and more complex, they become more difficult to manage effectively. Keeping the complex simple lies very near to the heart of the successes identified in regional experience. It follows that big is not necessarily better. As persuasively articulated by the Judicial Reform Team, experience in Indonesia demonstrates that the key to the success is *feasibility* rather than *more resources*.

This leads the reader to contemplate the prospects for a more integrated approach to judicial reform. Certainly, this recognition may explain the emerging trend towards the new sector-wide programme approach which intends to address the fragmentation of the earlier institutionally-focused project approach. In terms of developing a reform approach to address this challenge, the experience outlined in this book collectively calls for a more integrated approach to judicial reform which configures goals with results, research, and data with evaluation, training with capacity building, independence with accountability, and leadership with relationship-building. Taken together, the papers overlap to explore the mesh of critical interdependencies between access to justice and procedural reform, case management and information management, training and incentives, integrity and discipline, and so on.

5.7 COMMUNITY

Authors attest that community participation is essential to success in judicial reform. Not only is the community central to identifying the problems and developing solutions, it is also critical to sustaining implementation and monitoring results.

The role of the community in judicial reform is variously described by authors, who explore their experiences to offer insights on the often complex nature of the role and relationship of courts with non-state actors in the community and civil society. Just as they have identified the importance of judicial leadership in championing the reform process, they recognize the benefits of forming partnerships with the community to understand its needs and use its advocacy to sustain the momentum of the reform process. While this may seem an improbable outcome for those judges who believe that circumspection is required to preserve their independence, this

was the case in Sri Lanka and Vanuatu, where civil society groups have formed coalitions with the courts to improve access to justice from the bottom-up, much as in Indonesia where successful change has been attributed to having been demand-driven jointly by the judiciary and the community.

The lesson of these experiences suggests that stakeholders should be centrally involved as reform partners and have a real sense of ownership in developing access to justice solutions. Many of the experiences described in this collection indicate that change management is often critically concerned with managing the human dimensions of reform. Authors comment at length on the need for both leadership and participation. Active participation in the change management process is critical for ownership, and the Philippines' case management reform experience highlights that non-participation creates misunderstanding, suspicion, and resistance to change.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in the following chapters indicates that inclusion and participation should be seen as the corollary of judicial leadership, and requires the formation of long-term relationships with community stakeholders.

5.8 DONORS

Other important messages have emerged from the authors' experiences relating to the role of donors in addition to those discussed above. First, the positive message of writers is first that 'home-grown' reform is best because it addresses the needs which stakeholders really want to change, is genuinely owned, and as such is likely to be feasible and sustainable.

Domestic budget constraints, however, make donor assistance often indispensable for judicial reform initiatives. While the authors stress that donor support has been beneficial, this is only half the story. It is clear that this support has not always been coordinated to respond directly to the needs of stakeholders but rather, as one author puts it, to respond to the project designs of the development partners. As has been the case in Cambodia, donors may bring other agendas, however benevolent, but their advisors may lack knowledge and understanding of the needs to be addressed, and their programmes may compete, overlap, and pull their counterparts

in different directions. Likewise in Vanuatu, changes that are seen as being imposed from above or outside are often misunderstood and resisted. As in the case of Nepal, assistance may be discontinued before foundling intuitions have established their capacity to operate effectively. It may be from these reasons that India has funded its own reform programme without donor assistance, and Indonesia has focused on simple technical solutions that minimize the risks of dependence on external advisors.

Secondly, it is clear from these experiences that donor support, while perhaps indispensable, needs to be managed better. This is no trite diagnosis; getting the balance right is clearly difficult, and defies template prescriptions. This is a nuanced message that simultaneously recognizes the limits of capacity of developing judiciaries which in turn invokes a need to refine the role and relationship of donors. At the heart of this challenge lay many of the concerns to be addressed in the *Paris Declaration on Aid Effectiveness* in 2005, which writers indicate continue to plague practice.²⁴ Recent moves by the international community of donors to support the new sector-wide approach to planning—sometimes abbreviated to SWAp—may be seen as a promising step in this direction. While focusing on promoting the primacy of local planning and improving aid coordination, experience in this region continues to demonstrate that better planned collaborative partnerships between domestic stakeholders and international donors are required to consolidate local ownership and leadership of the reform agenda, and to harness commitments to long-term engagement and heightened responsiveness within reform approach.

Scarcity of domestic resources to address the needs for judicial reform impels reliance on foreign assistance, but reform projects to address these needs unavoidably require further resources. The experience of Cambodia, in particular, demonstrates how managing development assistance burdens already under-resourced courts and ministries of justice before it helps them. How can this problem be solved? Considering the needs of these overburdened actors is the first answer, coming from the Cambodian experience. Concentrate on simple feasible solutions to help them to cope with often overwhelming challenges is another, coming from the Indonesian experience.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates the need for the judiciary to actively engage with donors. Any such interaction must balance the legitimate role of donors to facilitate reform, with the imperative of the judiciary to lead the reform agenda.

5.9 DATA

Another recurrent theme that emerges from the contributions is the importance of data. The authors call for courts and donors alike to invest in information technology. This is a message which is shared most directly from experience in Jakarta and Manila to address the causes of delay through effective case-management strategies. The Supreme Court of Indonesia has found that building a systematic information management strategy has been foundational to reducing backlog which has been informed by an analysis of actual data from their case audit. This experience demonstrates that accurate information is an essential prerequisite to establishing an effective case-management approach for any court, and that introducing an information management system provides reliable data on which judges can understand the actual logistics of service delivery—possibly for the first time.

More broadly, the experience across the region calls for a greater investment in research to focus reform endeavours through a more methodical assessment of data on the actual performance of courts, better informed analysis of the community's needs for reform, and as a tool to evaluate data on the effectiveness of efforts. These calls correspond with the mounting recognition of the imperative for sound data, methodical research, and rigorous analysis to be found in the literature. In effect, both authors and commentators agree on the need for a more empirical approach to judicial reform, firmly grounded in an appreciation of actual needs and performance, which lies at the heart of the rationale for this book.

5.10 RESULTS

Finally, building on the need to invest more seriously in information, the authors confirm the near universal lack of evaluation, which has been identified in the literature. Focusing on results continues to remain elusive. Time and again, the authors remark on the

insufficiency of monitoring and evaluation. Governments and donors continue to under-invest in performance monitoring and evaluation. Why is this? Are they really unconcerned with demonstrating success, or afraid of exposing failure, or is it seen as an unimportant, expensive, and tokenistic afterthought?

The continuing nature of this deficiency remains something of a mystery and a substantially under-addressed challenge for organizations committed to development. We have seen that there is clearly a conceptual need to clarify the purpose of judicial reform, and to ensure the availability of reliable performance data, which is often no small challenge in developing countries. Additionally, time is required to discern change, and causal attribution is required. That said, it should be emphasized that monitoring and evaluating judicial reform is technically feasible. Once the goals are clearly specified, the design logic of the reform approach tested, and the information systems aligned, the exercise is essentially mechanistic, requiring roughly equal measures of rigour, resources, elapsed time, and commitment. Experience elsewhere in the region has indicated that getting serious about evaluation is not necessarily cheap, nor is it prohibitive or disproportionate.²⁵ These costs are as legitimate and useful as other costs to secure the integrity of the reform process, such as accountability mechanisms for impress accounts or personnel record-keeping. Addressing deficiencies in monitoring and evaluation, which as the literature shows has long been a weak link in legal and judicial reform, is key to addressing the core concern of development effectiveness.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates a need for government and the international community of donors to develop a more empirical approach in judicial reform through a consistently more serious investment in data, research, analysis, and evaluation.

6.0 CONCLUSION

Over the years, understanding of judicial reform has evolved in line with international development assistance and the growing recognition that the policy, governance, and institutional dimensions

play crucial roles in shaping development. Economic thinking has traditionally prevailed to cast the state and the judiciary as key institutions, in an instrumentalist role to support development of markets. More recently, this approach is yielding to growing recognition of the imperative to evolve a more human-centred, pro-poor vision for judicial reform. At the same time, understanding and appreciation of the complexity of the political economy environment has also deepened with this experience. Donors' continuing support for judicial reform reflects the growing recognition of the importance of justice to societal well-being, and is on what may be fairly described as a continuing journey of development understanding. Over the past decade in particular, many countries in the region have laid important but as yet uneven foundations in judicial reform which are characterized by both their development merit and their greater potential. These foundations, and their fragility, are to be appreciated by citizens, governments, donors, and reform practitioners alike.

Any serious contemplation of judicial reform should acknowledge the challenges of practice evidenced in the experience of authors in this collection. The effectiveness of judicial reform is often qualified, as is documented in the broader literature. That said, the evidence of practice demonstrates that judicial reform endeavours do yield results: whether in opening up the courts to provide justice to the poor, reducing backlog, disciplining corruption, reaffirming independence and accountability, or rebuilding competence from scratch in post-conflict countries. The experience of the authors—judges, court administrators, lawyers, and researchers across the region—shows that reform is doable: it will evidently take time, often it seems, more time than expected by donors; and the path may be littered with mistakes.

Acknowledging the experimental nature of these endeavours is both important and encouraging as it casts the courts as learning institutions committed to the dynamic process of ongoing improvement. Learning by doing requires innovation, experimentation, and evaluation. Does qualified performance, identified in these pages and the broader literature, indicate that the approach is flawed, as questioned by some commentators? Hardly! But the approach will surely benefit from refinement. As the

contributions indicate, confusion over goals, under-investment in data, fragmentation at many levels, and the focus on outputs rather than results are particular weaknesses in approach that warrant further consideration.

There is some risk of oversimplifying the challenges identified by authors which are to be addressed in judicial reform. Similarly, a prescription of solutions to address these challenges risks being trite. *Does one size fit all?* Evidently not. The diversity of needs, approaches, priorities, and responses described in spanning post-conflict, transitional, and development contexts defies over-generalization. Moreover, this collection does not claim to be comprehensive. The experience contained in these pages is indicative of actual experience in all of its diversity. The authenticity of these experiences is characterized by the diversity of its voices.

Some tantalizing questions remain to be addressed. Most importantly, is the experience contained in these pages illustrative of a distinctive regional approach to judicial reform? Is there a definable Asia Pacific approach which can be differentiated from the earlier Latin American or post Soviet approach and, if so, how? Finding the answers to these questions hinges on the more fundamental issue of whether the global practice of judicial reform reflects a coherent discipline against which this experience may be compared. Although this assessment goes beyond the empirical parameters of this collection, it warrants further inquiry and would usefully build on the foundations of existing regional scholarship, which has: validated the relationship of law to economic development in Asia;²⁶ explored the local challenges of promoting judicial independence in South-Asia;²⁷ formulated development strategies to rebuild the Afghanistan judiciary degraded by war;²⁸ developed a leadership model for judicial education and training in Asia;²⁹ explored practical aspects of integrating judicial reform in major sector-based reform programmes in Pakistan;³⁰ and developed a performance monitoring approach for legal and judicial reform programmes in Papua New Guinea,³¹ which collectively add to this emerging body of experience.

Taking into account these experiences, it is clear from initiatives already in hand that judiciaries across the region are responding to the need for judicial reform to improve the quality of justice. It is already broadly recognized that courts are essential institutions

for economic development and good governance through their instrumental role in enforcing contract and title, as much as to protect safety and security. Of considerable significance, it is now becoming generally recognized that their importance in development extends to a constitutive role as the guardians of equality and fairness.

It is hoped that the experience and insights contained in *Searching for Success* will provide an inspiration for judiciaries to seize the leadership of reform, to refine understanding of the purpose and means to improve substantive as much as procedural justice, to engage more closely with other reform actors in the executive community and donors, and to focus on effectiveness and the results of these endeavours to improve justice across the region and beyond.

NOTES

1. See, for example, Aristotle, *Politics* (1958) E. Barker (ed.), Oxford University Press, Oxford. Also, *Nicomachean Ethics* (1955) J. Thomson (trans.), Penguin, London; among others.
2. T. Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie, Washington DC, p. 7. It would be an oversimplification to categorize major players, notably the World Bank, as traditionally promoting economic growth, USAID as promoting criminal justice and democracy, and UN agencies as promoting human rights, as these objectives are invariably conflated and, it may be argued, confused.
3. The World Bank has increasingly come to recognize that the judicial system plays an important role in the development of market economies, and justice sector reform has emerged as both a priority development goal in recent international declarations and as one of the four pillars of development in The World Bank's Comprehensive Development Framework. The World Bank has financed more than 1,300 legal and judicial reform projects. From 2001 to 2006, worldwide lending for law and justice and public administration increased from \$3.9 billion to \$5.9 billion. In the same period, worldwide thematic lending for 'rule of law' projects also rose, from \$410 million to \$757 million. In this writer's personal experience, six current projects alone are worth \$600m. Asian Development Bank's *Access to Justice Loan* is valued at \$350m. AusAID is presently conducting a law and justice reform programme in Papua New Guinea valued at around \$150m. USAID has two law and justice initiatives in Cambodia valued at around \$40m, and similar amounts in Afghanistan.

4. See, for example: L. Bhansali, and C. Biebesheimer, 'Measuring the Impact of Criminal Justice Reform in Latin America' in T. Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie, Washington DC, pp. 301–23, 306. Also, L. Hammergren, 'Latin American Experience with Rule of Law Reforms and its Applicability to National building Efforts', 38 *Case Western Reserve Journal of International Law* 63 (2006).
5. T. Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie, Washington DC; see also: T. Carothers, 'The Rule of Law Revival' *Foreign Affairs* (1998), pp. 95–106; R. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' 14 *The World Bank Research Observer* 1 (February 1999), pp. 117–36; and D. Trubek, and A. Santos, *The New Law and Economic Development: A Critical Appraisal* (2006) Cambridge UP, New York.
6. E. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in E. Jensen, and T. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) Stanford University Press, p. 345.
7. Ibid., pp. 364–5.
8. L. Hammergren, 'Use of Empirical Research in Refocusing Judicial Reforms: Lessons from 5 Countries' <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/usesOfER.pdf>> (30 July 2008); and L. Hammergren, 'Reforming Courts: The Role of Empirical Research' *PREM Notes*, March 2002 <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/premnote65.pdf>> (30 July 2008). Hammergren argues that a core challenge for legal and judicial reform is to improve knowledge management, specifically the empirical rigours of diagnostics, monitoring, evaluation, and research.
9. M. Weber, *On Law in Economy and Society* (1954), Harvard UP, Cambridge Mass.
10. D. North, *Institutions, Institutional Change and Economic Performance* (1990), Cambridge University Press; among others.
11. C. Biebesheimer, (now senior counsel at the World Bank but then of the IADB) and L. Bhansali. 'Criminal Justice Reform in Latin America', in T. Carothers, *Promoting the Rule of Law* (2006), Carnegie, DC, pp. 301–12.
12. L. Hammergren, 'Latin American Experience with Rule of Law Reforms and its Applicability to National Building Efforts' (2006), 38 *Case Western Reserve Journal of International Law*, p. 63.
13. E. Jensen, 'The Rule of Law and Judicial Reform', p. 348.
14. H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2002) Anthem, London; see also: K. Polanyi, *The Great*

Transformation: The Political and Economic Origins of Our Time (1944) Farrar & Rinehart, New York, p. 43; and Boston: Beacon 2001. Polanyi analysed the economic history of nineteenth- and twentieth-century Europe to discern a pendulum movement from tightly regulated to deregulated market economies reflecting policy movements driven by shifts in sentiment over the relationship between the state and the market. The Great Transformation was an inevitable consequence of adopting a pure market economy because of its harsh and unacceptable consequences. While this vision may not be shared by all economists, it illuminates the perpetual tension between state and market, and the historical trend to self-correction, which provides an explanation for economic development that transposes more transient theory-making, most recently expounded in the Washington Consensus neo-liberal mantra for deregulation, free trade, and privatization.

15. T. Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006), Carnegie, Washington DC; among others.
16. E. Jensen, and T. Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003), Stanford University Press.
17. A. Sen, *Development as Freedom* (1999), Random House, NY; among others.
18. J. Rawls, *A Theory of Justice* (1971), revised Edition (1999), Oxford University Press; J. Rawls, 'A Theory of Justice', in J. Arthur, and W. Shaw (eds) *Justice and Economic Distribution* (1978), Prentice-Hall, Englewood Cliffs NJ, pp. 18–52; J. Rawls, *Justice as Fairness: A Restatement* (2001) Cambridge, Massachusetts: Belknap Press.
19. See, in particular, Locke and Rousseau: Locke understood the social contract as preserving the natural rights to life, liberty, and property and the enjoyment of private rights; the right to own property is seen as a basis of modern capitalism. He advocated limited government to maximize individual liberty. J. Locke, 'Two Treatises on Government' (1690) <<http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html>> (1 May 2008); see also: J.J. Rousseau, *The Social Contract: Principles of Political Rights* (1764). <http://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/book1.html> (1 May 2008).
20. This is the so-called 'difference principle' with the first principle having priority over the second, and the first half of the second having priority over the latter half. J. Rawls, 'A Theory of Justice', in J. Arthur, *Justice and Economic Distribution* (1978) Prentice Hall, Englewood Cliffs NJ; and J. Rawls, 'Justice as Fairness' (1985) 14 *Philosophy and Public Affairs* 3, pp. 223–51, 227.

21. S. Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (2003) Carnegie Working Papers, Carnegie Endowment, Washington DC, p. 43.
22. D. Trubek, *The Rule of Law, Political Choices, and Development Common Sense*; C. Sage, and M. Woolcock, 'Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries' (2005) *World Bank*, 28; and D. Adler, D. Porter, and M. Woolcock,, 'Legal Pluralism and the Role of Interim Institutions: Challenges and Opportunities for Equity in Cambodia' (unpublished draft, 25 April 2007).
23. D. Kennedy, 'The Rule of Law, Political Choices, and Development Common Sense' (2006) in D. Trubek, *The Rule of Law, Political Choices, and Development Common Sense*, pp. 95–173. Kennedy argues that development strategy requires a detailed examination of the distributional choices affected by various legal rules and regimes to determine, as best one can, their likely impact on growth and development, p. 172.
24. The *Paris Principles* reflect a consensus of mounting concerns across the development spectrum by both donors and developing nations to improve endeavour through a series of key measures comprising the promotion of: ownership; harmonization; alignment; managing for development results; and mutual accountability. Measures to be taken by 2010 include: development strategy frameworks in developing member countries; aid flows aligned to national priorities; strengthen capacity by coordinating support/programmes; use country systems; share analysis; results-orientated frameworks to assess progress of national development strategies and sector programmes.
25. These costs have been estimated at 6 per cent of reform investment in AusAID's PNG's law and justice reform programme valued at A\$150 million. L. Armytage, and S. Miller, 'Legal and Judicial Reform Performance Monitoring: the PNG Approach', 20 *The European Journal of Development Research* 1, March 2008, pp. 141–57.
26. In a major regional law and economics study, Pistor and Wellons offer some validation for the premise that law is relevant and important to market and private sector development in Asia and, in particular, to the development of financial and capital markets; K. Pistor, and P. Wellons, *Role of Law and Legal Institutions in Asian Economic Development, 1960–1995* (1999) Oxford University Press, Oxford.
27. In relation to practical challenges in promoting judicial independence in the region, see, for example: Asian Development Bank, 'Law and Policy Reform Annual Reports 2003: Judicial Independence.'

28. L. Armytage, 'Justice in Afghanistan—Rebuilding Judicial Competence after the Generation of War' (2007) *Heidelberg Journal of International Law*, HJIL/ZaöRV 67, pp. 185–210.
29. L. Armytage, 'Training of Judges: Reflections on Principle and International Practice', 2 *European Journal of Legal Education* 1, (2005), EJLE, pp. 21–38.
30. L. Armytage (2003), 'Pakistan's Law & Justice Sector Reform Experience—Some Lessons', *Law, Social Justice and Global Development Journal*, University of Warwick (LGD) 2; and 'Pakistan's Judicial Reform Programme,' *Australian Law Journal* (May 2001).
31. L. Armytage, 'Pakistan's Law & Justice Sector Reform Experience', 141–57. See also: 'Monitoring Performance of Legal and Judicial Reform in International Development Assistance—Early Lessons from Port Moresby & Phnom Penh', International Bar Association Chicago Showcase, Judicial Reform: Economic Development and the Rule of Law (18 September 2006), Governance and Social Development Resource Centre;

1 Securing Justice



Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries

MOHAN GOPAL

1.0 KEY MESSAGES

There are a number of valuable lessons to be shared from worldwide experience in judicial reform which may contribute to improving judicial reform in the Asia Pacific region and beyond.

In essence, these lessons or key messages build from the precept that the core function of the judicial system is to secure justice, rather than, for example, merely settle disputes fairly, efficiently, and promptly as an end in itself. It follows that the effectiveness of judiciaries should therefore be defined and measured on the basis of their effectiveness in fulfilling the core goal of securing justice. The goal of the judiciary and, thereby, of judicial reform initiatives, must be to enhance the effectiveness of judicial systems in securing justice.

Over five decades of experience in judicial reform suggests that, to be effective, judicial reform programmes need to address institutional, organizational, and individual dimensions in a comprehensive, systematic, and holistic manner. Judicial reform programmes need to be appropriately planned, managed, and monitored. The effectiveness of judicial systems, and judicial reform programmes, also needs to be measured in terms of improvements in justice outcomes—rather than merely in terms of ‘inputs’ or ‘outputs.’ One method of measuring justice outcomes is, for example, with reference to the availability of ‘law-dependent public goods’, as discussed in section 2.4 below.

Development and implementation of judicial reform initiatives for enhancing justice will require a justice-orientated approach based on a new understanding of the definition of 'justice.'

'Justice' should not be defined in a traditional manner, as, for example, merely the description of a (just) decision made by a court; or the process of making such a decision or the impact of such a decision (distribution, retribution, etc.). Rather, justice should be defined as a standard of human conduct which includes, at the core, the following five norms: freedom; equality; dignity; equity; and fairness. For example, gender justice would be realized not merely when a court renders a decision upholding equality for women, but when women actually experience human conduct towards them that conforms to standards of equality prescribed by law.

The goal of the judiciary (and, thereby, of judicial reform) should therefore be defined as *securing human conduct consistent with acceptable normative standards*. For organizations and activities governed by international law (such as internationally supported judicial reform programmes), the acceptable normative standard of conduct constituting justice is the standard of conduct required in international treaties and in generally accepted principles of international law.

To achieve this goal, the content ('what') and methodology ('how') of judicial reform programmes will also need a new approach that addresses not only 'bits and pieces' of judicial systems, but rather the following six *critical variables that determine the quality of a justice system*. These *critical variables*, referred to here as the '*judicial reform hexagon*,' cover the institutional, organizational, and human dimensions of judicial reform in a comprehensive, systematic, and holistic manner. The judicial reform hexagon consists of:

1. Role and responsibility of courts.
2. Organizational efficacy of the judicial system.
3. Knowledge of law of judges and counsel.
4. Judicial method including skills and practice.
5. Effective management of processes and people.
6. The demand-side—access to justice.

The judicial reform hexagon covers three broadly inter-related themes: firstly, enhancing the quality of adjudication; secondly,

strengthening human resource capacity; and thirdly, establishing modern and effective planning and management systems.

The Indian experience discussed illustrates that justice-oriented judicial reform that secures and promotes 'just' human conduct enhances public confidence in the judiciary. It strengthens public support for judicial independence and also provides a strong basis for improving judicial institutions, infrastructure, and judicial processes. International experience, including other case studies in this publication, reinforces this approach.

2.0 ANALYSIS OF JUDICIAL REFORM EXPERIENCE WORLDWIDE FIVE KEY MESSAGES

The importance of effective judiciaries is today more widely accepted than ever before, as are the challenges facing judiciaries in all developed and developing countries. Mirroring concerns worldwide about the effectiveness of judiciaries, the President of the United States National Center for State Courts recently stated:

There are many sources of dissatisfaction with the justice system. In the United States, for example, the public thinks that justice is too slow, that it costs too much, that people cannot afford attorneys, that there is favouritism in the courts, that African-American citizens in the courts are treated less fairly than European-Americans, that English-speaking Americans are treated better than non-English-speaking Americans, and that judicial decisions are sometimes influenced by political considerations, or campaign funding in our judicial election processes. These deficiencies are real in the United States. Legitimate dissatisfaction with the judiciary is a far greater threat in the long run than improper influences.¹

Judicial reform has therefore become a prime programme in development assistance in many countries. The *Manila Declaration for a 21st Century Independent Judiciary* notes that, '...almost every country [in the Asia Pacific region] is now embarking on judicial reform.'² Initially, projects were limited in number and scope when donor interest in reforming developing country judicial systems began in the 1950s and the 1960s. There has, however, '...been an astonishing proliferation of judicial reform projects in recent years.'³ There are today over 5,000 activities

on judicial reform supported by development aid agencies in over seventy-five countries.

Yet there is little consensus on the success of judicial reform programmes. For example, a recent independent study assessing judicial reform in Latin America concludes that, '...the results of the decade long judicial reform process in Latin America are neither obvious nor easily measured.'⁴ This, for the region with the world's longest experience with donor-assisted judicial reform and involving, in just the last decade, over USD1 billion of donor investment in this sector. It has also been noted that:

...we do not have an adequate understanding of how to build a healthy judicial system in Latin America because of the general dearth of studies on the subject, the lack of widely accepted and consistently employed indicators to measure the effects of judicial reforms, and the 'inadequate, insufficient, and...counterproductive' set of assumptions with which judicial reformers (national and international) tend to work.⁵

A fresh approach to the development and implementation of judicial reform programmes is required. Such an approach is presented in the following discussion.

2.1 JUSTICE AS THE GOAL OF THE JUDICIARY AND JUDICIAL REFORM

It is important to establish clarity about the goal of judicial reform because, even after over half a century of experience in legal and judicial reform, there is considerable lack of *consensus* and *clarity* about the goal and role of judicial institutions and the goals of judicial reforms, as summarized below.

2.1.1 Lack of Adequate Consensus About the Goals of Judicial Reform

As noted in a G-24 paper:

Although some consensus has been reached and several international institutions and bodies have begun promoting legal reform, the consensus is unwieldy as there are still many forces against reform and little agreement about what constitutes feasible legal reforms.⁶

There is substantial divergence of donor approaches to legal and judicial reform. DFID, the UK aid agency, for example, describes its goals for legal and judicial reform as '...promot[ing] safety for all

from violence and intimidation, security of personal property and equality of access to justice.' DFID sees legal and judicial reform as a means to 'Safety, Security and Access to Justice.' Capturing the differences in donor approaches, DFID itself describes the legal and judicial reform goals of some other donors as follows:

The World Bank focuses on legal and judicial reform for the purpose of strengthening market institutions, and USAID on the 'rule of law.' Human rights are emphasized by the Ford Foundation, the European Union and the Canadian and Swedish development agencies.⁷

The Ford Foundation—a donor with over half a century of experience in funding legal and judicial reform—describes the goal of legal and judicial reform as promoting the '...use of law to secure human rights, improve the lives of people...[and support] the advancement of disadvantaged populations and...social justice.'⁸ On the other hand, the 'law and policy reform' goals of the Asian Development Bank are to '...foster economic activity and sustainable development...', broadly similar to those of the World Bank.

In the context of domestic law in industrial countries, judicial reform has been defined in an entirely different way as '...the continuous improvement of how we do business—our individual and collective performance as judges, as a branch of government'.⁹ The main difference between this 'domestic approach' of industrial countries to judicial reform, and their approach to judicial reform in developing countries is that their domestic approach does not seek to bring about fundamental or systemic change in legal and judicial systems.

The underlying premises and goals of the donor legal and judicial systems may not be mutually compatible. The introduction of equity and trust principles into countries that do not have a common law tradition, for example, or the introduction of inquisitorial approaches into countries with common law traditions is not always appropriate.

Nor is there consensus on whether legal and judicial reform should focus on formal or informal institutions, or on the 'supply-side' or the 'demand-side.' It has been argued, for example, that:

...the international aid field of law and development focuses too much on law, lawyers and state institutions, and too little on development, the poor

and civil society. In fact, it is doubtful whether ‘rule of law orthodoxy,’ the dominant paradigm pursued by many international agencies, should be the central means for integrating law and development. Legal empowerment—the use of legal services and related development activities to increase disadvantaged populations’ control over their lives...

has been suggested as a better alternative.¹⁰

Goals for judicial reform, such as: ‘poverty alleviation’; ‘sustainable development’; ‘promotion of the rule of law and good governance’; and ‘promotion of human rights,’ are often stated in general terms and do not provide adequate clarity for the purposes of planning and executing judicial reform programmes. On the contrary, they raise more questions than they resolve. It has been argued, for example, that:

...the formalist rule of law advocated by the World Bank and other donors does not necessarily exist in the developed world...[and] attempting to transplant a common template of institutions and legal rules into developing countries without attention to indigenous contexts harms pre-existing mechanisms for dealing with issues such as property ownership and conflict resolution.¹¹

‘Goal congestion’, ‘goal confusion’, and ‘goal conflict’ have made it difficult to systematically develop, implement, and assess the impact of judicial reform programmes. As a result, there is considerable scepticism about the effectiveness of judicial reform programmes, notwithstanding the scale of assistance being provided.

2.1.2 Lack of Clarity About the Goal and Role of the Judiciary

Lack of adequate consensus about the goals of judicial reform arises from lack of clarity and agreement about the goal and roles of the judiciary itself.

There are diverse views on the role of judicial systems. Some see judicial systems as instrumental (teleological) to achieve larger policy goals. Such goals include the establishment of safety and security, efficient operation of the market system, promotion of investments and economic growth, and promotion of good governance and the rule of law.

The US judiciary, as an example, restrains the legislature from violating the Constitution and has, therefore, developed

sophisticated tools for judicial review of legislative action. Judges in common law countries create law through the doctrine of binding precedent (*stare decisis*). In civil law countries, courts have a more modest role in implementing law. The UK, on the other hand, upholds the principle of parliamentary supremacy. Defining crimes and ensuring prompt and effective punishment for criminal conduct is very often a key goal and main activity of judicial systems.

Alternatively, judicial systems protecting basic rights and freedoms of human beings may be seen as ‘deontological.’ The judiciary is seen as an end in itself, and as inherently moral. The purpose of courts, especially at the local level, may be seen as merely ‘finding facts’ and ‘agencies for dispute settlement’, rather than for the upholding of rights. These two goals may be complementary; however, they also have the potential to be inconsistent. Upholding rights can, on occasion, create rather than resolve conflict; for example, by asserting and upholding equal rights for women, courts may create rather than resolve marital disputes in marriages where equal rights are being violated.

2.1.3 The Way Forward: Establishing a Clear Goal for Judicial Reform Programmes to Enhance Justice

In light of the lack of clarity about the goals and roles of judicial systems and the goals of judicial reforms, countries contemplating judicial reform programmes need to give particular importance to identifying the: goals and role of the judiciaries; criteria for measuring the effectiveness of judicial institutions; and goals and criteria for determining the effectiveness of judicial reform.

The following discussion provides a suggested framework for establishing these goals and criteria for both judicial systems and judicial reform programmes.

1) The goal and function of the judiciary—is to *secure justice*, rather than to merely decide disputes as an end in itself.

One of the core goals/functions of the nation state—and the justification for its existence—is securing justice. For example, the *Preamble to the Constitution of the United States of America* declares that one of its goals is to ‘...establish justice’. The *Preamble to the*

Constitution of India says that its goal is to ‘...secure to all its citizens, justice, social, economic and political’. Most other constituent documents mirror these provisions in one form or other.

Establishing justice is also a core goal of the international system. The *Preamble to the Charter of the United Nations* declares that one of the purposes of the United Nations is to ‘...establish conditions under which justice...can be maintained.’

Judiciaries are entrusted with responsibility within nation states, and by the international system, in this ‘quest for justice’. Judiciaries do so through independent adjudication, protection of rights, and safeguarding rights and the rule of law. For example, the *Beijing Statement of Principles of the Independence of the Judiciary*, signed by 32 Chief Justices throughout the Asia Pacific region, states that:

...the objectives and functions of the judiciary include the following:

- (a) To ensure that all persons are able to live securely under the rule of law;
- (b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) To administer the law impartially among person and between persons and the State.

The mission statement of the District Court of Maryland states that the mission of the Court is ‘...to provide equal and exact justice for all who are involved in litigation before the Court’. Jawaharlal Nehru, India’s founding Prime Minister, said:

[T]he purpose of law and the purpose of the judiciary is not merely to sit in wig and gown for a number of hours a day and look very learned. They supply a social purpose, that is, to bring about justice, to deliver justice to the people. That is the purpose, obviously.¹²

Law is the instrument through which justice is secured. Laws stipulate specific rules of conduct required for securing justice and establish rights and remedies for this purpose. By enforcing laws so as to secure justice, courts play a unique and central role in ‘the administration of justice’.

Given that the core function of judiciaries is securing justice, it follows that the effectiveness of judiciaries should be defined and measured with respect to their role in securing justice.

2) Defining the effectiveness of the judiciary—Traditionally, in common law-based systems at any rate, the role of the judiciary is seen as ‘settling disputes’, with the judge acting as a ‘neutral umpire.’ As noted by Iyer, ‘[t]he robed umpire is uninterested in the justice of the cause but forbids violations of the boxing rules (called law) and there ends his duty.’¹³

The effectiveness of the judiciary has traditionally been defined mainly with reference to ‘inputs’ and ‘outputs’ relating to the juridical system, such as the *quality of the functioning of judicial institutions and processes*,¹⁴ rather than with reference to the ‘outcome’ of justice. A judiciary may traditionally be considered to be effective, for example, solely on the basis of whether or not one or more of the following indicators are ‘healthy’:

- i) the *number and proximity* of courts to habitations;
- ii) *access to courts* including the cost of legal counsel and availability of legal aid;
- iii) the *functioning of courts* including legal awareness/legal literacy and the number and type of new cases being filed in court;
- iv) the *number and quality of judges* including their professional educational requirements and continuing education;
- v) the *independence of the judiciary* (including procedures for appointment of judges and judicial remuneration);
- vi) *judicial accountability* including complaints mechanisms;
- vii) rates and outcomes of *appeals*;
- viii) adequacy and independence of the *financing of courts*;
- ix) *quality of prosecutors and lawyers*;
- x) *quality of non-judicial court staff*;
- xi) *quality and use of IT infrastructure*;
- xii) *quality and use of knowledge infrastructure to support judges, lawyers, and prosecutors*;
- xiii) *quality of enforcement agencies for court decisions*; and
- xiv) the *availability of alternative dispute resolution (ADR) mechanisms*.

These indicators of judicial institutions and processes are *necessary* for a judiciary to be effective. However, they are *not sufficient* measures because they do not address the core issue of justice. The inadequacy of the traditional measures of effectiveness of judiciaries may be illustrated by the following example. In the infamous *Dred*

*Scott v. Sandford*¹⁵ decision, the United States (US) Supreme Court decided in 1856 that people of African descent imported into the US and held as slaves, or their descendants, could never be citizens, whether or not they were slaves. Further, the US Supreme Court held that the US Congress had no authority to prohibit slavery in federal territories. In 1856 the US federal judiciary would have satisfied all the traditional criteria of effectiveness. However, a judiciary that upheld the injustice of slavery and helped propel a nation into civil war could hardly be considered an 'effective judiciary' and a model that judicial reform would seek to emulate. A broader understanding of effectiveness of judiciaries, informed by the idea of justice, is therefore essential.

In *The Family Story*,¹⁶ the late British Justice Lord Denning tells a story that illustrates the fallacy in considering any decision of a court as being inherently just. Denning writes about the origins of the Latin phrase *Fiat justitia ruat coelum*—'let justice be done though the heavens may fall'—as follows: in ancient Rome, Piso sentenced a soldier to death for the murder of Gaius. He ordered a centurion to execute the sentence. Just before this was done, Gaius appeared, alive and well. The centurion reported the matter to Piso who sentenced all three to death—the soldier because he had already been sentenced; the centurion for disobeying orders; and Gaius for being the cause of death of two innocent men. Piso justified his decision on the basis of the plea *Fiat justitia ruat coelum*.

Defining the effectiveness of judiciaries merely in terms of institutional and process characteristics is not adequate in today's world. The normative role of the judiciary requires to be appropriately taken into account. This is because judicial institutions and processes are means to an end—the ultimate end of all judicial systems, that is, *securing justice*.

The effectiveness of judiciaries should therefore be evaluated in terms of their *ability to secure justice*; and the main purpose of judicial reform should also be *the advancement of justice*.

3) Justice as a standard of human conduct—What then is 'justice'? Responding to this question, the renowned legal philosopher Hans Kelsen said:

No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious, from Plato to Kant; and yet this question is as unanswered as it ever was.¹⁷

Philosophers may set aside the question as unanswered. However, systems of administration of justice need to have an operational understanding of justice against which their performance may be planned and evaluated. Such a working definition is suggested here.

Although the term 'justice' is ubiquitous in law and legal literature, and liberally used by judiciaries (many judges call themselves 'justices'), there are few terms as divergently defined and poorly understood in law. Therefore a clear understanding of the term is required for the purposes of developing and implementing judicial reform programmes.

Traditionally, 'justice' is used in one or more of the following ways:

- As a description of a 'right' decision of a court, that is, justice is said to be 'delivered' when a decision is made by a court in accordance with the law and with the values of fairness, integrity, independence, and competence.
- To refer to a description of a fair and even-handed decision-making process (for example, the symbol of blindfolded justice holding the scales even), irrespective of the content of the decision reached through that process.
- To refer to the manner in which benefits and burdens are distributed in society (distributive justice, justice as fairness, etc.).
- To refer to infliction of punishment—retributive justice.

When used in a top-down manner, justice is defined as if it were a product of the state—it is 'administered' or 'delivered' (by the state).

In this paper, the author offers a different perspective of justice. The author takes the view that 'justice' is 'a standard of human conduct'. When human conduct is guided by the 'right' norms/standards ('jus'), justice prevails. Injustice, on the other hand, is human conduct based on 'wrong' norms.

What are the 'right' norms that would constitute 'just conduct'? The answer varies across social and legal systems. The word justice does not, in and by itself, contain a specific set of norms. Rather, it may be used to refer to any set of norms that would uphold a particular vision of society (for example, Islamic justice would refer to those norms of conduct that would uphold Islamic society). For nation states, therefore, the constitution would provide the set of norms of conduct that would constitute 'justice' as envisioned in the concerned constitution.

For international organizations, however, justice is the standard of human conduct specified in generally accepted principles of international law including international treaties on human rights and other applicable instruments. These include, at the core, the following five norms: freedom; equality; dignity; equity; and fairness (FEDEF).

It is important to note in this regard, that by justice this paper refers to a condition of human existence in which human conduct fully conforms to the prescribed standard of conduct—not to a *process* or a *decision* that is intended to achieve that result. So, for example, justice as envisaged in the international human rights charter would prevail only when—and to the extent that—standards of human conduct fully comply with the values of FEDEF.

To this extent, justice is an outcome, not an input. 'Justice', for the purposes of this discussion therefore, should be understood as a 'standard of human conduct' *established by law*, rather than merely as a description of a (just) decision made by a court, or the process of making such a decision. For internationally supported judicial reform programmes, justice refers to the standard of human conduct *specified* in generally accepted principles of international law including international treaties on human rights and other applicable instruments.

The approach to the concept of justice discussed here allows the integration of diverse views of justice and diverse approaches to legal and judicial systems and legal and judicial reform. Human conduct that upholds these values will result in strengthening of the market economy as well as protection of the human rights of the weakest and the poorest, by promoting the rule of law (however defined) and underpinning good governance. These values are

found in internationally accepted human rights instruments and in constitutions as diverse as those of the US and China.

This approach shifts the focus of judicial systems and judicial reform to the underpinning for core human rights values that is necessary to achieve varied development goals.

While there will be few if any countries that reject the above five values of FEDEF, there will be significant differences between countries as to how they interpret them. All legal systems in the world provide a basis for defining and regulating these values through law.

2.2 JUDICIAL REFORM PROGRAMMES NEED TO BE INDIVIDUALISTIC YET HOLISTIC

Given the concept of justice as a standard of human conduct, judicial reform programmes should aim to have the maximum impact—in the shortest period of time and at the lowest cost—on changing *general standards of human conduct* from ‘unjust’ to ‘just’ as established by law.

This will require a different approach towards the content and methodology of judicial reform programmes. ‘Traditional’ approaches to judicial reform consist mainly of one or more of the following ten broad types of interventions:

- 1) Strengthening independence of judges: To strengthen the independence of the judiciary, judicial reforms address issues pertaining to the working conditions of judges, review of judicial decisions, and accountability issues.
- 2) Strengthening judicial organizations: Increasing the number of courts and judges as needed, enhancing support and administrative staff capacity, planning, and finance capacity.
- 3) Strengthening physical infrastructure including IT infrastructure.
- 4) Improving management systems including use of information and communication technologies (ICT), Informatics, etc.
- 5) Strengthening justice stakeholders: Bar, police, prosecution, jails.
- 6) Enhancing legal literacy and awareness.
- 7) Strengthening non-court dispute settlement systems such as mediation, arbitration, etc.

- 8) Strengthening the knowledge and skills of judges including through judicial education and enhancing knowledge resources available to judges.
- 9) Process re-engineering and process automation and modernization of court management, caseload management, and case management as well as of judicial processes.
- 10) Enhancing access to justice by the poor: provision of legal aid, enhancing legal awareness, improving access to information, and enhancing transparency of judicial processes.

Judicial reform may also include law reform to eliminate bottlenecks in judicial processes arising from the law as well as to strengthen the judiciary.

Donors specialize in certain types of intervention. For example, DFID emphasizes support to criminal justice systems, based on their safety, security, and accessible justice agenda. The US focuses on a freedom agenda, building judicial institutions that would support democracy and human rights. The World Bank and other multilateral financial institutions seek to assist capacity building of judges such that competent courts are available to deal promptly with economic and investment disputes. In other words, the content of donor-assisted judicial reform programmes is heavily influenced by donor programmes and priorities and does not vary adequately from one country to another for the same donor.

Is the traditional content of judicial reform (the types of interventions listed above), the 'what', adequate and appropriate? While the 'inputs' and 'outputs' of the types of judicial reforms are measurable, the 'outcomes' and 'impacts' are less readily identified and measured.

The benefits of years of investment by USAID and the World Bank in improving court infrastructure in Latin America, for example, are not fully obvious or measurable. On the other hand, there is no evidence that the *lack* of an independent judiciary in several East Asian countries has been a positive—or negative—factor in their economic development.

One criticism is that judicial reform has focused too much on the supply-side and not enough on the demand-side of judicial systems.¹⁸ Another criticism is that judicial reform has not

adequately addressed or even considered reform of related social, political, economic, and governmental practices so as to enhance the availability of justice in the country.

An analysis of ‘what’ judicial reform programmes are doing shows that an emphasis on the eventual outcome of justice is missing. This ‘justice deficit’ in the approach to judicial reform may be addressed by the ‘justice-oriented approach to judicial reform’ suggested here.

A justice-oriented approach requires that both supply-sides (operations of judicial institutions) and demand-sides (users of the judicial system) are addressed. It will also provide a basis for monitoring outcomes and impacts in terms of availability and exercise of rights.

Judicial reform must address the key issue of the mission and role of courts and orient them towards a clear vision of justice. This may be accomplished by ensuring that courts are conferred adequate jurisdiction and power to intervene in matters of justice and to provide effective access to victims of injustice. A justice-oriented approach to judicial reform would thus address, in addition to the traditional components, the following aspects: a clear definition of a vision of justice; the role of courts at different levels in securing justice; jurisdiction and power of courts to address issues of injustice (that is, FEDEF); adequate remedies available to the courts to grant effective relief; and effective access to justice, especially for the poor and socially and economically excluded. This approach will also reform the mission of courts so as to make them more justice-oriented as well as provide a vision of justice for guiding judicial reform.

Judicial reform programmes need to be placed in a broader framework and adequately linked to the ‘outcome’ of justice. There are a large number of factors involved in the functioning of a judicial system. Of these, the six most *critical variables* affecting the effectiveness of judicial systems (the ‘judicial reform hexagon’) are:

- 1) Role and responsibility of courts—including: a justice-oriented role; judicial independence; judicial ethics; and accountability.
- 2) Organizational efficacy of the judicial system—including: required support of counsel; police and other state agencies; the cooperation of parties; availability of infrastructure and resources; use of modern human resource management systems

to attract, recruit, reward, and retain the best talent into the judiciary; and use of technology and effective planning and management systems.

- 3) Knowledge of law of judges and counsel.
- 4) Judicial method including skills and practice.
- 5) Effective management of processes and people in the conduct of cases and courts.
- 6) The demand-side—access to justice.

These six critical variables are summarized below.

2.2.1 Role and Responsibility of Courts

The role and responsibility of courts varies from one country to another and changes over time. Views diverge and, in some cases, there is inadequate clarity and consensus within countries. There are gaps between the stated roles of courts and their de facto social, economic, and political roles.

The main de facto role of courts in many countries is, for example, to provide a forum for the powerful state to prosecute poor people rather than for the poor to hold the powerful accountable for injustice under the law. In India, some 65 per cent of total litigation consists of criminal cases involving petty crimes, and an estimated 80 per cent of the accused in criminal cases are poor people who languish in jail as under-trial prisoners often for a longer period than the maximum jail sentences for the crimes of which they are accused. In such situations, many common people perceive courts as institutions of injustice rather than of justice. Judicial reform needs to transform the role of courts to being forums that will effectively safeguard and enhance justice.

Further, the role of courts in many countries (especially primary courts in which the bulk of adjudication takes place) is defined narrowly. This role consists merely of settling the disputes brought before the court, without adequate emphasis on their norm-setting function. Judicial systems with colonial origins have a lingering legacy of their colonial role in disposal of cases without attention to the normative role.

Traditional judicial reform programmes have not paid adequate attention to the issue of the role and responsibility of courts. On

the contrary, some programmes may inadvertently reinforce the negative social role of courts by giving priority to strengthening the criminal justice system without adequate attention to the social role of courts.

As noted earlier, a 'just society' is one in which generally accepted and observed standards of human conduct conform to the standards of conduct comprising 'justice'. The core role of courts should be to *promote* the general acceptance of the norms/standards of human conduct that comprise justice, and to *operationalize and apply* such standards or norms to specific situations.

As standards of human conduct are typically stated at high levels of abstraction (such as FEDEF), and some of the norms that comprise justice may have mutual conflict (such as equality and equity), there is a constant need to elaborate, explain, and operationalize these general norms in specific situations. This will require courts to go well beyond the role of mere dispute settlement, and address the establishment and implementation of generally accepted norms/standards of human conduct that constitute justice in their domestic context.

Going forward, the main role of judiciaries, therefore, needs to be changed to be the protection of the rights of the socially excluded and providing them redress for injustice. Judicial reform should address and strengthen the responsiveness of courts to justice issues. As noted by the Supreme Court of India in 1982:

The judiciary cannot remain a mere bystander or spectator but...must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach.¹⁹

This role transformation can—and needs to—become the main driving idea behind judicial reform. Such a transformation of role, with powerful multiplier effects on other dimensions of the judiciary, was witnessed in India in the 1980s as illustrated in the Indian case in section 3.0, below.

2.2.2 Organizational Efficacy of the Judicial System

Strengthening the capacity of judicial organizations (a supply-side intervention) is currently a main focus of traditional judicial reform programmes. As noted earlier, courts need to be provided

with adequate physical and knowledge infrastructure to function effectively. This, therefore, is an area of vital importance for the effective functioning of judicial systems.

What is less emphasized in traditional judicial reform programmes is the need to assess and strengthen the functioning of the judicial system as a broader organizational system that involves multiple stakeholders. Many judicial reform programmes focus mainly—sometimes solely—on judges although judges are only one part of these systems. In many countries, the failure/subversion of the role of non-judicial stakeholders (such as the Bar, executive agencies, litigants, and court ministerial staff) plays a key role in the failure of judicial systems.

The development of judicial reform programmes must include an analysis of key issues and solutions pertaining to all those involved in the judicial system and the implementation of reforms.

2.2.3 Knowledge of Law of Judges and Counsel

Consistency of judicial decision making, as well as fidelity of judicial decisions with legally established standards is influenced by the quality of legal knowledge of judges and counsel. The role of legal knowledge is becoming increasingly important in a world in which law (national and international) is proliferating at an unprecedented pace.

On the other hand, the overall standard of legal education in most non-industrial countries is poor, and unable to maintain quality or cope adequately with the huge increase in demand for legal education. Graduates of elite institutions typically gravitate towards private practice or academia, leaving judicial positions mostly to those for whom a judicial career is the best available option. As a result entry level judges, and counsel assisting courts, can no longer be relied upon as having essential legal knowledge.

The Indian judiciary, therefore, has established a well endowed and autonomous National Judicial Academy, chaired by the Chief Justice of India, as a 'joint venture' between the judiciary, executive, Bar, and academia. The Academy provides one of the finest judicial education facilities in the world. Under a comprehensive National Judicial Education Strategy adopted in 2006, the Academy today conducts some 100 programmes annually, involving over 3,500

judges. The National Judicial Education Strategy has linked judicial education to the goal of enhancing timely justice, addressing delay and arrears reduction, and enhancing the quality and responsiveness of justice. The Academy has also linked judicial education to judicial reform, focusing its interactive judicial education programmes on judicial reform, undertaking research, and generating new proposals for policy development for judicial reform.

Judicial reform programmes must, therefore, focus on ensuring the adequacy of legal knowledge of judges and the Bar, both entry-level and continuing. The content of knowledge programmes must have a justice orientation and provide not only knowledge of black letter law but also inter-disciplinary knowledge useful to ensuring that normative standards are transformed as discussed earlier.

2.2.4 Judicial Method

Judging is a process of decision making by judges. It is well recognized, at least since Benjamin Cardozo's treatise on the nature of judicial process,²⁰ that the personal background and experience of judges has a significant impact on judicial decision making. One of the great challenges faced by judicial systems, therefore, is reconciling the human element of judicial decision making with the need for consistency in the norms that are applied by courts to human conduct; and the fidelity of these standards to normative goals established by law at the national and international level.

The only means to insulate judicial decision making (not entirely, but to the maximum possible extent) from the vagaries of subjectivity is professionalization of judicial method. Notwithstanding, the critique of reasoning offered by certain legal scholars, 'reasoning' and 'rationality' combined with the use of science, can strengthen impartiality, objectivity, and fidelity to law in the judicial process.

In the common law systems, judging has traditionally been self-taught though, more recently, this is increasingly becoming part of formalized programmes of judicial development. Judicial method is not a part of judicial education in many countries. Weakness in judicial method is one of the important reasons for the large, irrational, and socially harmful variations in judicial decision making experienced in many countries. This weakness is also

responsible for the variance in many instances between individual judicial decisions and legally established concepts of justice.

A justice-oriented role of the judiciary will require a different approach to judicial method, conducive to the cause of justice. This may be illustrated as follows. Using a traditional approach, a judge may resolve a case by merely choosing between competing arguments of opposing sides on facts and law. An alternate 'normative' approach would be to: consider the arguments on facts and law to first determine the norms/standards of human conduct that are 'at play' in the case; then to identify which of these norms are consistent with legally established justice norms and therefore require to be upheld; and subsequently make a decision in the case accordingly.

Judicial reform programmes must address issues of judicial method and seek to develop a more professional and justice-oriented approach to judicial decision making. Judicial education is the tool to address this concern. Judicial education must therefore be a central part of all judicial reform programmes.

2.2.5 Effective Management Systems of Courts

One of the most difficult challenges facing judicial systems is managing the process efficiently so as to achieve the objectives of justice. This is especially true in common law countries in which judicial systems are still struggling with the challenges of case delay and arrears, and enhancing efficiency and access.

Modern methods of management—involving use of ICT as well as management tools—are essential to improve the effectiveness and efficiency of judiciaries. The interface between litigants and courts needs to be modernized using ICT tools to reduce transaction costs, eliminate rent-seeking opportunities, and enhance transparency.

In many countries court data and information is still held manually, making it difficult to manage caseloads effectively. Court data and information needs to be digitized through informatics projects. This is a prerequisite for use of technology-based solutions for better management of the system.

Modern case management and court management solutions need to be deployed, with a variety of solutions developed over the last quarter century. These need to be studied and an appropriate solution, suitable for local conditions, developed and implemented as part of

judicial reform programmes. Not all solutions developed in other countries will be suitable for local conditions in developing countries where, in some instances, a reliable power supply or computers are not available to courts. Innovative approaches are needed to strengthen management systems even in these challenging circumstances.

Decisions of courts must be made publicly available to facilitate wider dissemination and discussion about the norms upheld by courts in adjudication. This is essential to fulfil the core role of courts in transforming the general standards of human conduct as discussed earlier.

The development of a comprehensive human resource development (HRD) strategy for the judiciary will provide an effective tool to address all HRD concerns. HRD and capacity building of judges and court officials is a major management challenge. Judiciaries need to recruit, reward, and retain the best available talent. Substantial investment in induction and continuing judicial education is required—every judge should be required to invest at least one week in judicial education annually. Considerations of seniority and merit will have to be carefully balanced in a system that is inherently hierarchical.

2.2.6 The Demand-Side: Access to Justice

An unprecedented framework of rights and remedies—national and international—provide citizens today with unparalleled opportunities to resist injustice. Yet, in general, there has not been a commensurate use of courts, either by the state or by citizens, for this purpose. In India, for example, the filing of civil suits in courts has been steadily declining despite the fact that unprecedented economic growth has increased the scope for civil conflict.

Why is the use of courts not commensurate in all cases with the creation of rights and remedies? The cost and complexity of approaching courts through counsel is an important barrier faced by justice seekers. The lack of adequate awareness of rights and remedies is another.

Proactive justice-oriented courts should see their role as being to stimulate demand for justice. Judicial reform needs to include ways and means of stimulating demand for the use of courts to protect rights not only through legal aid and legal literacy campaigns, but also

through creating a new jurisprudence that will expand both remedies and the right to use them. Strategies may include the relaxation of restrictive rules governing standing to sue (*locus standi*), and the development of an 'epistolary' jurisdiction as found in India, in which a letter (epistle) by a person complaining about human rights violations is adequate to invoke the jurisdiction of courts.

Expanding 'access to justice' should become an integral part of judicial reform programmes.

2.3 JUDICIAL REFORM PROGRAMMES MUST BE 'GROWN' AND NOT 'MANUFACTURED'

Is it necessary to develop judicial reform programmes from first principles, or can judicial reform programmes be replicated from the experience of other countries?

As noted earlier, key donors supporting judicial reform routinely replicate programmes across countries and continents. They take the view that effective judiciaries require certain common institutional and organizational arrangements independent of the social context in which they function. Donors do accept that modifications may be required to adapt these arrangements to local contexts but set as a main goal the establishment of common frameworks across countries.

There is a vast academic literature examining the efficacy of transplantation of ideas and institutions on law and justice. The conclusions and experience emerging from this analysis is mixed, with some successes on legal transplantation such as the replication of European commercial law by Japan, and the enactment of the Penal Code in India, and many failures. Imported judicial institutions have been even less effective in providing accessible and effective justice for common people—Singapore being a notable exception of a colonial judiciary adapting effectively to its post-colonial role.

The experience over the past half century of judicial reform programmes clearly shows that judicial institutions—more than any other type of public institutions—cannot be 'designed' and 'manufactured', that is, they cannot be 'produced' through putting in place pre-designed laws, organizations, and personnel.

Judicial institutions need to be 'home-grown'. Core ideas such as those discussed here on the role and responsibility of the judiciary

and appropriate organizational arrangements should be introduced into public debate for consideration by policy makers and civil society. Priorities and desired sequencing should be debated. An agenda for reform should emerge from this debate. Such an approach will produce reform that is owned locally, with a much higher chance of sustainable success.

The example of the reforms in India discussed in this chapter at 3.0 below, provide such an example of a 'home grown' agenda that emerged from responsiveness to national needs and priorities. The approach to judicial reform that emerged from the judiciary was substantively different from the agenda emphasized by donors at that point of time. The reform has, however, been irreversible and effective.

2.4 JUSTICE AS A BENCHMARK OF JUDICIAL REFORM PROGRAMMES

Assessing the impact of judicial reform programmes is one of the most problematic issues facing judicial reform. What are the indicators to be taken into account? How will the judicial reform inputs be co-related to outcomes with reference to identified criteria?

The central difficulty in evaluating judicial reform programmes is the lack of clarity about the goals of judicial reform and on the role of the judiciary. As noted earlier, in the absence of such clarity, evaluation is of limited value.

Evaluation of judicial reform programmes follows the priority of the donors and governments. Programmes that assist strengthening of criminal justice programmes typically measure conviction rates and speed of trials. The main concern of governments and donors financing such programmes is preventing impunity rather than protecting innocence. Programmes that support human rights and democracy goals measure awareness of rights and degree of enforcement of rights. Programmes that support economic goals measure business confidence, as well as transaction costs in enforcing rights, and the extent to which rights are actually enforced.

For the most part, judicial reform programmes evaluate outputs rather than outcomes or impacts. Improvement of quantity and timeliness of court disposal is often used as an indicator of the performance of a judicial system. Quality indicators are more difficult to establish in terms of court decisions and case disposals.

Attempts have been made in a number of countries to measure satisfaction of court users and confidence in the judiciary. These are very useful and important measures, although the tools used are still evolving.

If a justice-oriented approach is taken to judicial reform, reform programmes may be measured against benchmarks of equality, freedom, and dignity, using measurement instruments and surveys employed by agencies in other sectors.

This chapter has developed a framework for measuring the quality of legal and judicial systems based on the identification and measurement of law-dependent public goods (LPGs), which are public goods in the production of which the legal and judicial system plays an essential role. LPGs would be identified in a participatory manner at the local level taking into consideration internationally accepted norms.

2.5 JUDICIAL REFORM PROGRAMMES NEED TO BE APPROPRIATELY PLANNED, MANAGED, AND MONITORED

It is well recognized that sound planning and management requires above all, clarity of goals and methods, as well as measurable performance indicators. As previously noted, this is an area in which judicial reform programmes are severely challenged—goals are unclear, methods are poorly related to goals, and measurable benchmarks are missing.

Judicial reforms must be developed and implemented in accordance with a strategic vision and implementation plan which has a clear road map and clear milestones. What has been missing in many cases is a holistic vision to guide the judicial reform process. The Philippines developed such a long-term vision for judicial reform through a consultative process. This process could be emulated by other countries.

The agenda for judicial reforms must be developed and managed in a participatory manner, ensuring inclusion of demand-side voices in the process. Judicial reform must be developed and implemented with the participation of all stakeholders in the justice system—civil society organizations, academia, and government—in addition to the judiciary.

Some donors (such as DFID and USAID) have also provided considerable funding to non-judicial agencies involved in the administration of justice such as the police, prosecutors, and jails, as well as to non-government organizations. Assistance for judicial education, legal education, and lawyers' training are also important components to be implemented by the concerned entities.

Who should take the lead in developing and implementing judicial reform programmes? Should judicial reform be led by the judiciary or by the executive? A variety of models has evolved internationally for carrying out judicial reforms.

International financial institutions, such as the World Bank and the Asian Development Bank, have sought to carry out reforms mainly through the judiciary, with courts and judges playing a key role. Given the need for safeguarding the independence of the judiciary, the central role of the judiciary in reforms is appropriate and necessary. However, judiciaries often lack the capacity and skills to develop and implement projects and may not have adequate objectivity in critically evaluating the need for the reform of judicial institutions.

Sound planning and management also requires adequate institutional capacity and skills, not only of lawyers and judges but also professionals drawn from other disciplines such as management and finance. Judicial reform programmes typically lack adequately staffed planning and management units with adequate budgets for planning and management.

Judicial reform programmes need to be implemented in a manner that preserves the delicate balance between judicial independence and the effectiveness of planned reforms. This, therefore, requires both the involvement of the judiciary, and the expertise and knowledge that rests in executive branch agencies. Leadership and management of judicial reforms need to be decided in accordance with a country's circumstances. The lead agency would need to have adequate legal authority to develop and implement reforms; capacity to implement reforms; and 'objectivity' to be able to consider both supply- and demand-side reforms.

Conventional wisdom is that reforms should be sequenced so that institutional reforms precede changes in the vision and mission of courts. The sequence can, however, be reversed. Changes in the

vision, mission, and role of the judiciary can result in institutional reform that is responsive to national needs and priorities as illustrated in the India case study below.

3.0 DESCRIPTION OF REFORM EXPERIENCE: JUSTICE-CENTRED JUDICIAL REFORM—THE CASE OF INDIA

3.1 PROBLEMS/CHALLENGES

The key message of this chapter is that enhancing justice must be the central focus of judicial reform initiatives (justice-centred judicial reform). India offers an important and influential case study of this approach to judicial reform. The Indian experience in promoting access to justice through judicial reform is discussed in more detail elsewhere in Chapter 3. The case study below briefly touches on certain aspects of the Indian reform experience relevant to justice-centred judicial reform.

India has an ancient judicial tradition and one of the largest and most complex judicial systems in the world today—some 12,000 judges (against some 15,000 judicial positions) handle over 45 million cases a year on average, disposing of some 18 million cases each year.

The judicial system is still plagued by many challenges, including chronic delay, inadequate infrastructure, and shortages of judges. In the last three decades, the Indian judiciary has substantially reformed itself to become a model to the world for its innovative and proactive ‘justice jurisprudence’, with its public interest decisions to secure justice for common people now being emulated. Within India, the judiciary has emerged as one of the most trusted organs of the state. The judiciary has reformed processes for judicial appointment so as to significantly enhance judicial independence.

For the first thirty years of India’s independence this was not always the case. P.N. Bhagwati, former Chief Justice of India and one of the architects of justice-centred judicial reform in India, described the judicial situation prior to the justice-oriented reform as follows:

With a legal architecture designed for a colonial situation and a jurisprudence structured around a free market economy, the Indian economy could not accomplish much in fulfilling the Constitutional aspirations of the vast

masses of poor and under-privileged segments of society during the first three decades of freedom.²¹

As one Indian scholar has characterized it, the court appeared to act during this period as 'the conscience keeper' of the status quo.

What is remarkable about the judicial reform initiative that transformed the role of the Indian judiciary from being seen as the *conscience keeper of the status quo* to being seen as the *conscience keeper of justice* is that this reform was conceived, developed, and implemented by the judiciary itself.

The background to this reform lies in the tension between the colonial legacy of the Indian judicial system, built over roughly a hundred-year period beginning in the first half of the nineteenth century, and, a revolutionary, justice-centred constitution that provides the blueprint for a new egalitarian society. In the first three decades of independence (1947–77), the judiciary remained distant from common people and from the fierce ongoing struggle for social change in society. On key issues (such as land reform, social reform, and economic reform) the judiciary interpreted law in a narrow and pedantic manner and impeded social change. Notwithstanding questioning by individual judges, the judiciary allowed the government of the day to curtail civil liberties in 1975–7.

3.2 ACTIONS TAKEN

How did the judiciary 'turn around' from this nadir to emerge as a powerful force for freedom and human rights during the next thirty years? What were the gains from this reform? What, if any, are the risks?

There was a clear strategy evolved by a handful of Supreme Court judges. The core group consisted of four visionary judges who served on the Supreme Court of India for various periods between 1973–87 and became the key drivers of the reform: V.R. Krishna Iyer;²² P.N. Bhagwati;²³ D.A. Desai;²⁴ and O. Chinnappa Reddy.²⁵

Perhaps the key strategic thinker behind this judicial reform strategy is V.R. Krishna Iyer who came to the judiciary from a political background, having served as a minister in the world's first democratically elected communist government in the southern Indian state of Kerala from 1957–9. Although the other reformist

judges may not necessarily subscribe to Iyer's own strategic agenda, his vision for judicial reform (which he called 'Project Popular Justice') was crystal clear. He did not discuss or reveal the full extent of his vision often. He did so with rare candour in a series of lectures subsequently published in 1986 as a book, *Equal Justice and Forensic Process: Truth and Myth* (referred to here as *Truth and Myth*). In essence, his fourfold vision for judicial reform presented in *Truth and Myth* is:

- 1) *Justice Orientation*: To make the system primarily oriented towards securing justice as envisaged in the Constitution, covering all aspects of life, with a pro-poor and pro-weak bias and the commitment and capacity of judges to override procedural and substantive impediments that come in the way of constitutional justice.
- 2) *Remedy Guarantee*: To ensure that courts always provided a remedy for every right through innovative and creative interpretation of procedural law and proactive use of the powers and jurisdiction of courts.
- 3) *Liberalizing Access*: Access to justice was expanded, *not only* through conventional legal aid and legal literacy programmes that would *bring common people closer to courts*, but also through radical and substantive legal and judicial reform that would *bring courts closer to common people*. This was to be achieved by such measures as liberalizing rules governing standing to expand opportunity for class action and public interest litigation and creating what has been called 'epistolary jurisdiction' for the protection of human rights (invoking jurisdiction through mere letters), simplifying law and procedure.
- 4) *From a Colonial Legal System to a People's Legal System*: Simplifying the legal and judicial system, making judging into a 'common sense driven' system of flexible decision making, focusing on justice outcomes.

Justice Iyer identified the priority for judicial reform in a way that questions conventional approaches. In *Truth and Myth* he said that:

[T]he real relevance of court and litigation today is not jurisprudential perfection of judicial judgments but the acceleration of the human ascent—the ascent of all people in their equality, dignity and development.²⁶

Further, he stated that the most important need was that:

[T]he extant Indo-Anglian [sic] judicial organs and operations must suffer people-based transformation, broaden conceptually its rules of locus standi, forms and formularies, rites, and rituals and shift its focus from gobbledegook sophistries and high-tech juristics to where common men live in injustice.²⁷

Over twenty years later Justice Bhagwati echoed Justice Iyer, saying:

The judiciary has to play an important role in preventing and remedying abuse and misuse of power and eliminating exploitation and injustice. It is necessary for this purpose to make procedural innovations in order to meet the challenges posed by this new role which the judiciary has to fulfil.²⁸

3.3 OUTCOMES

While this vision for reform is admittedly ambitious and far from precise, what is unique about this approach is that it gives primacy to transforming the role of courts to a justice-oriented approach.

It has been implemented in part over the last thirty years or so with considerable success. Looking back at the initial years of the judicial reform programme he launched, Justice Iyer noted in *Truth and Myth* that:

Many changes in our judicial system...have fruitfully happened...human rights jurisprudence has blossomed in India; social action litigation has bloomed beyond the dreams of our forebears' poverty jurisprudence; human deliverance strategies through court processes and many other aspects of the democracy of judicial remedies have sprouted from the soil with home grown sturdiness.²⁹

and

For once, the judiciary is taking the Constitution and shaping the social order to the benefit of the lowliest and the last.³⁰

Justice Bhagwati looked back at the radical changes brought about by the judicial reform process he initiated and remarked as follows:

The highest court in the country was shedding its character as upholder of the status quo and was assuming a new dynamic role as the protector of the weak through the adoption of a highly goal-oriented and activist approach by some of the judges. But...judicial activism has opened up a new dimension of the justicing process and given hope to the justice starved millions...³¹

The most important consequence of this judicial reform in India has been the emergence of a body of public interest litigation (PIL) that has had a profound influence not only on the judicial system but on the course of national development in India. Through PIL, courts have taken up a wide range of issues which would traditionally have not been considered as falling within the ambit of courts as they did not involve any inter-personal disputes between the private litigants who had filed the cases in court.

Under PIL, courts have addressed human rights issues such as rights of prisoners and those who were detained by the state;³² addressed labour rights such as exploitation of bonded labour and working conditions and remuneration of the poorest segment of workers in the unorganized sector;³³ brought relief pertaining to broader economic rights of the poor such as entitlements of the poor to land;³⁴ intervened extensively to protect the environment;³⁵ and intervened in governance issues including judicial appointments and corruption.³⁶

3.4 KEY QUESTIONS AND KNOW-HOW

India offers an example of a different approach to judicial reform—one that seeks to transform a colonial adjudicatory system to a system that serves a democratic polity and a market-oriented economy. Indian judicial reform has been internally driven, with hardly any role for external donors. Nor has this process of institutional transformation been referred to commonly as judicial reform.

The driving impetus of judicial reform in India has come from the *jurisprudence of courts on justice* (the central purpose of judicial institutions), rather than organizational reforms—thus reversing the traditional sequencing of reform programmes. Changes in jurisprudence led to a change in the social role of courts which in turn led to organizational reforms, including a new highly independent process for appointment of judges, and increased funds for the judiciary.

The Indian example is an argument for reversing the sequence of judicial reform as currently approached. But it is more. It is also an argument for an integrated approach to judicial reform that takes into account three dimensions, that is, institutional frameworks, efficiency of judiciaries, and the role of justice. It is also an argument

for allowing greater flexibility and space for internal evolution of institutional structures for adjudication and of phasing. It is an example of the need for clarity about the role of the judiciary and the need for leadership by judges who are sensitive to the socio-political context of the country. The Indian experience of judicial reform thus more closely approximates the type of evolution that took place in industrial countries.³⁷

What is the lesson from the above? It appears from the above that there may be no short cut to the development of judicial institutions—they need to be *grown* rather than *manufactured*. The challenge then is to provide strategic direction to their growth rather than *construct or manufacture* judicial systems.

The 'symptoms' of delay and arrears are yet to be fully addressed in India. However, the judiciary has transformed itself to a key force promoting not only democracy, human rights, and sustainable development but also economic investment and growth. This was done by transforming the role of the judiciary to the protection of justice.

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2 Case Management Reform and Delay Reduction



Case Management Reform— The Philippine Experience

ZENAIDA N. ELEPANO

1.0 KEY MESSAGES

In adversarial litigation, parties, especially defendants and their lawyers, have been known to abuse the right of due process through procedural manoeuvring in order to delay judgment and effectively deny fair and timely justice. Since 2003, the Supreme Court of the Philippines' pilot project on case and caseload management (CFM) for trial courts has been a ground-breaking reform in confronting this problematic situation. This project has challenged judges to assume a more activist-interventionist role in the management of cases. Through a scheme that requires strict enforcement of timelines and schedules, case events and the presentation of evidence are effectively organized and conducted in an expeditious way.

The approach principally uses caseload management (CFM) techniques—which have been generally defined as the supervision or management of the time and events involved in the movement of a case through the court from the point of initiation to its disposition—to collapse timeframes and intervals into reasonable periods to enable a case to exit from the court with reasonable dispatch. This project has demonstrated that courts which consistently exercise firm control and supervision over cases under the CFM process can experience faster disposition rates compared to their non-CFM case disposal performance.

In the Filipino experience, the case management process should focus on delivering timely justice by using a *rights-based approach*. In other words, procedural law which figures prominently in any case

management design should be used solely as a tool for the attainment of substantive justice. If procedural law hinders or prevents justice, then it should be disregarded or altogether discarded. The ultimate goal of case management in any conflict resolution endeavour is to see that justice is done and attained within a reasonable time and in a fair manner. All activities and processes involved in managing cases from filing to disposition therefore must be *purpose-driven*, that is, attain justice, as opposed to *rule-driven*, by which technical rules of procedure are allowed to run roughshod over justice considerations.

To this end, project planners must make certain that timelines for case events are reasonably fixed so that the parties are not procedurally deprived of their constitutional and statutory right to present completely their respective causes due to unreasonable time constraints.

When courts take over the primary responsibility of moving cases to conclusion according to defined timelines and other case management techniques, delay is avoided or reduced. Overhauling this traditional concept of judging as a purely adjudicative enterprise is no simple task, just as taking control of the pace of litigation from the lawyers is by no means an easy transition. But it does mean that predictability becomes assured in terms of case events occurring as scheduled and cases being disposed of within reasonable timeframes. This in turn enhances trust and confidence in the judicial processes since courts are seen to discharge their adjudicative functions in a fair and timely fashion. This is not to say that elimination of delay equals speedy justice, thereby, necessarily assuring full public confidence in the courts; speed by itself does not guarantee this. However, the Philippine experience does show that when unnecessary delay is minimized or altogether avoided, people cannot help but perceive their courts as no-nonsense tribunals that truly mean business.

In the Philippines, we have found that case management techniques have been successful. Specifically, differential caseload management (DCM) which categorizes cases into fast, complex, and standard tracks depending on their needs for management; uses case tracking and monitoring systems and other strategies such as referral of cases to mediation; and employs modes of discovery and effective pre-trial techniques to reduce litigation costs in terms of time, money, and effort has been effective. Due to shortened case-life, lawyer and

witness appearance fees and other attendant legal expenses incurred in hearings and other court proceedings are reduced or eliminated. Valuable court resources such as time, energy, and money that otherwise would have been spent in prolonged hearings can then be channelled to and focused on other important judicial activities. These factors encourage court users to seek relief from the courts free from the anxiety and fear of protracted, unpredictable, and expensive litigation. Accessibility to justice is thus promoted.

In the course of our recent reform endeavours, we have found that case management cannot be handled merely as an ad hoc measure to remove the bulk of cases from a court's docket whenever the caseload grows to precarious heights. More serious measures must be conducted to reform and improve existing systems that cause backlogs including the use of effective pre-trial techniques, modes of discovery, and a firm policy of adjournments or continuances. Without systemic improvements, efforts to reduce delay will lead only to short-term success, which may in turn lead to detrimental longer term impacts.

For case management to work effectively, it needs to be linked to other measures within the court system. Information gathering and management processes, court annexed mediation, conciliation or arbitration, and even diversion proceedings are some excellent devices. The Philippine project, which did not have these measures except for court annexed mediation as a mandatory pre-trial process and diversion proceedings before the family courts, highlighted the need for such linkages.

We have also found that the nexus between case management and information technology (IT) is crucial. Experience has shown that effective case-management reforms depend upon the establishment of adequate infrastructure for the management of data, records, and systems in an accurate, reliable, and efficient manner. Technology enables the court to oversee case progress and ensure timely dispositions. Further, reliable data in addition to easy-to-process information also significantly empowers the courts to formulate better strategic policy and management decisions. Designing a good information management system must consider the availability of the necessary technology, a CFM software programme that can easily be reconfigured in case changes are required, the capacity

to operate and maintain the hardware, and regular competency training programmes for the personnel involved.

The use of technology has to be considered from day one in the planning stage so that early appreciation of fundamental issues such as funding, technology acquisition, maintenance, use, transfer, and management can better prepare the planners to meet technology problems that may arise. Ad hoc solutions to day-to-day problems will continually challenge the ingenuity and creativity of the planners and implementers. This approach, however, results more often than not in half-baked solutions that subsequently need to be recast. Strategic planning is still the better alternative to day-to-day improvisation.

In designing an effective case management scheme for one's own judicial system, policy makers and planners must take into account the court's organizational culture, the existing legal and regulatory environment, assessed needs, and available resources, if sustainability of interventions is to be promoted. These considerations specifically relate to the need for a mission statement, good leadership, an environmental scan of existing legal structures, a realistic view of the legal culture, an identification of the key persons to be involved in the project, an inventory of existing management information systems, the level of support of local government units, and the viability of the project itself.

As may be expected, introducing case management to the courts has also been a process of managing change, and coopting key actors without which the desired change would have been resisted. Resistance to change was discernible at the training programme and during implementation, from older judges, court personnel, and litigants who found adjusting to the new timeframes difficult, causing complaints of burn-out and stress. Many of these concerns ultimately transpired to be based on misunderstandings which were redressed through more participatory planning and communication.

Monitoring the impact of the initial pilot programme generated mixed results, with a pleasing 95 per cent of CFM civil cases and 90 per cent of CFM criminal cases disposed of according to their designated timeframes at the level of Metropolitan Trial Court (MeTC). A more disappointing average of 23.5 per cent disposal rate of all cases was recorded at Regional Trial Court (RTC) level,

attributed to a failure to strictly administer time limits, insufficient technical know-how, and unexpected vacancies. These findings indicate that CFM can work and is effective in reducing delay in the disposition of cases, *but only if the court is genuinely committed to seeing that all the events or stages of the case happen within the designated timeframes so that undue delay is averted.*

More specifically, analysis of this pilot experience has indicated that a refinement of approach is required in relation to certain aspects including capacity-building, sustaining motivation, monitoring progress, and ongoing training requirements. A range of critical factors for success has also been identified as including clarification of purpose; judicial leadership; assessment of project parameters, prevailing operating culture, and key actors; and the availability of management information, support and logistics for sustainability. Importantly, such reform endeavours demand considerable time and attention, and sufficient resources should be budgeted from the outset. Perhaps most important is the need to manage the human dimension of this change process with sufficient communication and training being provided, particularly in computer literacy. These considerations have been taken into account in the second phase of this project which is currently ongoing.

Finally, a successful case management programme should be coordinated with activities of other government agencies that relate to the administration of justice. Bar associations, the prosecution, the office of the public defender, the social welfare and services department, law enforcement and correction, and rehabilitation agencies will have to be involved actively in supporting the project. Unless these agencies cooperate fully in observing court-fixed timelines and other management processes, many cases will continue to slumber for long stretches of time. Comprehensive briefings about the case management process through dialogues, seminars, and focus group discussions will educate these agencies and organizations about the concept of case management, how it works, what it is supposed to achieve, and how it advances the ends of justice. These stakeholders need to be convinced that their full support is indispensable in attaining the goals and objectives of the project.

2.0 DESCRIPTION OF REFORM EXPERIENCE

The final decades of the last century witnessed an electrifying season of change in almost all aspects of human activity. New technologies, philosophies, and cultures have been developed that defy ingrained patterns of thought and conduct resulting in the transformation of existing lifestyles. Prominently observed in economics, politics, and law, these changes necessitate concomitant rethinking about the manner in which people can have better access to the beneficial effects of these changes.

Judicial systems have not been spared from these modern developments. Courts are traditionally known for their reactionary and conservative views of how justice may be best administered and delivered. The surge in judicial reform initiatives in jurisdictions worldwide can, however, only indicate a rising sea change in set attitudes manifested by a willingness by courts to now enter into areas where they once feared to tread.

One area of judicial reform that has received much attention and support by the citizenry and government is case management—a strategy employed to respond to the problems of case delay and court congestion. Both problems have long been identified as the most common impediments to the effective discharge by the courts of their primary duty to do justice in a manner that is inexpensive, fair, and expeditious. A phenomenon that has not spared even developed judicial systems, case delay with its resultant backlog has sparked serious study, research, and discussions to find ways and means of moving cases reasonably swiftly from filing to disposition and reduce if not eliminate congestion.

Various factors have been pinpointed as principally contributory to case delay. Some of these are the exponential growth and movement of population, increase in the number of laws and a corresponding increase in legal remedies to enforce the rights and obligations created by new legislation, court and lawyer-caused delay, and the absence of clear and workable management techniques that can ensure a reasonably swift exit of cases from the courts. *'Justice delayed is justice denied'* is a truism that hungrily feeds on poor case management by courts, and causatively demands immediate and effective solutions.

Effective case management, which is the heart and soul of adjudication, promotes quality service to litigants through timely, fair, and efficient case processing methods. This innovative system enables and empowers judges and court personnel to deliver fair justice in a reasonably swift manner, thereby heightening confidence in the judicial process and in the court as an institution. A shortened litigation period reduces associated costs. It promotes accessibility to justice by encouraging court users in particular and the public in general to confidently seek relief and redress from the courts in a manner that is free from the anxiety of high costs attendant to protracted litigation. Inexpensive, expeditious, and fair litigation dissuades people from relying on extra-constitutional and often violent means to attain justice.

In the Philippines, litigation is adversarial. Our experience has been that this system has allowed lawyers and their clients to arbitrarily manipulate procedural rules to suit their personal interests rather than to serve the ends of justice. This has been encouraged, no less, by express constitutional provisions that mandate the strict observance of due process so that every side of a legal issue brought to court gets to be heard. It does not help, that a great number of our judges tolerate this propensity of law practitioners to utilize all existing procedures, even if it is clear that resort to these strategies is purely dilatory. One can only wonder how many legal bouts in the country have been irretrievably lost through technical knockouts!

There should be no question, therefore, that the case-management process demands a re-engineering of local court processes where alterations in procedural rules become an imperative. Intended changes should be geared towards bringing about the attainment, not the frustration or subversion, of the ends of substantive justice. This, after all, is the ultimate goal of any legitimate adjudicative endeavour.

2.1 PROBLEMS AND CHALLENGES

Like any other court system, Philippine trial courts have been beset by the problem of case delay and docket congestion. The adversarial system of litigation in the country, underpinned by a constitutional mandate of substantive and procedural due process, allows parties a great deal of latitude in presenting their respective causes before

the courts. This, and the traditional passive role of judges during trial, has encouraged lawyers and their clients to practically dictate the manner and pace of litigation. Consequently, the figurative day in court, in many instances, translates literally into *years* in court! The chronic lack of courts, judges, prosecutors, public attorneys, and practicing lawyers, compounded by the absence of a firm control over the caseload process by the judges, paints a scenario that has not at all been encouraging for the Philippines's justice system.

Prior to 2003, the year the implementation of the Philippine Pilot Project on Case Management commenced, data from the Office of the Court Administrator of the Supreme Court (OCA) relative to trial court performance showed caseloads in the country's RTC at an unmanageable average monthly docket of 346 cases per court. The RTCs in the area selected for piloting case management had an average inflow of 268 cases per month and an outflow of only 234 cases for the year 2002. This was a good cause for raising a red flag, since courts could not even attain one twelfth an equal number of case inflow and case outflow to keep their caseloads steady. For the period of 2000 to 2002, the ninety-five first-level courts of MetroManila had a total inflow of 82,104 cases, and a total outflow of 82,875, showing a dismal disposal of only 771 cases in three years.¹

On the matter of ageing of cases, monthly case reports for 2003 in the metropolitan area showed one RTC having 130 cases that remained dormant, that is, in court for nine years or more awaiting movement and disposal. Some courts in the provinces have been nursing several cases for ten years or more. In a situation such as this, a simple case for collection of money which, with firm judicial management, could be disposed of by a full blown trial in six to eight months could on the average, take somewhere around three to four years in court before it could be disposed of at that level. The period could run to six or more years, if the case is brought up on appeal. The disposal of complex cases was even more problematic, as the average time to disposal at trial court level was four years and would lengthen to undeterminable periods on appeal.

Given this dreary docket landscape, the need for the Philippine courts to rationalize case management and bring caseloads to manageable levels had to be confronted before the problem

became too massive and unwieldy. Time spent in disposition had to be shortened, anchored on the fundamental concept that trial judges should do more than just mechanically receive the submissions of parties, decide issues, determine rights and obligations of litigants, or pass upon the guilt or innocence of a person accused of a crime. Judges should also pay equal attention to their administrative and managerial responsibilities in their respective courts, acknowledging that the manner in which they administer their courts has a tremendous bearing on the efficient discharge of their adjudicative functions.

There is unanimity in the belief that unless the court actively controls the progress of its cases, the caseload will control the court. Similarly, if the judge cannot expeditiously dispose of the cases filed in court, these cases will expeditiously dispose of the judge!

Originally, case-management and CFM were thought of as the responsibility of lawyers and their clients, while judges merely refereed courtroom skirmishes. This was true of the Philippine legal situation where the manner and speed in the conduct of a court case was controlled to a great extent by lawyers.

Judges, on the other hand, allowed themselves to be passive, apathetic, and timorous actors in the adjudicative process, locked in the belief that they had no control over case input and output, case survival, and case life. This attitude was reinforced by a common fear that if judges enforced strict compliance with procedural rules and timelines, litigants would bring administrative charges for being too unfair, unreasonable, and oppressive! Also, and too often, judges found themselves at the end of an inhibition petition or a motion filed by lawyers with the OCA for change of venue of a case due to judicial partiality and bias which is mostly fictive and employed only to delay the case or to circumvent the rule against forum-shopping to get a more sympathetic court. A lot of these motions are eventually denied for lack of merit, but in the meantime, delay has already set in.

These practices have contributed, without doubt, to bursting caseloads and 'rocket' dockets. Judicial attitudes towards responsibility for case management, therefore, had to undergo a paradigm shift. Trial court judges had to be made to recognize that while a case is not yet filed and is still in the hands of the lawyer, responsibility

remains with the lawyer; however once a case was filed, the case becomes the primary responsibility of the court. It was now time for the judges to step out of the judicial box, so to speak, be pro-active, and take the initiative of controlling the court environment through effective case management.

Overhauling this traditional concept of judging as a purely adjudicative enterprise was no simple task, but it had to be done. Innovative strategies had to be adopted to improve case management and hasten disposition. Effective CFM as the principal tool for case management was untested in Philippine waters. It became the major game plan for Philippine trial courts.

To be sure, case and caseflow management are not novel concepts in judicial education for Philippine judges and key court personnel. Orientation programmes conducted by the Philippine Judicial Academy (PHILJA) for newly appointed judges and clerks of court include CFM as a core subject. Due to short time allotments, the course consists of interactive lectures introducing the CFM concept, with a preliminary exposition of Total Quality Management (TQM), and Trial Court Performance Standards (TCPS). Principally discussed are the dynamics of CFM and the best practices developed in American and Canadian jurisdictions. The workshop that follows requires the participants to examine and critique the traditional way of handling cases, identify causes of backlog, and propose ways and means of shortening case life. It could not be verified, however, that the judges were implementing the techniques learned at these orientation programmes in their respective courts. Admittedly, no monitoring mechanisms accurate enough to show that they did had been developed. What was observed relative to this matter was that case outputs continued to be outnumbered by case inputs, resulting in backlog, as shown by the monthly case reports of the courts.²

2.2 ACTIONS TAKEN: THE PHILIPPINE PILOT PROJECT ON CASE MANAGEMENT

2.2.1 The Case Management Plan

In 2001, as part of its Action Programme for Judicial Reform (APJR), the Supreme Court of the Philippines (SCP) through PHILJA and the OCA, embarked on a pilot project on effective CFM as a strategy

of case management for trial courts. Patterned after the American and Canadian models, the CFM Philippine version adopted as its underlying philosophy on caseflow *Standard 2.50 on Caseflow Management and Delay Reduction* formulated by the American Bar Association which states that:

From the commencement of litigation to its resolution, whether by trial or by settlement, any elapsed time other than reasonably required for pleadings, discovery and case events is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation.³

To implement the pilot project, the SCP, exercising administrative and supervisory powers over all lower courts of the country, organized a CFM committee composed of representatives from the different sectors of the justice system. The first task of the CFM Committee was to create a Technical Working Group (TWG) that would design a CFM Plan to be tested in a target area.

The CFM Plan was contained in a CFM Handbook prepared by the TWG, describing step-by-step the proposed CFM procedure for civil as well as criminal cases, consistent with the existing legal structure and rules of procedure. The CFM Committee proceeded from the premise that CFM involves reshaping rules of procedure to establish reasonable time standards, creating new case events to hasten case disposition, and eliminating events that caused unnecessary delay. It decided that since the rule-making power is vested by the Philippine Constitution in the SCP, the amendment of rules of procedure to suit CFM needs could be undertaken by the court itself, without need for intervention by Congress.

Eliminating or reducing undue delay entailed fixing reasonable time brackets for case events and their time intervals. In collapsing timelines into reasonable periods, the designers of the CFM plan were guided by the policy that time intervals between case events should be long enough to afford the parties time to prepare, but short enough to encourage them to prepare. This formula addressed the twin demand for swift disposal and fairness.

Additionally, the technique called DCM was adopted in which cases were clustered or categorized into those needing very little judicial intervention, those requiring more judicial attention;

and those where ordinary judicial effort was sufficient. Fast track, complex track, and standard track processes were formulated for each case type to travel. From filing to disposition, each track had its own timeframes and case-processing requirements. The tracks would ensure that cases proceeded according to fixed deadlines.

Track assignment was determined at the time of filing or soon thereafter by the parties, their lawyers, the judge, and the clerk of court. Parties are asked to indicate their preference in a case information sheet (CIS) which they fill out upon filing their initiatory and responsive pleadings. Ultimately, however, the determination is based on the court's and the lawyers' knowledge and experience about what level of judicial attention individual cases need. Basically, the criteria employed concerns the nature of the case, the claims and the defences, the kind of evidence to be presented, and the degree of proof required by law.

Introducing DCM to key justice sector players involved convincing them that not all cases in court are alike and therefore should not be subjected to the same time and processing schedules and needs. It was necessary to instil the idea that courts needed to abandon the 'first in—first out' policy of case handling. The traditional approach to case management simply was not working, ignoring as it did the nature, individual time, and processing requirements of each case.

The CFM Handbook described not only the tracking systems but also the particular functions of each of the key players in case management. It also contained sample forms for court orders, minutes for pre-trial proceedings, and other documents to be used by judges and clerks of courts. These proformae could be electronically generated by computer to save precious time and energy that otherwise would be spent in the manual preparation of such documents every time the need arose. These electronic forms are now considered one of the best features of the CFM system.

So that the courts could monitor the progress of cases through their assigned tracks, it was necessary to use technology. Initially, the management of data in the pilot project was to be done manually, since the project intended only to show that CFM worked as a strategy for delay reduction or elimination. During the CFM training programme, however, vital issues arose including the need for

accuracy in monitoring case progress through the tracks as well as strict observance of pre-trial and trial events. Both were matters that could very well be solved with the help of automation.

The need for technology was therefore recognized. This, however, generated additional problems for the implementers regarding funding sources, technology acquisition, maintenance, use, transfer, and management devices. As these considerations were not factored in during the planning stage, solutions had to be immediately formulated—improvized is the better term—as further problems arose during implementation. One important lesson drawn from this experience was that the use of technology in case management is essential and must be made an integral part of the management plan from the very beginning. To ignore IT considerations is to ensure the derailment of the project.

A CFM software programme had to be developed based on the tracking systems and the case processes described in the CFM Handbook. The technology, which included computer units and printers, the CFM software programme, the costs of training of court personnel in the use of the software, and the connectivity of the courts to each other and to the OCA, were all made available through the assistance of USAID.

The project proposal of PHILJA to pilot CFM ran into some problems. The main issue centred on the choice of court system in which CFM would be piloted. The CFM Committee decided that the criteria to be adopted for selecting a trial area would be the number of participating courts, judicial leadership situation, level of receptiveness of the key players to the change contemplated, and the state of existing court infrastructure, which included the level of computer literacy of the key court players.

These criteria were determined on the basis of necessity and practical considerations. Of the four possible pilot candidates, the court system of Pasay City in Metropolitan Manila was chosen as the ideal site, as it substantially fulfilled these requirements: the court system consisted of only eighteen courts—a manageable number; a high level of leadership was exhibited by the judges; the enthusiasm of the court personnel was a good sign; and several court employees were computer literate. In addition, the city government was very supportive of this novel reform initiative.

The pilot project began with a comprehensive and intensive training programme on case management and CFM for all the trial court judges, court personnel, prosecutors, public attorneys in the RTCs (second level courts) and MeTCs—(first level courts) of Pasay City. Also invited to participate in the training were: law enforcers, practicing lawyers who were officers of the Integrated Bar Chapter of the pilot area, private citizens, and representatives of the civil society.

Funded by The Asia Foundation, the training programme included courses on ethics and value formation, developing ideal work attitudes and work relationships, human resource management, total quality management for trial courts, role of technology in CFM, and effective CFM.

Since CFM was a new concept to almost all of the participants, these topics were drawn up to effectuate an attitudinal change or adjustment to the role of courts and other justice players in the case management process; and acknowledge that delay is an obstacle to justice which can be remedied through the commitment and concerted efforts of all justice stakeholders. Convincing the participants of the positive effects of delay reduction through effective case management entailed dialogues and focus group discussions on the mechanics of the CFM process.

2.2.2 The Caseflow Management Process

CFM has been generally defined as the supervision or management of the time and events involved in the movement of a case through the court from the point of initiation to its disposition. The CFM process as developed for the Philippine pilot project is as follows:

1. When a case is initiated with the Office of the Clerk of Court, the party fills in a CIS and files it together with the initiatory pleading. The entries in the CIS consist of necessary initial information about the case, that is, the parties, the nature of the case and the relief prayed for, the name, address, and contact numbers of the lawyer, and the tracking system requested. The responsive pleading filed later by the defendant is likewise accompanied by a duly filled in CIS.

2. Once filed, given a docket number, and recorded, the case is raffled off to a branch court, and the clerk-in-charge encodes all entries in the CIS in the CFM computer, thus creating a specific file for that case.
3. Thereafter, every event of the case is encoded immediately after it happens. If the case event occurs according to the timeframe fixed by the tracking system, the event is printed in black ('on track') on the computer screen. If the case event does not conform to its tracking schedule, this is printed in red ('off track'). An administrative check is regularly done by the clerk of court to see if a case is off track or nearing off track. This is necessary so that all those involved should exert efforts to prevent an off-track situation or to place the case back on track.

It is worthy to note that recording and monitoring of case progress can be done manually as was done during the first months of the project implementation, at which time there were neither computers nor a software programme. However, this method is cumbersome and time consuming. What technology does is to facilitate the task by providing a fast and convenient electronic method of verifying if each case event that actually happens occurs within its scheduled timeframe. In this way, critical chokepoints are identified and remedies can be developed to ease caseflow.

The proposed CFM Handbook underwent validation at the training programme. Several copies were printed and pre-distributed to the participants for study and comment before validation. An entire day was allotted for this event, at which a lively and sometimes volatile exchange of views and concerns ensued, coming most especially from judges, prosecutors, and public attorneys. Substantive proposals to tighten and attune the CFM process to the existing legal framework were incorporated into the process. The CFM Handbook containing the revisions was subjected to further scrutiny and refinement by the CFM Committee after which the same was submitted to the Supreme Court for approval. By a Resolution, the High Tribunal finally gave its go-ahead signal to launch the CFM pilot project.

Prior to the launch, a comprehensive information and publicity campaign was conducted through the use of tri-media—dialogues

with different sectors of society, speeches before Bar association chapters, and dissemination of brochures and other information materials. Almost two thousand copies of the CFM Handbook were printed and distributed to external as well as internal court users.

2.2.3 The Pilot Project on Case Management: Implementation

The pilot project formally began on 1 July 2003, in Pasay City's 13 RTCs and five MeTCs, as well as their respective Offices of the Clerk of Court. The pilot was for a period of two years. Cases filed from 1 July 2003 onward (called 'day forward' cases) were included in the project. Cases pending in court on 1 July 2003 or 'day backward' cases were not covered, and would continue to be processed under traditional case management methods. This was done to facilitate case scheduling and calendaring. Another equally important reason was to provide a good basis for comparison between the two categories to see whether the day forward cases were moving faster than the day backward cases.

The issue of automation of the CFM process was finally resolved when USAID came forward to underwrite the necessary expenses. Automation of the process started towards the end of November 2003, and encoding of the cases into the software programme was completed in February 2004. From July to November 2003, capturing of case data had to be done manually as the technology was not yet available.

2.3 OUTCOMES

2.3.1 Problems Encountered and Modes of Resolution

As in any experimental endeavour, the CFM pilot project had its share of roadblocks that needed to be cleared as soon as these appeared.

Resistance to the changes being introduced was discernible at the training programme and while the activity was underway. Judges and court personnel, especially the older ones mothballed in traditional slow-paced litigation, found difficulty in adjusting to, and keeping in step with, the new timeframes and schedules, as these entailed major changes in their work environment. They feared that gone would be the days when time was fully theirs and not circumscribed by rigid rules. This would upset the pattern of their professional and personal lifestyles. As a result, monitoring by the judges and clerks

of courts became lax, and timelines were often ignored. Was the Filipino trait of '*ningas cogon*'⁴ already rearing its ugly head?

A number of branch clerks of court began reporting that they were suffering from work burnout due to too much pressure and stress in adhering to case event deadlines. Data encoders complained about more work without additional or overtime compensation. There was also a lot of protest about processes that were perceived to be impractical such as the preliminary pre-trial conference before the branch clerk of court. Here, parties are required to bring their evidence for identification and marking, to identify what are their admissions and stipulations of facts or law, and what matters can be referred for mediation—all for the purpose of shortening the pre-trial period.

The concerns with this process turned out to be caused by a misunderstanding of the new procedures, and these were addressed by discussions about the importance of a preliminary pre-trial conference. The programme planners conceded, however, that this event could be done away with if, in the opinion of the judge, the evidence to be presented was not at all voluminous and did not need a separate day for exhibit-marking and other related administrative work.

Then again, other litigants did not see court-referred mediation as an effective help. They would rather have the judges mediate their differences than private individuals who they believed had no moral ascendancy to conduct a successful mediation process.

Within the pilot period of two years, a significant number of judges and court personnel ceased to be connected with the courts due to generally unforeseen causes like promotions, resignations, early retirement or deaths (no, not because of CFM)! The replacements, especially those temporarily designated to take over vacancies, found it difficult to adjust to the CFM process because of lack of sufficient motivation and training, especially in the operation and management of the CFM software. Technology-wise, when computers bogged down or crashed, users did not know what to do, and technical assistance was slow in coming.

In responding to these challenges, the CFM Committee concluded that some of the problems that surfaced were a matter of systems and thus were not unsolvable. It noted that the basic problem was lack of sufficient personnel. Added duties were imposed but the

number of personnel assigned to handle these remained the same. This could not be remedied immediately. The change involved a lengthy bureaucratic process of hiring additional personnel who had to meet a lot of civil service requirements, sourcing funds for their salaries, and conducting orientation and training programmes.

Computer literacy training programmes were held for those who were technology-challenged, judges most particularly. An in-house help desk support group composed of employees of the pilot courts who were technology experts was formed to respond to the call for assistance whenever minor technical difficulties arose. Major glitches were referred to the Management Information System Office (MISO) of the SCP, although MISO admitted that having limited technical knowledge about the process, it found the software difficult to maintain. At this point it must be noted that assurance of on-site technology support is a necessity so that when technology fails momentarily, immediate remedies are available and the system remains operational, and more importantly, data is not irretrievably lost. To ensure against loss of encoded data, MISO created and installed back-up files for all cases.

On the positive side, beneficial developments were observed in the courts that were determined to observe CFM. The creativity and innovativeness of judges and court staff were brought to the fore because they were continually challenged to provide effective responses to the various day-to-day problems generated by the project. A friendly competitiveness also developed among the courts, spurring the players on to do better and more. Work relationships improved, good teamwork resulted, and a sense of ownership in the project was developed. The players eventually acknowledged that a case management system utilizing the CFM process was one effective way of delivering justice to all in a manner that is inexpensive, fair, and swift. This message became the rallying point in their respective courts.

2.3.2 Formal Evaluation and Assessment of the Pilot Project

At the outset, the pilot project was expected to show that if observed strictly, case management through the CFM method works in reducing delay and eliminating backlog, thus resulting in an improved administration of justice. Was this achieved?

At end of the experiment, the courts did a self-assessment of their performance. At the level of the MeTC, 95 per cent of the CFM civil cases and 90 per cent of CFM criminal cases were disposed of according to their designated timeframes, disposals here being measured in terms of full-blown trials. At the RTC level, the disposal rate was a disappointing 23.5 per cent on the average for both civil and criminal cases. This could perhaps be attributed to the fact that some courts failed to strictly observe time limits due to disinterest, insufficient technical know-how, and unexpected vacancies that were not immediately filled. All of which ultimately resulted in failure of the monitoring process.

These findings nevertheless confirmed that CFM works and is effective in reducing delay in the disposition of cases, *but only if the court is genuinely committed to seeing that all the events or stages of the case happen within the designated timeframes so that undue delay is averted*. An additional but equally important finding was that the full support for the process by the SCP, the trial courts—judges as well as court personnel, the Bar and all other stakeholders is intrinsic to the success of any case management plan.

A formal evaluation and assessment of the pilot programme was later also undertaken by an Evaluation Team organized by the Supreme Court. It was composed of five trial judges, three of whom were technology experts who had independently developed electronic monitoring systems for the cases in their courts. The Team's findings, which generally coincided with the initial observations of the pilot courts were as follows: The implementation of case management using CFM techniques raised the level of awareness of judges and court personnel on the importance of reducing or avoiding case delay through the use of tracking systems for the case events and other case milestones. This augured well for the prospect of manageable dockets soon becoming a reality. The CFM system made it easy for judges and court personnel to track the status of each case on a day-to-day basis by just turning on the CFM computer. This afforded a greater facility of monitoring to ensure swift dispositions. One judge commented that the tracking system of the CFM process provided him with the ability to determine which of the cases in his court did not need much judicial intervention and which demanded his attention most. In this way, he now had more time for cases that

presented difficult and complicated issues. The Evaluation Team's assessment of the performance of the MeTCs coincided more or less with those arrived at by the earlier self-assessment conducted.

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

Was the pilot project a success? In the sense that it supported the hypothesis that case management through CFM is an effective method to reduce or avoid delay in the disposition of cases, the answer is a conditional affirmative, for it is effective only if the court is faithfully and consistently committed to its observance. The experience of the pilot courts shows that determination in strictly observing the designed processes (there were about eight in the RTC and two in the MeTC) results in delay reduction and backlog decongestion. Positive results are not pipe dreams and they can be achieved through the earnest resolve and industry of key workers, as well as the unflinching support of justice stakeholders. Notable was the fact that the pilot courts' presiding judges were not the only ones who displayed leadership and commitment to see the project to a successful conclusion. The Branch Clerks of Court decidedly stamped the work with their own brand of resoluteness and infectious energy that galvanized their co-workers into action. They worked as a team, shared a vision, and sustained it to the end.

Another cause for the generally positive outcome of the project was the formulation of a tracking system under the DCM policy. This clustered cases for track assignment, factoring in: the existing law environment (that is, informal relationships and traditional norms and practices of court users); procedural rules, the legal 'behaviour' of lawyers and other court users; and the need to establish reasonable time standards for the various types of cases filed in court. Without the DCM's tracking systems, there would be no impetus for the movement of cases forward from one case event to the next according to their management needs. Correspondingly, there would be no motivation for the judges and the court personnel to monitor such movement.

Technology was a critical component for the project. The development of CFM software based on the Handbook not only

facilitated monitoring of case progress; it also contributed much to the acquisition of computer literacy and skills by the participants.

3.2 CONSTRAINTS TO IMPLEMENTATION

There was a large increase in newly filed cases in both 2004 and 2005. Was this because of a newly found confidence by the public in the ability of the pilot courts to handle cases with dispatch? Unfortunately, the SCP Evaluation Team did not go so far as to investigate the cause of this phenomenon.

There were several deficiencies and gaps that were discovered in the implementation process. Initially, the project was started without paying much attention to the need for capacity building for key players, as the only goal envisioned at that time was to see if CFM as a tool for case management worked. Resistance was not foreseen as a hindrance, neither was backsliding, since the CFM planners relied on the mental maturity and sense of responsibility of the key court players. Sadly, the reliance on these traits was cock-eyed optimism. Courses and workshops on change management should have been included in the training programme to prime the principal players involved in the project. Only through this would it have been possible to deconstruct their mindsets, tear down walls of complacent attitudes, and thaw seemingly frozen behaviour steeped in the old ways. Efforts were simply not expended to build capacity for problem identification and resolution.

Related to this, maintaining the interest of those involved through motivational measures was not sustained throughout the project. Despite the training that judges and court personnel received prior to implementation, and the initial close supervision of the project by the implementers, several key participants started to backslide. Their enthusiasm for the continuation of the programme waned soon after the connectivity by local area network of the pilot courts to the OCA was established. This was because close personal supervision by the project implementers and technology experts could now be undertaken remotely, and was no longer necessary. Left with no one to call attention to their lapses, judges, and court personnel no longer felt obliged to comply strictly with the processes and observe deadlines. As the project progressed, it encountered a good amount of indifference especially from the older players inured

to the traditional ways of case administration and management. While some did not object to the new procedures, they also took no initiative to actively pursue their goals. Tokenism set in. The Holmesian 'fire in the belly' simply was not there.

The CFM software programme as designed, furthermore, made it possible for courts with an alarming number of 'off-track' cases to unilaterally change the track assignment of these. Such a change, from the fast to the standard or complex tracks (without notice to the parties or lawyers) was made to escape or avoid detection of their non-observance of the track assignments. Thus, when a fast tracked case was covertly converted to another track, the red print indicating that the case was off-track would turn to black to indicate an on-track status, as the standard or complex tracks had longer timeframes! The software programme needed to be reconfigured, to monitor or manage this aspect. Additionally, faulty and insufficient training on technical aspects of operating the software manifested itself repeatedly. Complaints about computers not working or programmes crashing were often traced to the failure to plug the computer to the electrical outlets! Obviously, the training on computer use and the CFM software demanded more in terms of training hours and skills-based approaches.

3.3 KEY QUESTIONS AND KNOW-HOW

The Philippine experience on case and CFM has been a ground-breaking reform initiative for the judiciary. It has opened mindsets and attitudes to the reality that courts need not be passive purveyors of justice, but can indeed be 'activists' by striving to tame their caseloads. The project, as an innovative endeavour, exposed and responded to more challenges than just the elimination of delay and keeping dockets down and current. The main thrust of case management must be the delivery of timely justice by using a *rights-based approach*. In other words, procedural law which figures prominently in a case management design must be used only as a tool for the attainment of substantive justice. If procedural law hinders or prevents justice, should it not be disregarded or altogether discarded? It is essential therefore that all activities and processes involved in managing court cases from filing to disposition must be *purpose-driven*, to promote the attainment of justice, and *not*

rule-driven, which promotes the paramountcy of technical rules of procedure over substantive justice concerns.

Furthermore, several important issues—drawn from this pilot project after dissection and analysis—were resolved into the following lessons learned:

- 1) The design of a successful case management programme should consider the following essentials:
 - *A policy statement or a statement of purpose for the case management plan* that serves as lodestar. Without a mission statement, the endeavour will be directionless with no specific goals to be achieved.
 - *Firm judicial leadership*—Judicial leadership involves more than just taking the lead in managing one's own court and pushing cases up to final disposition. A high degree of moral ascendancy or authority is demanded. This arises out of a legitimate cause and impels others in the litigation system to be morally obliged to accept and respect such authority, to be led, to follow, and to cooperate. Good leadership recognizes participatory management. It instils in the players a sense of ownership in the programme and empowers them to engage in a lively and frank exchange of ideas and concerns because they have a valuable stake in it.
 - *An environmental scan of the existing legal structure*—A review of statutes and rules of procedure that allow or inhibit implementation is imperative. In this way, parameters of the case management structure can be determined, including what can or cannot be done; legal barriers that may be pushed beyond perceived limits; or legislative action necessary to implement a process.
 - *An analysis of the legal culture*, namely, the readiness and willingness of the justice stakeholders to accept and adjust to the changes brought about by case management reforms. This also refers to the attitudes, the needs of, and relationships between, the local Bench and Bar.
 - *The identification of key persons* who are to be involved in the project and the description and delineation of their individual roles in the planning and implementation. This

ensures sustainability in terms of commitment to bring the programme to its desired result.

- An inventory of *existing management information* systems to determine the availability or viability of the infrastructure, if any.
 - The level of *support/cooperation of the local government unit officials*.
 - *Sustainability* in terms of logistics for system maintenance, continuity of training programmes, and other related administrative concerns.
- 2) Any serious case management project is apt to strain personnel resources and logistics beyond the limit—the Philippine experience has been that the endeavour demanded so much time and attention, that other equally demanding tasks of adjudication and court management suffered qualitatively. On the other hand, and more importantly, the project and the process forced major stakeholders to confront the steady stream of problems that poured in day by day, because they had no other alternative. This resulted in stimulating creative thought and action in ways never before imagined, especially when responding to procedural and functional obstacles. Designing new strategies to meet such process and technology issues was no mean task. But for courts that were resolute in performing their role, problems were simply viewed as challenges to be met.
 - 3) The balance between qualitative and quantitative outcomes in terms of case disposition came under scrutiny—was the quality of judgments being sacrificed for speedier disposals? Needless to say, the project generated uneasy questions and presented case management demands needing close study and carefully thought-out solutions.
 - 4) The human factor that insinuated itself into the project constituted a major concern—the key players: judges, lawyers, and litigants—often exhibited the tendency to give up. This was especially true with newly appointed or designated replacements for vacancies in the courts, as they had not undergone training, and were not properly and sufficiently motivated to continue

what their predecessors had started. Some senior players waved off continued active participation as they were retiring soon. Value systems as well as personalities within each court at times clashed. The one lesson to be learned here is that it is not safe to assume that all participants will exhibit and maintain the same level of enthusiasm in seeing a new project proceed to a happy ending. Close supervision over the progress of the project and activities of key players from beginning to end is not only advisable; it is imperative. On the brighter side, while the tendency of some players to relapse into old ways was strong, equally strong was the determination of the rest to make it to the 'finish line'.

- 5) External support for the project is critical—it is important to enlist, persuade, and obtain full cooperation and support from the Bar and other stakeholders in the justice system. This can be done through intensive publicity and information dissemination. In the pilot project, this was done only at the start of the project and within a limited area—Metropolitan Manila, and the pilot site itself. In hindsight, the information drive should have been undertaken on a continuous and an intensified basis, nationwide, in order to keep the stakeholders and the public informed about the project, encourage them to assist in monitoring and measuring progress; and increase and sustain their support.
- 6) In any endeavour that involves change, it is good to educate the key players in, and beneficiaries of, the activity on the need for and the value of change—this is why a change management programme should be held for the case management players before commencing case management reforms. This is necessary to overcome uncertainties and resistance, and to drive home the need for consistent and constant involvement. A training module for the implementation of a case management plan should include seminars and workshops on change management that covers topics such as change management principles, key areas for managing change, the change process, and harnessing skills and strategies for change management.
- 7) Leadership in relation to change management—judges and key court personnel must also undergo a leadership training

programme to improve or develop leadership skills, adopt TQM principles, and cultivate a shared value system in their respective courts. TQM is a management philosophy that enlists all employees in an organization to meet and exceed the expectations of the customer or user by integrating quality into all of its processes, services, or products. Applied to courts, TQM is concerned with improving the performance and services that courts render to the public.

Trial Court Performance Standards (TCPS) on the other hand, provide performance indicators in five major areas, namely: access to justice; expedition and timeliness; equality/fairness/integrity; independence and accountability; and public trust and confidence. It is against these indicators that court services and activities are measured to see if these are infused with quality that satisfies court users. Training programmes must be designed to effect a paradigm shift in work attitudes and relationships so that key players are inspired and motivated to develop good teamwork and a shared vision and mission among themselves.

TQM/TCPS courses are part of the core offerings of PHILJA for newly appointed judges at their orientation seminars. It is, however, not known if the knowledge acquired by the judges through these course offerings is implemented, and if so, whether it works effectively. PHILJA, in coordination with the OCA, has proposed to adopt a mechanism that can effectively monitor and evaluate the results of this particular training programme. The TCPS Measurement Systems developed by the US National Center for State Courts can be modified to suit the needs of Philippine trial courts and thus be utilized for this purpose. Since the OCA conducts regular judicial audit of all trial courts, the audit teams can be trained to use the TCPS measurement System in the trial courts to monitor TCPS implementation.

- 8) The Philippine case management experience unmasked the dire need of judges and key court personnel to be computer literate—to address this demand, the SCP directed PHILJA, together with MISO, to design a computer literacy programme for justices, judges, and court personnel as well. This programme is now under way. Initially, more senior judges exhibited reluctance to

undertake computer training, preferring the traditional way of doing things manually. This was exacerbated by the notion that learning to use the computer is difficult, especially for old people like them whose manual dexterity and mental acuity continue to diminish through the years. A welcome change in this thinking has now occurred. Having been introduced to the art, they realize that it is not *that* difficult to learn how to use a computer. Additionally, having discovered the benefits of computer use in terms of fingertip research and facility in decision writing, judges have spread the good news to their colleagues—which is why our judges now *demand* computer training.

- 9) The project also exposed the need for case management to be linked to other internal support mechanisms such as existing case information systems. The establishment of a Court Administration Management Information System (CAMIS) at the OCA in 2004 as a separate reform initiative with the support of the Canadian International Development Agency (CIDA) answered the linkage need. CAMIS captures and processes case data and statistics from the courts for use by case management planners in formulating policies to improve the project's design. Case data and statistics are supplied by the monthly reports on cases coming from the courts nationwide and are immediately entered into CAMIS. In this way, the data gathered can be used by the OCA in monitoring and analysing case information, and ultimately, in policy formulation. The CFM project was already in its second year when CAMIS was developed. It was discovered, however, that it could not be connected to CFM because both of the software platforms could not 'talk to each other'. The CFM software had Lotus Notes and Domino which were proprietary to IBM. CAMIS, on the other hand, was free, being an open-source programme with a structured database. The CFM software with its flat file system needed to be reconfigured to enable the programme to communicate with CAMIS.

Insofar as linking with other external support systems is concerned, the Philippine judiciary already has some of these in place, including conciliation and diversion proceedings. Conciliation proceedings are conducted before the officials of the *barangay*⁵ prior to cases being

filed in court. They can be linked to the court's case management; however, the existing conciliation process needs to be re-examined to see how it can be attuned to the needs of the courts. Diversion proceedings occur only in family courts and only in cases involving children in conflict with the law. The process also needs to be extended by legislation to other courts to include adult offenders, if it is to be an effective support apparatus for case management.

3.4 THE WAY FORWARD

The Pilot Project on Case Management undertaken by the SCP in 2003 is one of the many reform initiatives towards realizing the ultimate goal of improving the administration and delivery of justice to ensure its accessibility to all. Assessed and evaluated, the plan had its share of deficiencies and weaknesses that made it imperative for the system to be strengthened and improved. The project, therefore, commenced into a second phase called the *enhanced* Caseflow Management (*eCFM*). In 2006, the process was redesigned and the CFM Handbook revised with tighter procedures being incrementally developed in tandem with software reconfigurations. The CFM software can now talk with CAMIS, and data from the pilot courts can now migrate easily to CAMIS. Moreover, to effectively lend support to the caseflow process and further collapse time standards, electronic filing and legal fees, payment systems were designed, as well as electronic systems for docketing and assigning cases. These innovations have further shortened case life. The *eCFM* stage is being supported by the World Bank and the Asian Development Bank which have provided the CFM TWG with invaluable advice and technical assistance.

The improved system is now being tested at the original pilot courts to iron out possible kinks so that it can be ready to roll-out to other court systems in the country. The system is not perfect. It will have to undergo periodic evaluation and reinvention to make it consistently responsive to the demand of fair and timely justice for all. It will encounter many more obstacles along the way. Possibly bigger ones. This, however, should not deter our courts from forging ahead, for there is no other way to go but forward.

NOTES

1. Inflow means cases filed within the period covered, while outflow means cases disposed of within the period whether the disposal be through negotiated settlement, early dismissal for lack of interest or procedural flaw, or by decision after trial on the merits.
Insofar as the outflow being bigger than the inflow, the point being conveyed here is that there should have been a much bigger number of disposals (outflow) than the 771 cases in the three-year period by the 95 first level courts (that is, 8.11 cases per court for the entire 3 years or 2.7 per year per court) had effective case management schemes been adopted by the courts concerned.
2. In 2000, the average caseload was 306 a month. In 2001, the average case inflow per court was 231 while the average case outflow was only 214. This situation occurring every month for the years that followed accounted for bloated caseloads and clogged dockets.
3. American Bar Association, *Standards of Judicial Administration Volume II: Standards Relating to Court Organization* (1992), ABA Press, p. 70.
4. 'Ningas cogon' is a type of wild grass that ignites easily but burns out fast. This concept equates to 'a flash in the pan' or an activity that commences quickly but is of limited duration.
5. The *barangay* is the Philippines' smallest political unit of government.

Backlog Reduction— The Indonesian Experience

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1.0 KEY MESSAGES

The problem of case backlog and delay in the disposition of cases has hampered the Supreme Court of Indonesia for the last 25 years. Since 2006, in particular, the court has been developing and refining its experience in the application of information technologies to redress these problems. Scrutiny has increasingly been given to evaluating its success in terms of impact on performance. From this experience, a number of useful and important lessons are emerging for the consideration of other courts across the Asia-Pacific region:

1) A backlog reduction programme is not merely about reducing the number of pending cases, it is about establishing a caseload management system which will avoid backlogs re-occurring in the future. Initially, in developing responses to reduce backlogs and delays, the Supreme Court of Indonesia (SCI) fell into the trap of only responding to visible phenomenon. The court aimed to eliminate case backlogs immediately; however, it failed to address the fundamental causes generating backlogs.

Adding more resources is not a sustainable solution. The key to success from the SCI's experience is to develop an action agenda which is able to reduce existing backlogs, and establish a permanent case management system that is able to reduce the chance of backlogs reoccurring.

2) A court needs to understand its case management performance by establishing a case information system. The information system will assist in identifying areas where case management improvements can be made. In any effort to reduce backlogs, improvements in case management must be a high priority. The primary concern is to establish an effective system to manage case information—this will ensure that accurate and timely information can be collected to identify changes in case management performance. Management of case information is a critical element to objectively demonstrate which parts of the case management process need to be improved. It further serves as an important element to promote consistency in case management performance. Any deviation in performance standards can thereby be identified at a very early stage, before it develops into a serious problem.

3) Solutions to manage case information do not have to be sophisticated. More importantly, in an environment with numerous constraints, the solution can—and should—be simple and cost-effective. It is inevitable for courts, particularly those which manage a large case turnover, that the best solution for managing massive volumes of court data is by using computer-aided systems. Information technology (IT) based systems are critical to ensure that data and information management can be conducted in an effective, efficient, and accurate manner.

From the experience of the SCI, IT solutions to achieve effective information management do not have to be complex, or resource intensive. A generic spreadsheet application such as Microsoft Excel can perform sufficiently well in helping the court to improve its capacity to manage case information, without becoming chronically dependent on donor-assistance and thereby unsustainable. Such an option needs to be seriously considered by those courts which have limitations in terms of infrastructure and resources, or those currently undergoing a transition process.

4) A clear definition of 'backlog' is essential for setting priorities, with a measureable and commonly accepted definition of what constitutes backlog critical for any backlog reduction programme. A proper definition provides both the court and the public with an understanding of what to focus on, or which matters need to

be prioritized. This then helps people to look at backlog-related problems more objectively. At the SCI, 'backlog' has now been defined as being all cases that had not been returned to the originating court two years after registration at the court.

5) Wider participation in the consultative processes, both within the court and with its partners, is essential in generating progressive and innovative reform approaches. Courts need to make reform processes more participative by way of involving a wider audience in reform activities. A case backlog reduction programme often requires radical solutions which are often difficult to develop and implement due to issues of organizational culture, bureaucracy, or a lack of understanding. With wider involvement and discussion, reform actions can be conducted in a more open and interactive environment. The role of civil society as a partner in reform has, for example, been valuable as a means of maintaining the sustainability of a reform activity, by pushing initiatives during hard times through constant facilitation, advocacy, and support.

6) It is essential that there be supportive leadership by the Chief Justice and senior administrators. It cannot be emphasized enough; any agenda with numerous reforms in the pipeline requires highly supportive leadership. Staff only becomes engaged in a reform process and incur extra effort to support this, if their leadership drives, encourages, and recognizes their work, supported where feasible with appropriate incentives and rewards, and provides practical and tangible solutions to the problems that they face.

7) Showing the tangible benefits of reform initiatives encourages further organizational change. One strategy that pushes successful implementation of proposed changes is the ability to show direct benefits resulting from the reform activities to the court staff and users of the new system. In most computerization efforts, users are often left behind and forced to change without any real benefit to them. When a new system is introduced—if direct benefits by way of the ability to generate reports, improved information control, and ease of use are enjoyed by users—support for further reforms is encouraged.

8) Much of the success to date—being the reduction of cases aged more than two years (defined by SCI as backlog) by almost 35 per cent in two years—has built on simple information

management procedures. Specifically, these have included steps to create and communicate reliable and detailed information about the actual performance of cases. Based on the lessons learned from the case audit, the SCI has now implemented new procedures for the presentation of regular case status information to its justices, resulting in a growing demand among justices to have case status data presented regularly in a standard format similar to that of the case audit. Significantly, this information has provided an incentive for justices to perform well in comparison with their colleagues. They now expect detailed information on the exact distribution and age of cases, and more recently are starting to use this information as a monitoring tool in the management of their lists. Supply of this information has not only informed judicial stakeholders but provided them with practical tools and the means to increase buy-in and participation.

2.0 DESCRIPTION OF REFORM EXPERIENCES

2.1 PROBLEMS/CHALLENGES

2.1.1 Backlog in the Indonesian Court System

Unlike other jurisdictions, the problem of backlogs in the Indonesian judiciary manifests itself principally at the level of SCI, as the final Court of Appeal, and is a far less serious problem at lower court levels. In lower courts, completion of cases is fairly consistent with an established time-goal of six months for each case. This is due to court regulations which require the head of the judicial panel to report and explain the reason why a case is delayed for more than six months to the chief judge of the more senior jurisdiction.¹ This simple rule is sufficiently effective in motivating timely completion of cases at lower level courts, as this mechanism is combined with a closed career system within the Indonesian courts system. This, therefore, gives a strong incentive to lower court judges to avoid delays in handling cases before their courts.

The problem of case backlogs, and hence delays in the disposition of cases, has hampered the SCI for the last 25 years. There have been significant efforts undertaken by the court in a bid to eliminate them. Most of these efforts, however, have met with only limited success and have only been implemented over a limited timeframe.²

In 2004, a reorganization of the judicial system in Indonesia transferred the financial and human resource management of all lower courts from the Executive to the SCI—the so-called ‘one roof system’. Following this devolution of responsibility, the SCI once again tried to eradicate the backlog by using a more innovative approach which involved wider participation of stakeholders.

This chapter is a contribution from the SCI to share its experience in attempting to eradicate its backlog and reduce delay.

2.1.2 Sources of Backlog

Problems With Legislation: No Filter Mechanisms for Appeals

It is believed by many that the large number of cases coming to the SCI is one of the most significant factors that creates backlog. As the apex of judicial power, the SCI is the final appeal body that has the authority to hear appeals from all court jurisdictions. It has, however, few mechanisms which enable it to filter the types of cases that can be heard on appeal. This results in the court having to deal with all kinds of cases—from the very minor (such as petty theft or civil disputes of insignificant value); to very serious ones.³

This problem is based on the fact that parliament, in a bid to reduce delay and backlogs, has in the past addressed them by merely shortening the duration of each stage in the litigation process, and has consistently passed laws which either reduced the steps required to obtain a final decision; and/or established a fixed time period within which litigation must be completed.⁴ This has had the effect of more cases coming to the SCI.

Some specific legislation even allows appeals to be made directly to the court, bypassing the Court of Appeal.⁵ Other cases must be examined by the SCI as a court of first and final instance in a bid to reduce the overall time required for litigation. This easy access to the SCI, together with time limits set by legislation for some types of cases handled by it, has been at the cost of ordinary cases. These have been delayed simply by the fact that they have no statutory time limitation.

Inefficient Procedures

Various studies have indicated that current case management procedures are inefficient and, therefore, need improvement.

Current case management at the SCI is a process that consists of almost thirty manual steps.⁶ It is composed of four major elements, namely: reception and registration; distribution of cases; examining, deciding, and finalizing; and sending the case back to originating court. All of these steps were conducted using manual forms of case registration and tracking. The use of IT only focused on the presentation of case information to the public rather than supporting the process of managing cases.

The reception and registration process is complicated. In order to get the case approved for registration, a file must pass many desks. Similar case data is produced and recorded with very few uses of this data being made. The limited use of computers in the SCI requires similar case information to be recorded many times, creating a huge burden and consuming many resources.

The distribution of cases also contributes significantly to the creation of backlogs. Most of the time, civil and criminal cases are distributed on an equal basis to all judicial teams, regardless of their expertise. It is only recently that case distribution has started to consider the classification and complexity of a case. Therefore, for the past decade, there has been no specialization developed among judicial teams—all justices have to work as generalists, with everyone regarded as being able to work on at least civil and criminal cases.⁷ This has failed to consider discrepancies in jurisdictional background of justices, which may result in a difference in the time required to handle a case and the quality of outcomes achieved.

Examination of a case must be conducted by a panel comprised of at least three justices. Since there is only one case file available, the examination process must be conducted sequentially, a justice must wait until the previous justice has finished their examination before they can start to examine the case. Consequently, productive justices are often delayed by their not-so-productive colleagues. The examination process is followed by the justices' deliberation meeting in which they make a decision. This decision is finalized in a process called *minutasi* which consists of the preparation of the text of the decision, correction of the text, and signing by the members of the judicial panel.

Furthermore, the format for a SCI decision is lengthy and complex. This format requires that a decision retypes most of the information

mentioned in the lower court's decision. Consequently, this requires a significant amount of time for preparation, review, and correction, all of which result in additional delays in finalizing cases.⁸

Problems Regarding the Definition of 'Backlog'

Since the 1980s the SCI has used the standard reporting style which presents information on pending cases from the last period, number of incoming cases, number of cases decided, and number of pending cases this period⁹ with no definition of what constitutes a backlog. This model of case status reporting is practical for monitoring a large number of cases manually. However, it has two problems.

Firstly, this model does not take into account the age of the case in reporting. Cases registered days ago may be reported as 'pending cases this period,' along with cases that have been registered years ago. As a result all pending cases are regarded as backlog. Without a clear distinction and information about the age of a case, this reporting method gives the public an inaccurate impression of the cases circulating within the SCI. The perception is created that the 'cases pending at end of this year' are the SCI's total 'backlog'. This is unhelpful for the credibility of the SCI and, thereby, the public's confidence in the judiciary as a whole.

The second problem relates to how the SCI defined which cases were to be included under the column 'pending cases this period'. Up to 2007, only those cases that had not been decided were included in this category. However, within the SCI, once a case is decided, it enters another lengthy process of finalization (the *minutasi* stage) which can take years. Litigants are only able to enforce their rights once a case is finalized and the full text of the judgment is received.¹⁰ The definition of backlog in 2007, therefore, gave an inaccurate impression about the actual workload of the court as the large number of cases still in circulation within the SCI needing finalization were not reported as 'pending cases this period'.¹¹

Difficulties in Capturing Reliable Data Which Contributes to a Dysfunctional Supervision Mechanism

For almost a decade, the supervision of case management performance has not been implemented effectively. The SCI captured

very little case information on cases pending at the beginning of the period, coming in during the period, decided during the period, and pending at the end of the period. Consequently, the court had incomplete information on what happened while the cases were under circulation. The number of cases returned to the originating court has not been reported for the past 25 years.

This does not mean that mechanisms for case management were absent. The problem has been that the court has had difficulties in enforcing existing processes due to a lack of cooperation from court staff. Some court staff have resisted any extra tasks required to collect information to generate regular case reports. This has been aggravated by the inability of the court leadership and administrator to enforce existing data collection mechanisms. In effect, the case data required to undertake supervision has never been properly collected.

The lack of reliable case data has also made attempts to set performance standards ineffective. Without accurate case information, performance standards cannot be set. Targets to be achieved in managing cases can be completely misleading, as setting too optimistic or too low a standard negates the benefit of any performance indicators in assessing the effectiveness and efficiency of case management processes and staff performance.¹²

2.2 ACTION TAKEN

2.2.1 Traditional Approach

The SCI has been fully aware of the case backlog and case delay problem and has committed itself to resolving them. Since the backlogs were first identified in 1982, various approaches have been adopted to eliminate them. Unfortunately these approaches have been dependent on the current leadership within the court. They merely focused on how to reduce the number of backlog cases, rather than looking further at the causes generating backlogs so that these could be dealt with systemically. The early efforts did not deliver long-term successes and backlogs re-occurred as these strategies failed to address the root of the backlog problem.¹³

Some important measures that have been taken by the SCI in its earlier efforts to deal with backlogs fall into two general categories:

Linear Approach

This approach aimed to mobilize as many resources as possible, and push them to the maximum level of productivity to settle the backlog as quickly as possible. It was conducted by way of adding justices to increase the decision-making capacity; assigning 'assistant judges' from the court of first instance to support SCI justices to provide an initial summary of each case so the justice then does not need to read the whole case file; and setting highly optimistic targets for justices in order to try and meet the objective of reducing the case backlog.¹⁴

Our experience has indicated that this approach works only for a limited period of time. The first 'crash programme' called *Operasi Kikis I* (OPSKIS I),¹⁵ introduced by Mujono CJ in 1982, was carried out for a period of two years and successfully reduced a significant part of the case backlog.¹⁶ As the cause of the problem was neglected, however, the backlogs reoccurred. After ten years, a second crash programme was required as a response to even more serious backlogs at the SCI.¹⁷

The second crash programme (OPSKIS II) was implemented by using a similar logic to the first OPSKIS, however, it added another feature—a 'senior reporter judge'. Unlike the assistant judge, senior reporter judges are justices from the Court of Appeal. They had greater responsibility compared to an assistant judge, and took over the tasks of the SCI justice in deciding certain simple and summary cases. The senior reporter judge was responsible for preparing a case summary and drafting the judgment to be reviewed by the panel of justices. The panel justices only had to review the summary and decide whether they approved or rejected the draft judgment prepared.¹⁸ This measure was taken to ensure that presiding justices' limited resources were focused on more serious issues, while still taking summary cases seriously.

Simple Multi-Track Caseload Approach

This second approach provided a separate track for cases with time-specific goals. The first multi-track system applied by the SCI was in the handling of criminal cases where defendants are under detention. The criminal procedural law stipulates certain time limits

within which criminal proceedings need to be finalized, otherwise the defendant must be released.¹⁹ The SCI created a mechanism of prioritizing this type of case by processing them on a separate track from ordinary cases. Unlike ordinary cases, where the distribution to chambers is scheduled on a regular basis, detention cases are circulated as soon as they are received—once a case is received and registered, orders for distribution to chambers will immediately be sought from the Deputy Chief Justice for judicial matters.²⁰ The fact that it is a ‘detention case’ is stamped on the front of the case file as well as the date of the expiration of the detention order to ensure that everyone handling the case is aware of the case deadline.

In addition, since 1998, a series of reforms have introduced a time limit for all courts, including the SCI, in handling commercial, corruption, and human rights cases. The SCI has also devised a separate track for the hearing of some of these types of cases. One further notable step has been the establishment of a special unit to handle the administration of commercial cases. The SCI Directorate for Civil Commercial Cases was established as a separate unit from the Directorate of Civil Cases to handle first bankruptcy and later intellectual property cases which were the only civil cases with a time-specific goal at that time. The unit developed a more rigid procedure for handling cases, including setting up performance indicators for each part of the commercial case hearing.

2.2.2 An Improved Approach

Active Engagement with Wider Stakeholders in Undertaking Reforms

The more recent appointment of Bagir Manan CJ ushered in a new approach to judicial reform in Indonesia—including in the area of case management reforms and backlog reduction. Starting in the year 2000, the most important initiative was the involvement in the SCI reform process of external partners such as donors and civil society organizations (CSOs). In fact, the ‘First Blue Print for the Reform of the Supreme Court’ (the Blueprint), drafted in 2003, was a collaboration between the SCI, The Asia Foundation, and the Institute for Independence of Judiciary (an Indonesian CSO focusing on judicial reform).

In order to implement the Blueprint, the SCI established a Judicial Reform Team (JRT) which consists of several working

groups, including the Case Management Working Group. The JRT is composed of the SCI leadership, SCI justices and relevant court officials/administrators and is supported by CSOs and legal practitioners committed to judicial reform. The working groups coordinate reform using SCI resources or in collaboration with donors. In the context of case management reform, the working group serves an important role in pushing forward the reform agenda, and managing the implementation of many of the activities discussed in this chapter.

One principal benefit of this multi-stakeholder approach is the possibility to create a more open environment for the discussion of the reform agenda, and to expose the court to diverse approaches to addressing issues. In case management reform, the SCI enjoys the significant benefit of a long-term cooperation with the Federal Court of Australia, facilitated by the AusAID's Indonesia-Australia Legal Development Facility (IALDF), which provides technical assistance, including the assignment of researchers from CSOs to work directly with the SCI in advancing the reform process.

The Case Audit

This basic concept is one of the most important strategies established under the Blueprint in relation to case management reform—there was the need to conduct a comprehensive study on the current status of cases at the SCI before taking any action. This was critical so as to ensure that the subsequently developed reform agenda could avoid repeating earlier mistakes. The JRT agreed to first conduct a comprehensive audit of all cases circulating in the justices' chambers. The audit did not rely on reports compiled by the staff of each justice, but involved an actual physical inventory of all cases in the SCI by a team of independent auditors. This step was essential as no data existed that could accurately provide information on the status of cases within the SCI.

Further, as the audit was aimed at providing empirical data that would support further case management reforms, the audit needed to provide an in depth understanding of the current case management performance and problems faced by the SCI, and test the integrity of data currently being collected by the court.

Analysis of the Case Audit Data

The case audit provided key information to the leadership of the SCI as well as its justices and court administrators. For the first time, accurate information on the location of case files and their status was available. The audit identified which justices had the most pending cases, and enabled the court's leadership to take steps to remedy this situation.

The data produced from the audit has generated accurate information on which of the 30 phases in the handling of a case contributes to the greatest proportion of pending cases. This information allows the SCI to accurately identify the *steps where most cases are delayed*. The audit showed that 44 per cent of all cases are presently in the finalization, or *minutasi*, stage which includes typing the judgment, review, correction, and signature of the draft judgment. 47 per cent of the cases being finalized are awaiting correction by the judicial panel prior to signature. This provides objective information on which stage contributes to the most number of pending cases, something that could previously only be subjectively assessed as no data on the number of cases returned to the originating court was available.

The audit also generated accurate data on *the age of cases* currently under circulation in the SCI. This allowed the court to obtain information on which cases needed to be prioritized and identifying where it had progressed within the court's system. The audit also established where there were discrepancies between the data managed by the registry, and the physical files found in the SCI.

Post-Audit Reform Actions

The completion of the case audit had a significant impact on the overall case management reform agenda and the strategy to reduce the backlog. It allowed the court to make strategic decisions on the basis of the actual situation faced by the SCI. There are several important measures which are worth highlighting.

JUDICIAL FUNCTION-RELATED AGENDA—The Chief Justice took the immediate step to redistribute all civil cases which were more than three years old from the judicial panels that were handling these

to a newly established panel. This was an important measure as civil cases account for more than 50 per cent of the total cases managed by the SCI, and redistribution can expedite the completion of these cases.

Resources were also allocated to the case phase that needed the most attention. The audit data showed a significant number of cases pending at the finalization stage, particularly at the correction stage. The Chief Justice issued an instruction to all justices to dedicate one day in the week (Friday), to make corrections as part of the finalization process. This aspect is important, as in recent years the SCI has made no significant progress in terms of increasing the finalization of cases and returning these to the originating court. There is a strong indication that the number of cases pending for finalization keeps increasing, partly because data on this has not previously been collected and publicly reported upon by the SCI.

Finally the definition of backlog was clarified. The SCI also recognized the importance of separating data on cases which have been significantly delayed (constituting an actual backlog), and cases which are current. The audit offered an objective picture of the SCI's organizational capacity in carrying out its function. This could therefore form the basis for setting objective performance targets. After lengthy consideration, the Chief Justice of the SCI announced publicly at the National Judicial Working Meeting in September 2007 that 'backlog' would be defined as being all cases that had not been returned to the originating court two years after registration at the SCI.

CASE MANAGEMENT-RELATED AGENDA—The experience obtained from conducting the audit and managing information for tens of thousands of cases electronically enabled the JRT to develop reform initiatives to improve case management processes, related information systems, and supervision mechanisms. Supported by IALDF and the Federal Court of Australia, the JRT initiated an activity to digitize the recording of case information using a specially designed Microsoft Excel spreadsheet. The pilot aimed to determine the utility of such a simple electronic data management solution to significantly improve the efficiency of SCI's data management.

The JRT intentionally avoided large investments in IT equipment and/or sophisticated case-management applications on the basis that IT infrastructure in itself would not lead to success in the absence of efficient case-handling processes and supervision. This also enabled the team to assess whether court officials would resist a move to an electronic case-management environment. This was considered critical as previous attempts to fully computerize the case management process faced difficulties in convincing court staff and officials to utilize what was then considered an overly complex IT application.

Piloting procedures to increase the court's capacity to manage case data allowed an evaluation of the ability of the SCI to adapt, and enabled the measurement of the level of acceptance of new procedures. It also showed the leadership of the SCI the benefits that can be obtained by managing case data electronically.

The pilot consisted of a capacity-building package for court staff. All seven sub-registries were involved, with training which covered computer literacy, the use of case management spreadsheets, and assistance during the transition process. More specifically, computer literacy training consisted of an introduction to the Windows operating system, Microsoft Word, Excel, PowerPoint, and the Internet. This broad-based training was important, as low levels of IT literacy had in the past discouraged court staff from embracing new IT applications. During the pilot phase, a computer trainer was assigned to make regular visits to court staff and help them in solving technical problems as well as increasing their general level of computer literacy.

The pilot activity ran for less than a year when the SCI formally accepted the Excel spreadsheet and electronic database as a permanent case management procedure.

REGULAR PRESENTATIONS ON CASE STATUS—Based on the lessons learned from the case audit, the SCI started to implement new procedures for the presentation of regular case status information to its justices. There is now a growing demand among justices to have case status data presented regularly in a standard format similar to that of the case audit. Previously, case status data presented was very general, and only included figures on cases pending at the start of

the period, cases received, cases decided, and cases pending at the end of the period. The justices now expect more detailed information on the exact distribution and age of cases.

The SCI Registrar has now assumed the role of presenting case status data to justices on a regular basis as a means of monitoring cases in the SCI and as a way of developing a self-evaluation approach amongst justices. Since data is managed electronically, information can be presented in various ways and can cover the exact number of cases in a particular justice's chamber and the current stage of each case. This is important case data for justices as it provides a form of peer review and comparison amongst the justices of the SCI. Rather than setting an optimistic target and attempting to force the justices to meet the target, this regular presentation has created an important incentive for justices to perform well in comparison with their colleagues.

2.3 OUTCOMES

2.3.1 Successful Change in Case Management Process

The JRT focused on the improvement of internal case management, informed by the case audit. Through this the JRT was able to ensure that existing court resources could manage the caseload in an effective manner, thereby avoiding backlogs redeveloping in the future.

The SCI has agreed to adopt the use of the electronic Excel spreadsheet database as the principal mechanism in managing its caseload data. In addition, existing compulsory physical registry reporting continues.²¹ The SCI still uses its existing case reporting format, however, it is now able to utilize the flexibility and functionality of the Excel database to enhance its ability to prepare more diverse and informative reports.

The SCI registry has now established a new office under the Registrar which is responsible for managing the data submitted by all sub-registries. The office collects and produces consolidated reports based on the electronic information submitted by all sub-registries.

Another significant outcome is that, since 2008, the SCI has begun to report the number of cases returned to the originating court in its official statistics. As this data has been absent from the SCI Annual Report for more than twenty years, this is a sign of change within the SCI towards becoming a more transparent and efficient institution.

2.3.2 Reduction in the Supreme Court of Indonesia's Backlog

Twenty months after the implementation of the case management reform agenda was initiated through the case audit, there has been a significant reduction in the number of backlog cases (using the established definition of two years after registration). As illustrated in Table 2.1 below, even though the number of cases in circulation in 2007 rose by 7 per cent above the number at the end of 2006, it is significant that the number of cases aged more than two years (defined as 'backlog') in 2007 was reduced by almost 35 per cent.

TABLE 2.1: NUMBER OF CASES UNDER CIRCULATION
ACCORDING TO AGE

<i>Status</i>	<i>Aug 2006</i>	<i>Dec 2007</i>	<i>% change in cases</i>
Cases in Circulation	18,913	20,319	+7
Cases older than 1 year	14,335	10,803	-25
Cases older than 2 years	10,423	6,794	-35

Source: The Supreme Court Registry.

This demonstrates clearly that the measures taken by the SCI have significantly reduced the number of cases before the court for over two years, while effectively managing newly registered cases.

2.3.3 The Government and Legislature's Greater Confidence in the Judiciary

Another important aspect is the acknowledgement from the government and the parliament of the SCI's achievement in pursuing its overall reform agenda. The court has successfully argued for an increase in remuneration for the judiciary based partly on the success of the case management reforms undertaken.

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

3.1.1 Strong Leadership and Organizational Commitment

The support of the judicial leadership is essential in carrying out any reform agenda. The case management reform agenda at the SCI could only be implemented by firstly eliminating the status quo which had

existed for many years as a result of the absence of effective supervision. The reform process was a relatively complex undertaking.

The decision to undertake the case audit was not a very popular idea and neither was the idea of making regular presentations on case status to justices. Strong commitment was shown by the Chief Justice who consistently pushed the reform agenda and the eradication of the backlog. Consequently, SCI justices and court staff had no other option but to support the reform agenda.

Standing behind the commitment of the Chief Justice, the role of a strong senior court administrator (chief executive officer) is of critical importance, as the administrator is ultimately responsible for: breaking down the status quo in the absence of effective supervision mechanisms; lack of performance in the case management area; dealing face-to-face with court staff; and negotiating with the justices in a bid to make sure that case reports can be implemented. It is also the court administrator who has to balance the limitations of the court budget and the demands of professional performance—a challenging task.

3.1.2 Broader Participation in Reforms

A key feature of the successful case management reform in the SCI, has been the involvement of a broad range of reform partners in the process of change. The SCI is a relatively conservative institution which has few incentives to transform the status quo. Furthermore, frequent changes in SCI officials results in newly appointed officials not fully comprehending the significance of the reform agenda that has been developed, or having their own approach to reforms. The role of civil society as a partner in reform, therefore, is very important as a means of maintaining the sustainability of a reform activity. Wider partners are also able to push initiatives during hard times through constant facilitation, advocacy, and support.

The involvement of a wide range of partners also allows free-ranging discussions to take place on reform options. This includes topics which may have previously been regarded as sensitive such as the implementation of a case audit in each justice's chamber. Through partnership, the SCI was also able to draw on the experience of the Federal Court of Australia in implementing the audit as the

two courts have developed a regular consultative mechanism in the area of judicial cooperation.

3.1.3 Selecting Simple Information Technology Solutions

The JRT saw the key challenge as being how to manage the change process for all stakeholders involved in case management in order to make the existing system more effective before replacing it with a new one.

The SCI faces constraints in relation to both IT infrastructure and human resources. Previous case management-related IT developments have seen systems operated by an outside contractor. These systems have mainly been for the purpose of public information, with no improvements being developed in the case management system. The perception was that systemic changes failed because court staff thought the IT systems were too complicated. Given this previous experience, it was not considered appropriate to embark on a major case management IT development programme.

On the basis of the lessons learned from the audit, the JRT recommended that the court use a Microsoft Excel spreadsheet as the tool to help it manage its high caseload while still using existing procedures. Excel was selected for its flexibility and very low investment cost, as well as its being widely available on the courts' computers. Another important feature is that Excel is a simple database which can be imported into virtually any other database application. Furthermore, with the support of donors, the JRT was able to facilitate the data entry process from the SCI's sub-registries and consolidate the sub-registry data in one central database unit. With limited network coverage in the SCI, data collection is conducted by using flash drives.

The approach to select a simple IT solution allowed the case management reform agenda to be successfully conducted using the existing IT infrastructure of the SCI.

3.1.4 Providing Relevant Information Promotes Self-Evaluation

In the process of reducing the backlog, it was important to not consider justices as merely a production factor. A justice's work

must aim to produce justice and fairness. External pressures to push them toward work methods which will quickly reduce the backlogs may also lower the standard of substantive justice delivered, and ultimately reduce the independence of the judiciary itself. Recent steps taken to reduce the backlog no longer focused on setting optimum targets as had occurred in the past. Activities were directed toward promoting the mechanism of self-evaluation by justices through regular presentations on case status.

3.1.5 Demonstrated Benefits

In persuading court officials and staff to change the way they work from a fully manual to hybrid manual/electronic process, it was important to demonstrate that the new system would benefit them. This is particularly important with new IT solutions, as in the short-term, these will always constitute additional work for court staff.

To this end, the JRT emphasized that the use of the Excel database could significantly reduce the time required to prepare regular reports. Reporting could be reduced from a one to two-week process to one taking a few hours—while maintaining a high level of accuracy. Furthermore, the use of the Excel database enables the production of a variety of reports, by utilizing the application's existing functions such as filtering and pivot tables. It provides the ability to easily search for information in the database to respond to specific information requests. Also, by using a mail merge feature, the court staff can now enter information into the database and automatically produce the notification to parties of registration, advice form for justices, and notification of detention.

Now one staff member can achieve what previously required at least two staff.

The Excel database also allows court staff to make changes to the system to provide additional functionality, without having to rely on an external programmer, who may limit access to the application settings that have been developed.

3.2 CONSTRAINTS TO IMPLEMENTATION

3.2.1 Strong Cultural and Organizational Constraints

Cultural and organizational resistance constituted the biggest problem in implementing the reform agenda. In the past, it would

have been inconceivable to court staff that an audit of cases would be performed inside the justice's chamber to review all files. During the planning session, court staff conveyed their reservations about the idea of conducting an audit or presenting the case status information openly, all of which was based on their desire to not have their justices inconvenienced in any way. In addition, the JRT decided that external personnel were needed to implement the audit. This was important so that the audit represented an independent and comprehensive case status report for the SCI.

To overcome this constraint, the Chief Justice asserted his leadership. He announced that a case audit would be conducted, and circulars supporting the implementation of the audit were issued to all justices and court staff.

3.2.2 Major Organizational Restructuring Within the Supreme Court of Indonesia

As the SCI moved to a 'one roof system' it commenced a major organizational restructure which affected almost all working units. This process was underway when the court commenced its case management reform agenda. The registry was one unit which experienced major restructuring.

This process of organizational change within the SCI significantly affected the case management reform agenda. Longer timelines to implement some aspects of the reforms were needed, principally due to personnel changes, and the need to repeat IT training on the Excel database. This added further complexity to the reform process, as new structures, officials, and significantly higher work loads needed to be factored into implementation strategies.

3.2.3 Legislative Constraints

The law on the SCI was amended in 2004. The JRT considered that it was unlikely that further legislative amendments related to SCI procedures would be possible in the short term. The JRT recognized that it must work predominantly within the existing procedural system. This is why a significant change, such as the full computerization of the case management process, was not an option, as it would require a legislative amendment. Consequently, the only reform option available was to improve the existing SCI

case management processes by introducing targeted IT support to enhance the way current manual processes were implemented.

3.3 KEY QUESTIONS AND KNOW-HOW

From the SCI's experience, it has become clear that proper change management is the key to effective reform; *how does one convince officials and court staff to change their behaviour in line with the desired reform strategy?*

We have found that support from the court leadership has been critical. Indonesian experience shows however that in some instances, this is not enough. From past experience, initiatives that were driven by the court leadership did not last beyond their term of office. This is because the reforms failed to nurture ownership among the court staff. We have found that it is important to have as many change agents involved in the reform process as possible to help instil change more effectively. This can be achieved by providing knowledge on leadership and change management to the broader audience within the court institution, and by including civil society elements in the reform process. Knowledge of leadership and change management will provide a strong foundation for more sustainable change.

The JRT's effort to reduce the backlog was not merely a struggle to reduce the number of pending cases but also an effort to establish a solid foundation that would avoid a further backlog reoccurring in the future. This is why the eradication of backlog cannot be resolved by simply setting targets or adding more resources. In SCI's experience, setting time limits for the resolution of particular cases will only expedite the completion of those selected cases at the expense of other cases with no time limits.

Efforts to eradicate backlog must be informed by a clear understanding of what the underlying problems are that create them. Only in this way is it possible to determine the most appropriate strategy to address existing constraints that result in backlogs occurring. It is also important to incorporate elements into the reform strategy that ensure the court can deal with the flow of new cases coming in. This can be achieved by statistical analysis of the case data. However, it can only be achieved if the data used as the basis of the statistical analysis has a high level of integrity.

The Way Forward

The case management reform agenda in the SCI has achieved some successful outcomes. However, the overall agenda of keeping the number of cases in circulation at an ideal level still needs to be conducted and monitored properly. Options such as the expansion of IT and sufficient network infrastructure will be critical in ensuring that supervision and monitoring can be conducted more effectively. A further option which is currently under consideration is to install a bar code case tracking system to allow monitoring of the exact movement of each file by providing a practical instrument to the court staff to easily update the status of the case by simply scanning the bar coded file folder by a scanner which can automatically update the progress of the case through the court into the server.

A mechanism to keep case data updated is critical as a case audit consumes a lot of resources which limits the frequency of its use. Data obtained from the audit should be updated immediately and used regularly.

Internal data management is critical to effective management because the SCI cannot control all external factors such as legislative determinations which affect the types of cases that can be appealed to the court. The SCI still needs to organize special judicial chambers for particular types of cases to be examined by a specialist justice in that field. It is hoped that this may increase the efficiency of decision making as well as improve consistency of judgments.

Finally, for court support staff, it is necessary to set a series of objective work performance standards and indicators that can be used to measure the efficiency of their work and provide clear performance standards to make sure that judicial panel decisions can be finalized properly and expeditiously.

NOTES

1. Supreme Court Circular No. 3/1998 on Finalization of Cases.
2. A statement of a former Supreme Court justice made at the end of the 1990s mentioned that the average time required to litigate in Indonesia is approximately 7–12 years before the litigant could obtain a final and binding decision. The longest time was spent in the examination of the case at the Supreme Court.

3. Law No. 5 Year 2004 on the Supreme Court, Art 45; this tries to set the first ever barrier to the cases that can be appealed to the Supreme Court. It said that cassation cannot be allowed on the basis of: 1) pre-trial decision; 2) criminal decision punishable by a maximum of one year and/or punishable by fine; 3) state administrative cases wherein the object of the dispute is a decision of local officials and coverage of the decision is only applicable in the local region, and the Chief Justice of the District Court may directly refuse the cassation without any need to send the case to the Supreme Court. However, such limitation does not seem to be effective, since the number of cases received by the Supreme Court for the past three years has been relatively stable around 7000–8000 cases annually and even increased to 9516 cases in 2007.
4. This has particularly been the case in fields such as: commercial; anti-corruption; and human rights.
5. For example, for bankruptcy and intellectual property rights cases, objection against decisions of the Indonesian Anti Monopoly Commission, and objections against the Consumer Dispute Resolution Agency.
6. The 30 manual steps are practically a simplification of what is actually happening during case processing. Manual record requires similar data to be written down repeatedly for the purpose of good bookkeeping, which is very inefficient but required to handle significant number of data in a completely manual system.
7. Except for specific cases such as religious dispute, state administrative, and military, which are only distributed to a specific chamber.
8. Art. 197, *Criminal Procedural Law* (Law No. 8 Year 1981), which stipulates a lengthy list of information that needs to be included in a judgment.
9. And no longer reports the status of finalization. This has been criticized by the media as not reporting cases that are still awaiting finalization and therefore not providing data on the actual workload of the Supreme Court.
10. A serious implication of reporting only those cases that have not been decided is that all available resources will be focused only on expediting the decision-making process rather than efforts to expedite the finalization process. The completion of a case is when it is returned to the originating court and this requires finalization of the decision.
11. Currently, approximately 44 per cent of all cases circulating within the SCI are at the finalization/minutasi stage. For further details, see discussion in '*Analysis of the Case Audit-Data*', p. 112, below.
12. Even if we carefully look at the timelines set by the legislators for

certain cases, it is obvious that the targets set by the legislator are based only on subjective considerations rather than objective and scientific considerations. Therefore, it is not surprising that later laws set even more relaxed timeframes for the completion of cases.

13. From approximately 4000 cases a year in the mid-1970s, during the 1990s the number of incoming cases at the Supreme Court has increased to the level of a maximum of 10,000 cases annually. This figure has been relatively stable for the last couple of years. Since 2003, the intake rate has been around 6000–8000 cases a year.
14. 'Book III Supreme Court on Guidelines in Implementation of Task and Administration at the Supreme Court of the Republic of Indonesia', *The Supreme Court* (1994). A target of 50 cases per month for each judicial team was introduced. Later, in 1992, this figure increased as each team is targeted with 120 cases monthly.
15. *Operasi Kikis* standing for 'Operation Eradication'.
16. Media reports that in the beginning of OPSKIS, there were 10,400 pending cases at the Supreme Court. By 1983, the figure had been successfully reduced to 4556 cases.
17. The second OPSKIS failed completely to reduce the backlog of cases. In 1993, the backlog hit 20,210 cases, aggravated by the declining number of cases decided. The court kept increasing the case backlog. For the past several years the court's case backlog has been between 14,000–20,000 cases.
18. The judge's deliberation will formally still be conducted by the appointed panel of judges, but the final concept of the judgment must be prepared by the senior reporter judge.
19. Arts 26 (4), 27 (4), and 28 (4) *Criminal Procedural Law*, Law No. 8, 1981.
20. While distribution orders for other types of cases are made by the Chief Justice directly, the role of Deputy Chief Justice here is to ensure that there is an expeditious distribution of detention cases.
21. In circular Number 15/PAN/INT/II/2008 on the Closing of the Registry Book and Compilation of Registry's Electronic Data, the Supreme Court Registrar has now made it compulsory for all sub-registries to submit data from the Excel electronic database (in soft copy format) to support the routine hard-copy report.



3 Promoting Access to Justice through Judicial Reforms



Barriers to Accessing Justice— The Vanuatu Experience

ANITA JOWITT

1.0 KEY MESSAGES

The Manila Declaration for a twenty-first century Independent Judiciary states that we need to accomplish ‘...a 21st century civilization grounded in the rule of law and access to justice for all citizens.’¹ One part of ensuring access to justice for all is that everybody can seek redress if his or her rights are breached. The main state institution that provides individuals with a forum for ensuring their rights are respected and protected is the court of law. This chapter addresses the role of state courts and judiciary in enhancing access to justice for all members of society.

But what is ‘justice’? In the first chapter justice is described as ‘...a standard of human conduct based on the values of freedom, equality, dignity, equity and fairness’.² This concept of justice is based on generally accepted standards of human conduct found in international documents including the *Universal Declaration of Human Rights 1948*, the *International Covenant on Economic Social and Cultural Rights*,³ and the *International Convention on Civil and Political Rights*⁴ and is enshrined in the constitutions of almost all countries in the Asia-Pacific region. As injustice tends to affect particular groups of people, in recent years international conventions that aim to ensure the recognition and protection of the rights of specific groups such as women,⁵ children,⁶ disabled people,⁷ and migrant workers⁸ have been developed and widely adopted.

Despite the widespread paper commitment to rights, a law or a signature on an international document is only a symbolic commitment. In reality many people suffer injustice on a daily basis.

Central to this injustice is the fact that not everyone is treated the same. Particular groups are marginalized in every society and experience lack of freedom, inequality, lack of respect, inequity, and unfairness. The marginalized groups and the nature of the injustice that they face varies from country to country, but a commonality is that social values and governance systems entrench the disempowerment of certain groups. The challenge is for courts to ensure that, in societies that may be blatantly unjust or prone to embedding injustice, they take steps to provide a forum in which everyone, *including* the marginalized groups, can have his or her grievances heard and rights upheld.

The causes of injustice and the barriers to accessing justice are varied, and there is no 'one size fits all' solution to improving access to justice. Instead, analysis of the particular barriers in a country and the design of context-specific solutions is needed. In order to provide more examples of different sorts of access to justice problems and how they can be overcome, this chapter provides two case studies from Vanuatu which illustrate different solutions to different problems. The first examines the court's response to improving access to the court for people suffering from violence in the home, primarily women. The second examines the court's response to improving access to the court for the majority of the population that lives in rural areas and has little familiarity with, and understanding of, the courts and the state justice system.

The key messages to be drawn from the experience of judicial reform in Vanuatu are:

- 1) Improving access to courts is only one part of access to justice. If laws themselves are unjust, then people do not trust judges to apply the law; if legal institutions to enforce decisions do not exist or are ineffective, or if social institutions undermine court decisions, then the quality of justice dispensed by courts is weakened. Improving the quality of justice dispensed by the court is a multifaceted challenge. Without a well-educated judiciary and court staff and clear systems for accountability of judiciary and court staff the public may not trust in the integrity of the courts and the justice of the decisions delivered. Effective case management is necessary for timely decisions, for 'justice delayed is justice denied'. This chapter highlights how the external social context in which courts operate also affects the quality of justice.

The case study on domestic violence protection orders illustrates how the underlying causes of violence against women are deeply entrenched in patriarchal social or cultural values. Social and cultural pressures often inhibit women from seeking orders from the courts. If court orders are made, police are sometimes reluctant to enforce court orders and cultural pressures may force women into reconciliation with violent family members. There are few support mechanisms to help women resist these pressures. The court-led initiative to make it easier for women to seek legal protection from violence in the home is not a complete solution. Instead, it needs to be supported by other programmes that address the inequality that makes women more susceptible to violence.

2) Judges can act as agents or leaders of change by proactively improving the operation of the courts. Critical in this process is creating the climate in which the judiciary sees leading change as a legitimate role. Judicial ownership of the change process has been vital for success. Once this climate has been established, changing the operation of the courts will make them easier to understand and use by marginalized groups, and may also serve as role models for change in other parts of society. Although improving access to the courts will not, in itself, be sufficient to address the underlying social causes of inequality, the judiciary does have considerable control over the operation of the courts, and can implement changes in this area. Such changes can then influence, support, and lead changes in other areas of society.

The two case studies both offer examples of how the judiciary can contribute to social debate and can implement changes to the operation of the courts to improve access. The study on domestic violence protection orders offers a particularly powerful example of how the judiciary can implement legal change that upholds rights, even in the face of a parliament that may be reluctant to implement laws that protect the rights of women. The study on Island Courts offers an example of a judiciary-led programme to reform laws and court institutions so that they are more suitable both for the public and for the personnel operating them.

3) Community and stakeholder involvement in identifying, developing, and implementing reforms is necessary to make change successful—inequality stems from not having your voice

and concerns respected. The starting place for addressing inequality and improving access to justice therefore be listening to the voices of those who are the subject of inequality.

As the case studies indicate, this is a crucial factor in success. In the domestic violence case study, the concerns of marginalized groups were central to identifying problems and developing solutions. These groups were also involved in implementation. These changes were welcomed by the marginalized groups and so can be considered a success, although follow-up research to monitor the impact of the change and judge success is lacking. In contrast, the development of a customary land tribunal has been greeted with suspicion by many people, who have resisted its implementation as they are concerned that the state, which has historically not considered the concerns of landowners, may have produced a solution that still does not adequately consider the concerns of landowners. This suspicion arose because many people did not feel that they were consulted or involved in developing solutions to the sensitive issue of resolving customary land disputes.

It can also be noted that judges were involved in developing domestic violence protection orders, whilst police were not. The judiciary has not resisted the law change, but some police have, and are not always willing to implement orders. This suggests that stakeholders also need to be involved in developing solutions to access to justice problems. Such involvement then serves an educative function and so gives the implementing agencies ownership of the solution.

4) The state court system can draw on commonly used, local, non-formal dispute resolution systems to strengthen its relevance and reach. All countries have non-formal dispute resolution systems as well as state dispute resolution systems, with non-formal dispute resolution being particularly strong in post-colonial countries that had state dispute resolution bodies 'imposed' by outsiders on top of existing indigenous mechanisms for resolving problems.

Non-formal dispute resolution is sometimes thought of as existing in parallel to the state courts, and states are now under an international ethical obligation to respect the right of indigenous peoples '...to promote, develop, and maintain their institutional structures and their distinctive customs, spirituality, traditions,

procedures, practices, and...juridical systems or customs, in accordance with international human rights standards.⁹ However, state courts can also work more closely with non-formal dispute resolution mechanisms; each system complementing the other.

The case study on Island Courts demonstrates how the reach of state courts can be strengthened by involving local leaders in the court system, thereby allowing more people to have access to courts that will uphold their basic legal rights. It also demonstrates a more radical redesign of a state dispute resolution mechanism so that it is more in line with underlying non-formal dispute resolution methods, although this redesign has not yet been fully successful.

Significantly in the Vanuatu experience, the nature and extent of home-grown initiative and local ownership in harmonizing and integrating customary and formal justice systems have been critical factors in the success of judicial reform endeavour, as there is a latent risk of collision between those systems. In a very important sense, change has been demand-driven jointly by the judiciary and the community.

Reform efforts of the Island Court system, for example, have not sought to develop a body in which decisions made in custom are given force as state law; instead the changes ensure that the Island Courts function better as subordinate courts, and give more of the population access to the justice system. This approach has enabled a supervision system that ensures the decisions of justices are consistent with human rights provisions, and with the written law. Another factor that has been critical to success is the careful selection of key personnel. Selection of court clerks has proved to be essential in enabling public accessibility in reality.

The relative success of this Island Court reform approach, which has been locally initiated rather than imposed from above, is to be contrasted with the parallel experience in developing Customary Land Tribunals which lacked raising public awareness and were perceived to be externally imposed and as a result widely distrusted at the community level as a mechanism to weaken the customary system.

The critical nature of the extent of local ownership in the success of any judicial reform process has also been evidenced in efforts to improve access to justice for women by developing rules on domestic

violence protection orders which have encountered only limited success. In the Vanuatu experience, these reform efforts did not sufficiently involve police in the reformulation of the new procedures who, as a result, have not fully operationalized those laws.

2.0 DESCRIPTION OF REFORM EXPERIENCE

In Vanuatu, there are many barriers to accessing the courts for the majority of the population. One set of barriers arises from the challenge of trying to dispense justice over more than 60 islands¹⁰ with very limited resources.¹¹ Another set of barriers arises from Vanuatu's colonial history and post-colonial present. On gaining Independence in 1980 Vanuatu adopted (or inherited) a legal system comprising an adversarial court system, with the legal rules being an inheritance of locally-made legislation, adopted English common law and equity, adopted French civil law, and indigenous customary law.¹² About 99 per cent of the population is indigenous ni-Vanuatu, and customary law is a more important social ordering device than state law for many people, which, as a device of the colonizers, may be mistrusted or poorly understood.¹³

The majority of the population is, therefore, positioned to experience marginalization within the state legal system. This is further complicated by the fact that within the customary law system particular groups, most notably women, are also marginalized. This 'double-marginalization' means that some people are not able to access justice either through the customary law system or through the court system.

A third set of barriers arises from Vanuatu's erratic economic¹⁴ and weak human development performance. In 2007 Vanuatu was in the third last of medium development countries on the United Nations human development index, with a rank of 120.¹⁵ Few people have regular employment in the formal sector,¹⁶ the average wage is low,¹⁷ and court filing fees and lawyers are expensive. Functional literacy has been estimated to be 30 per cent for women and 37 per cent for men.¹⁸ English, the primary language of the courts, is unfamiliar to many. The combination of these barriers means that the notion of access to justice through state courts may be largely irrelevant to many people.

The first case study of island courts in Vanuatu illustrates projects that attempt to harmonize customary authority and the state legal system in order to both increase the geographical spread of courts at a relatively low cost and to overcome the perception that the courts are '*kot blong waetman*',¹⁹ or courts 'for white-men only', and not for use by the indigenous population.

The second case study of domestic violence protection orders in Vanuatu illustrates how the courts can streamline application procedure and reduce costs for a specific type of order in order to improve access to justice for a particularly marginalized group in society.²⁰

2.1 CASE STUDY: ISLAND COURTS, VANUATU

2.1.1 Problems/Challenges

The makers of Vanuatu constitution envisaged Island courts as being one solution to the broad difficulties with access to justice outlined above. Customary law is part of the legal system,²¹ and it is a constitutional requirement that 'parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.'²² Additionally, all landownership in Vanuatu is determined by custom,²³ and it is a constitutional requirement that 'The government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.'²⁴ In 1983, in response to these constitutional requirements, parliament passed the *Island Courts Act [Cap 167.]*. Justices in the Island Courts are people who are knowledgeable in custom, and decisions are made by three justices sitting together. No lawyers are permitted in the Island Courts and there are no strict rules of evidence. Island Courts were warranted to have jurisdiction over land matters and a variety of minor criminal and civil matters.

By the mid-1990s it became obvious that the Island Court system was failing. Whilst eight courts had been warranted, the majority of these were no longer operational. Complex procedures that were modelled on those of the western court system made use of the Island Courts difficult. The courts were warranted to apply criminal and civil law (rather than customary law), but the justices had no

training and experience in these areas, and were often felt to be biased in their decision making. 100 per cent of land disputes heard by the Island Courts were appealed to the Supreme Court, thereby defeating the constitutional requirement that land disputes be determined through customary institutions or procedures.²⁵

2.1.2 Action Taken

Two formal actions were taken to address the above problems: improving the functioning of the Island Courts, a project initiated by the Chief Justice, with funding support from AusAID; and developing a new system for resolving land disputes, a project initiated by the government of Vanuatu, following calls for reform from a number of sectors, including the judiciary, which was primarily funded by AusAID.

IMPROVING THE ISLAND COURTS—Firstly, land disputes were removed from the scope of Island Courts,²⁶ as experience had shown that they were not an effective body for dealing with these disputes. From 2003–4, following the appointment of justices and court clerks to the inoperative courts, training of island court justices and court clerks was undertaken. This training covered the laws that the Island Courts administer, the processes that the Island Courts must follow, and basic legal reasoning and decision making. In the course of this training, the inappropriateness of the Island Courts' procedural rules,²⁷ and the need for closer supervision of the decisions of lay justices in order to ensure consistency and correctness in applying the law, became more apparent. In 2005, a new series of rules to guide the operation of the courts was made. The *Island Courts (Supervising Magistrates) Rules 2005* provided guidance on the role of Supervising Magistrates, who oversee the operation of each Island Court. Supervising Magistrates now have guidance on how to select justices, with criteria including level of education and training, business and administrative experience, religious affiliation, political affiliation, standing in the community, knowledge of custom, and gender,²⁸ —all being factors to consider, as well as the need to have justices with '...a balance of gender and religious and political affiliations to provide independent and impartial judicial services...' ²⁹ Supervising Magistrates now also have a specific role in reviewing and revising

cases every three months. This acts as a safeguard against unfair decisions, without the need for parties to institute appeals. The Supervising Magistrates are also to ensure adequate training for justices and clerks, and to provide annual reports on the operation of the Island Courts under their supervision.

The *Island Courts (Court Clerks) Rules 2005* provide step-by-step guidance on the procedures to be followed by clerks and the documentation required for each case. Finally the *Island Courts (Civil Procedure) Rules 2005* and the *Island Courts (Criminal Procedure) Rules 2005* provide simple rules to be followed. They are accompanied by clear and simple forms, published in the local language Bislama, as well as French and English, which helps the parties and the court clerks to maintain correct documentation.

DEVELOPING CUSTOMARY LAND TRIBUNALS—In 2001, the *Customary Land Tribunal Act* (CLTA) was passed. This Act was developed by a team of three local consultants and was drafted locally by the State Law Office. It aims ‘...to provide for a system based on custom to resolve disputes about customary land.’³⁰ The CLTA was a thoughtful attempt to provide a state body that followed custom laws and practices, but also blended in with some ‘state court’ practices, such as requirements that decisions be kept in writing and time limits on appeals.

Under the CLTA the country is divided into villages, custom sub-areas, custom areas, and islands. Disputes are initially heard by a single or joint village tribunal that usually consists of the principal chief and two other chiefs or elders. The principal chief may be excluded if they have a conflict of interest, or holds office in parliament, municipal or local councils, or in any political party. The council of chiefs is the body that decides the list of chiefs who are appropriate to hear any land dispute claims. Disputes can be appealed from the village level to custom sub-areas, custom areas, and finally the island land tribunal. There is no further right of appeal.

There are requirements for notice of disputes to be given, and fees are paid to have a matter heard in a customary land tribunal (CLT), but other than that the procedure for hearing claims is entirely customary. Land tribunals must produce a written record of their decision.

Following the drafting of the CLTA, the government CLT office conducted community awareness on the CLTA, visiting all provinces in Vanuatu at least once. Raising awareness was also undertaken through radio, the newspaper, and the CLT office. The CLT awareness team travelled around the islands of Vanuatu promoting the law changes and on 10 December 2001, the CLTA came into effect.

2.1.3 Outcomes

IMPROVING THE ISLAND COURTS—The reform of the Island Court system does not develop a body in which decisions made in custom are given force as state law. Instead, the changes ensure that the Island Courts function better as subordinate courts, and give more of the population access to the justice system. Seven Island Courts are now operating, and in 2006 an additional 225 justices were appointed to the courts and trained.³¹ The supervision system should ensure that the decisions of justices are consistent with human rights provisions, and with the written law.

Because the system is: less formal than going to magistrates or Supreme Court; does not involve the cost of a lawyer, and has lower filing fees, it is more accessible. The Island Courts themselves are not housed in intimidating court buildings, which makes them more approachable. The justices are all respected members of the community, so the fear of being ‘judged by an outsider’ is reduced.

DEVELOPING CUSTOMARY LAND TRIBUNALS—CLT committees, who are tasked with selecting chiefs and who are eligible to hear disputes that come before the CLT, have been established in some areas. CLTs also exist in some locations; however, they have not been formed in the majority of places.³² Instead the initiative has been greeted with mistrust by many people, as ‘...many people do not view the CLTA as an organic, or grassroots, law; it is a law from [the capital city] Port Vila...’³³

2.1.4 Successes in Implementation

IMPROVING THE ISLAND COURTS—The successes of these courts relate to operating a subordinate court that is applying introduced law in a forum that is not as formal as a court and that adopts the more relaxed procedures that can be found in customary dispute resolution.

This is a low-cost project that was driven by internal or local needs and wants. The Chief Justice, Supervising Magistrates, and Island Court personnel were all aware of the problems in the Island Courts. As a group they set the scope of the training programme, and suggested what was needed in drafting the new rules. Vanuatu-based consultants were used to doing the training and drafting work. As a result there has been no resistance to the reforms.

Having clear guidance for court personnel, particularly when they are not legally trained, is vital. The new rules provide this guidance. However, the actual personnel that have been appointed are also critical to the successful operation of the courts. In the Island Court system the role of the clerks in assisting complainants to file claims, and in assisting the court in its processes, is crucial to ensuring that the rules are implemented, and anecdotal reports suggest that the accessibility of an individual Island Court largely rests on the performance of its clerk.

A danger with the operation of Island Courts is that justices will be biased in decision making, or will not uphold constitutional rights of parties. Three justices hear each complaint which minimizes this risk. In addition, the selection of justices to ensure that there is a balance of gender, religious, and political affiliations; and defining a supervision process that does not interfere with the day-to-day decisions of the justices, but which ensures that all decisions are reviewed, have both been additional steps in minimizing this danger.³⁴

DEVELOPING CUSTOMARY LAND TRIBUNALS—On paper the CLTA looks to be a success. It respects the customary dispute system, whilst at the same time creating a consistent system to be used in land disputes across the country. Some people have embraced the CLTA, as they see it as a law which, amongst other things, ‘...can resolve land disputes; will restore power to the chiefs; [and] is a land court that follows kastom.’³⁵

2.1.5 Constraints to Implementation

IMPROVING THE ISLAND COURTS—These courts do not have jurisdiction over ‘custom disputes’. This need not be a constraint—after all, on islands where custom operates, the existing customary dispute

resolution mechanisms do not need the recognition of state law in order to be recognized by the people as legitimate bodies.

Chiefs, however, are concerned that their authority is being undermined by introduced law. Island Courts can be seen as contributing to this undermining of chiefly authority, particularly if complainants who do not like the resolution of a dispute in custom then go 'forum shopping' and take their dispute to an Island Court hoping for a more favourable outcome. One way to minimize the potential dangers of forum shopping is to be careful that the selection of justices includes important chiefs, and not just 'people knowledgeable in custom.' This may also help the justices to use customary principles in deciding sentences, fines, and damages orders.

Another major constraint is the level of available resources. Seven Island Courts are now operational. However, there are about sixty inhabited islands. The majority of Island Courts operate in locations where there are also Magistrates Courts. More courts, in a wider range of locations, are needed.

There is also an issue in relation to criminal matters. The accused cannot be represented by a lawyer, although they may be assisted by a non-lawyer. This can lead to the accused not receiving a proper defence. Further, the police lay the charge and control the prosecution. Although police are usually not legally trained, they are more familiar with the requirements of a criminal case. Accused frequently plead guilty, and there are reports that justices tend to prefer the case presented by the police. Supervising Magistrates, when reviewing cases, may find it difficult to correct any injustices, particularly if the accused has pleaded guilty, and so no evidence has been presented.

In the Island Courts reform process, an opportunity to raise the profile of the Island Courts and awareness about their operation was overlooked. The stakeholders, whose concerns fed directly into the training and reform process, were primarily court staff and not court users. Whilst the experiences of court users had informed the views of the court staff, an opportunity to engage in consultation that could also provide an educative function was missed.

A final constraint has been the lack of evaluations to see how well the revised system is operating. The training and rules' changes

were warmly received by the judiciary and court staff at all levels. There have also been some anecdotal reports from Island Court staff that the training received and the clearer procedures have improved operations. However, there has been no research undertaken on the satisfaction of court users.

DEVELOPING CUSTOMARY LAND TRIBUNALS—In practice, the CLTA has not been very successful. There is considerable suspicion of the law from some who are afraid that it is going to weaken the customary land system and remove power from the chiefs. CLTs ultimately give a final ruling as to ownership, and customary law does not necessarily ever give a final decision. Further, chiefs can be prevented from hearing a dispute if there is a conflict of interest, although impartiality is not a feature or necessary requirement of customary adjudication.

These matters do slightly alter the nature of custom and customary dispute resolution. There are, however, also chiefs who support the system, seeing it as a way of enhancing custom.

These views (either suspicion or support) depend, in part, on the level of awareness a particular community possesses. Another important factor is that communities who are most suspicious of the CLTA feel that they were not adequately involved in the making of the law. Landownership is a very sensitive issue in Vanuatu and there is general suspicion of state law. These factors combine to lead to a belief that the CLTA, as a piece of state law in which the local community had little involvement, is a device for weakening custom or removing land from its rightful owners.

In some areas there are disputes about who are the rightful chiefs, and this hinders the formation of CLTs. The result is that this situation can lead to suspicion of the CLTA, which may be seen as a device for legitimizing certain peoples' authority, whilst undermining the authority of others.

The fees for taking a dispute to a CLT are also fairly high, and are determined based on the number of days a complaint takes. This can put parties at a disadvantage, and limit access by people with little money.

2.1.6 Key Questions and Know-how

IMPROVING THE ISLAND COURT—This initiative has been successful in part because the problems and solutions were developed locally under the guidance of the Chief Justice in response to problems that had been defined by the judiciary and the Island Court clerks and justices. As a result there has been no suspicion of the initiative by the parties who are responsible for implementing it. Court users are only affected in the sense that procedures are more easy to use, so the reforms caused no controversy amongst this body.

It is important to appoint key personnel carefully. In relation to Island Courts, court clerks are critical to the effective day-to-day running of the courts, and their appointment largely determines the success of any individual court.

Clear simple rules that define the roles and obligations of the justice, court staff, and parties are vital to the effective operation of a dispute resolution body that essentially operates as a community court (and are probably vital for higher courts also). A system of supervision to ensure that rules are followed and human rights are upheld is also necessary.

The approach taken in reforming the Island Courts creates a possible avenue for the greater blending of state law and customary law. Whilst the Island Courts have not taken up this challenge as yet, the structures that are in place allow for further development to increase the harmony of these two legal systems.

In implementing any reform, there must be follow-up evaluation. The lack of evaluation subsequent to the reforms is one of the major weaknesses in the otherwise very positive reform of the Island Courts.

DEVELOPING CUSTOMARY LAND TRIBUNALS—The most important lesson to be drawn from the CLTA experience is that in order that there be a successful blending of state law and customary law in relation to resolving disputes over sensitive areas, there must be wide consultation. Any blending of state and customary law changes both systems.

Historically customary law is usually subjugated to state law, so people who operate under customary law are likely to be suspicious

of any change that is seen as being 'imposed', even if that change is being done with honest intentions. This is particularly true if the law is being developed to deal with sensitive issues, such as landownership. In order to avoid this, laws that aim to blend state and customary law into new, more appropriate institutions for resolving disputes, need to be developed in response to local demand, and in close consultation with the customary authorities and the local 'grassroots'.

2.2 CASE STUDY: DOMESTIC VIOLENCE PROTECTION ORDERS, VANUATU

2.2.1 Problems/Challenges

As noted above, there are many barriers to accessing the courts for the majority of the population in Vanuatu, and the Island Courts go some way in lowering these barriers. Women face additional difficulties. Legally women are guaranteed equality,³⁶ and Vanuatu has ratified the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW).³⁷ However, in reality the majority of women do not experience equality, with the gravest injustice being violence against women. This is largely due to patriarchal nature of Vanuatu society. In custom, almost all chiefs are men, and women do not usually play a role in decision making. The customary exclusion of women from decision-making positions also affects the non-customary sphere. At the moment Vanuatu has only two women in parliament—but this is the largest representation of women in parliament ever. Women are also under-represented in senior public service positions, senior church official positions, the police, and the judiciary.³⁸

Women are not only marginalized in public decision making, but are disempowered in other aspects of life. The last census indicated that almost double the number of men, as compared to women, had attained tertiary education,³⁹ and there are twice as many men as women in paid employment.⁴⁰ In the home, men are usually considered to be the 'head of the household'.⁴¹ It has been reported that:

...a married woman in contemporary Vanuatu cannot accumulate property because it is considered that anything she has is to be jointly owned with

her husband. In fact, what she owned prior to marriage is taken over by the husband upon marriage... [losing] the traditional right to own personal wealth because it is considered unchristian.⁴²

Indeed, women may be considered the property of their husbands. Custom marriage remains a very strong institution. Traditionally, arranged marriage was practised, with '...marriage being a family affair rather than an individual or personal choice',⁴³ and arranged marriages continue to occur. Additionally, the practice of bride price, in which the man and his family pay money to the woman's family before being permitted to marry, continues to be widely practised.

The combination of custom beliefs and Christian beliefs that are at the heart of Vanuatu society are used to legitimize domestic violence—almost entirely violence against women and female children. 'The view that domestic violence is an acceptable aspect of marriage or cohabitation is not a fringe or extreme position in Vanuatu.'⁴⁴ The reasons men give for beating their wives include, the '...man paid the bride price, it is kastom...the bible give (sic) men the right (*Eph* 5: 21–4), [and] Man was created before woman and therefore he's boss (*Genesis* 2)'.⁴⁵ Women who wish to leave their husbands are often required to stay by families, and customary dispute resolution bodies,⁴⁶ and may be counselled not to 'break God's law' by seeking a divorce.⁴⁷ Because they are economically disempowered, in the absence of family support they may not be able to support themselves if they choose to leave a violent relationship.

There is no specific legislation in Vanuatu addressing domestic violence. In the Penal Code [Cap 135] intentional assault is a crime,⁴⁸ and can be used to prosecute men who beat their wives. However, women may be reluctant to report cases to the police, as women have '...reported difficulty in getting the police to treat their complaints as serious and in having the cases brought before court.'⁴⁹ In addition to the social pressures to remain in an abusive relationship, the law hinders divorce, as a divorce will only be granted by the courts in the event of 'fault' by one of the parties, which can make seeking a divorce a humiliating experience.⁵⁰ There is no law regulating the division of matrimonial property in the event of a divorce. At the court's discretion payments to support children and a former spouse can be ordered,⁵¹ although

there are instances in which spousal support payments have been denied by the court because the woman refused to be reconciled with her spouse.⁵²

Parliament has delayed passing a law designed to provide legal redress for women facing violence in the home for many years. As a result, people who wanted to seek injunctions to prevent further violence from occurring needed to either wait for a criminal prosecution and then get restraining conditions placed in a defendant's bail conditions, or apply for a restraining order on the basis of the prosecution, or file a civil case for trespass to the person and ask for an interim injunction.

This was costly and slow, and further increased the barriers to women seeking justice from the court. The absence of quick, cheap, and easy-to-use legal mechanisms for people suffering from domestic violence to seek protection was a problem that needed addressing through an avenue other than parliament.

2.2.2 Action Taken

The first challenge, in an environment in which violence against women is so normalized, was to raise awareness of the fact that violence against women, in any form, is a violation of human rights. A number of non-government organizations (NGOs) work on women's rights, but only the Vanuatu Women's Centre (VWC) is specifically focused on violence against women. The VWC was established in 1992 to provide support and counselling for women and children who have been the subjects of violence, and education on violence against women has been central in increasing awareness about violence against women. Awareness raising on violence against women, which has largely been led by the VWC, combined with Vanuatu's ratification of CEDAW in 1995, led to the drafting in the late 1990s of the Family Protection Bill, which stalled when it reached the all male Council of Ministers in 2000.⁵³

In July 2000, the first annual Chief Justice's Conference was held, with one key issue being improving access to justice. One method identified for doing this that was identified was the redrafting of the civil procedure rules; a reform that was initiated and led by the judiciary. This redrafting was done with the broad '...overriding objective...to enable the courts to deal with cases justly'.⁵⁴ The

working party drafting the rules agreed that they should be ‘...user friendly; suitable for the people of Vanuatu; [and appropriate to] the realities of the local context’.⁵⁵ The Civil Procedure Rules 2002 are written in plain English and are simple. They also allow for active case management by the judges.

One of the innovative inclusions in the rules is the provisions on domestic violence protection orders (DVPOs). In 2001, the Chief Justice of Vanuatu hosted a second conference, with the theme being women, children, and the law. The theme of this conference was driven by a growing awareness in society of violence against women, and concern about the stalling of the Family Protection Bill. One of the outcomes of the conference was the decision ‘...to pass interim rules to help facilitate access to civil procedure remedies for victims of domestic violence’.⁵⁶ These rules, which became incorporated as part of the more general reform of the civil procedure rules, were intended to provide some avenue of protection until parliament passed a law on family protection.

The Civil Procedure Rules 2002⁵⁷ allow for any person to file for a DVPO against another member of her or his family. No lawyer is required for these proceedings. Filing requires the completion of a statement of claim and a sworn statement, which can be handwritten. The cost of filing is less than half that of other magistrates court claims. Once the documents are filed, the registrar is required to immediately inform the magistrate of the claim, and the magistrate is required to hear the claim as soon as possible. This claim is heard in chambers. No notice is given to the defendant of the hearing.

The order can include: giving the claimant exclusive occupation of the family home: requiring the defendant to cease all contact with the claimant or other members of the family, and prohibiting the defendant from using violence or threats of violence. The order is temporary, and may be in effect for up to twenty-eight days. The order must usually ‘...include a statement authorising the police to arrest the defendant if he or she breaches the order’.⁵⁸ It is served as soon as possible by someone other than the complainant, and a copy of the order must be given to the police.

A further hearing takes place either on the date set by the magistrate in the order, or on the application of either party. At this time the order may be continued, amended, or revoked.

2.2.3 Outcomes

The Rules came into effect in early 2003. The court staff and judiciary have been supportive of the initiative and applications for DVPOs are regularly made, with the majority of applications being made by women. From 2006 to 2007, the number of DVPO applications made by the University of the South Pacific Community Legal Centre (CLC), doubled.⁵⁹ As a supervisor in the CLC, I handled a number of DVPO applications. Both my personal experience and that of the CLC Manager has been that the court has acted in a timely and appropriate manner in awarding DVPOs.

In order to prevent abuse of DVPOs, which are made without any evidence from the other party, magistrates frequently request that applications be accompanied by a medical report and a copy of a complaint lodged with the police. These documents are quick and cheap to obtain. The 'informal' requirement to provide supporting documentation means that, in the absence of physical abuse, a DVPO is harder to obtain. However, DVPOs are still available without this support, although magistrates will consider the applicant's statement more carefully in order to ensure the judicial process is not being abused.

In order to support the implementation of the Rules, a number of NGOs partnered to raise awareness about them and build capacity on how to apply for DVPOs. In addition to public workshops to groups throughout Vanuatu, publicity was done through brochures, posters, comic books, videos, and radio shows.

A package for people wanting to apply for orders was compiled. This package is available in the three main languages of Vanuatu (Bislama, English, and French), and explains the steps they need to take in applying for a DVPO, and what happens after a DVPO is granted. All the forms that need to be filled in are included in this package. Ongoing free information and legal support is available through the VWC, the Public Solicitor's Office, and the University of the South Pacific CLC. The VWC has committees throughout the islands which continue to raise awareness on DVPOs.

2.2.4 Successes in Implementation

The reform of the Civil Procedure Rules has in many ways been successful. The simplicity of the approach is one of its major

strengths. The rule change has resulted in a rapid judicial remedy for victims of domestic violence, which can be obtained using a fairly simple and relatively cheap procedure. The initiative was low-cost to implement. As changing the rules did not require action by the government, only support of the judiciary, this change did not get blocked. Because the rule change was initiated by the judiciary itself, this internal support was present and the judiciary has been willing to grant DVPOs.

The project also had widespread support from civil society groups who saw the need for the rule change, and indeed, had been demanding legal reforms relating to violence against women for a number of years. As a result these groups took on most of the work in raising awareness to the wider population about the rule changes and how to use the courts to get a DVPO. The courts were not, therefore, burdened with the task of raising awareness, removing the danger that the new law would not be used because people did not know about it. This awareness raising was not 'one-off' but continues, even today.

Because the procedure for applying for a DVPO can be done in the *lingua franca*, Bislama, and the proceedings are heard in chambers rather than open court, it reduces the intimidation that people may feel about going to court.

2.2.5 Constraints to Implementation

There are many constraints to the reform. Problems of geographical reach and cost that affect access to justice generally in Vanuatu also affect DVPO cases. Magistrates' courts are only found in a few locations, and the reach of the police is also limited. The filing fee is also relatively high for some people.

More significantly, social attitudes mean that there may be lack of effective follow up once the DVPO is gained. DVPOs are not always served and the police are not always willing to intervene if a DVPO is breached. One reason often given is that the police do not have the resources (trucks, boats, or fuel) to be able to rapidly respond in the event of a complaint. Another is that not all of the predominantly male police force is committed to eradicating violence against women, or to upholding the law. The lack of commitment to the law may also be affected by lack of awareness about the law. Part of

the explanation for this is that, unlike the judiciary, the police were not particularly involved in developing the rules on DVPOs, so do not have 'ownership' of the law.

Despite raising awareness around the country, chiefs may not recognize or understand DVPOs. There is a fundamental collision between the state and customary systems as to how best to deal with family disputes. In custom, the emphasis is on keeping the family together, and although a person who is committing domestic violence may be fined, it would be very unusual in custom for a husband to be restrained from seeing his wife. At times, chiefs can be fearful that the introduced legal system is undermining their authority. There is also cultural pressure on people to not use the legal system, particularly if it may mean breaking up a family. As there are only a limited number of temporary 'safe houses' for victims of violence against women, it can be very difficult to resist this cultural pressure. In practice, this collision between state and customary systems, and the importance of customary law, mean that women may find themselves without any real protection.

The ideal situation is perhaps one in which DVPOs provide temporary respite from a dangerous situation, and that once the immediate danger is removed, parties can find a lasting solution. Customary dispute resolution which aims at building a lasting peace can potentially play an important role in finding this solution. However, in order to develop harmony between state law and custom, further change is needed. It would be possible to provide chiefs with more training in order to encourage an attitudinal shift; keeping the family together should not override the safety of all family members. However, attitudinal shifts are very difficult to bring about and to monitor.

Training in itself may not be an adequate solution. It would also be possible to bring customary dispute resolution within the state legal system. Already Vanuatu's Civil Procedure Code allows for cases to be referred for mediation. Cases could be referred to a 'custom style' dispute resolution process, in which there were also 'human rights representatives' either acting alongside chiefs as mediators or providing a viewpoint that chiefs need to consider.⁶⁰ Such a solution would address the fear that the introduced legal system is undermining customary authority

without sacrificing women's rights which are frequently not well recognized in custom.

2.2.6 Key Questions and Know-how

In this situation, NGO activity created an awareness of the problem of violence against women, and demand for a law change amongst some people. Whilst cultural pressures have meant the parliament has not yet responded to this demand, the judiciary and court staff have acted as leaders in changing laws in order to improve access to justice in relation to violence against women. In this instance, in order for the judiciary to act as a leader of change, several things needed to occur.

Firstly, in creating a climate in which the judiciary saw leading change as a legitimate role, key personnel (the Chief Justice, in Vanuatu's situation) needed to take the lead. Secondly, conferences proved a very useful forum in which the judiciary as a whole could discuss its concerns about the delivery of justice and also discuss issues with the wider public. This helped to develop a shared vision amongst the judiciary of a better justice system. This shared vision was then used to implement changes in areas which were in the control of the judiciary, so it was not reliant on the actions of external bodies to endorse its changes. Whilst individual judges may not be comfortable in this leadership role, if the judiciary as a whole is seen as expressing a shared vision to help improve access to justice, this discomfort is minimized.

Whilst there may have been concerns about whether judges and court staff, who exist within the cultural environment in which violence against women is treated as normal, would respect the rule changes, experience has shown that they have respected the new rules. This is probably because, when judges and court staff act as leaders in changes, they are then more likely to implement the changes. They have 'ownership' of the changes, and are not having new rules imposed upon them by external authorities.

By ensuring that all stakeholders are involved, particularly marginalized groups and enforcement agencies, greater commitment to implementing reforms is likely to ensue. In this situation, interaction between the judiciary and the community helped to identify the reform, which was 'demand-driven'. This has had the

benefit that a number of NGOs have supported the changes and assisted to ensure that there was meaningful implementation. As the judiciary is limited by time and other resources to conduct implementation programmes, community support has been vital. Without it there would have been real danger that the rule change, whilst existing on paper, would have little practical impact. A question raised by the Vanuatu experience is whether the police would have been more committed to enforcing DVPOs if they had been more involved in developing the changes to the rules.

Finally, for justice to be achieved, what happens after a court order is made must be taken into account. In this situation we can see that whilst access to justice through the courts has been improved, the quality of that justice is undermined by what happens after a woman has been to court. For real successful change, there often need to be changes to multiple parts of the justice system, as well as changes to underlying social values.

This, however, does not mean that there is no value to smaller changes. If resources do not permit systemic changes, then smaller changes—which improve access to justice for at least some people—are better than no changes at all. Furthermore, as in the DVPO situation, a smaller change can provide a focus for ongoing awareness raising campaigns which, in the long term, will help to affect the underlying social values. By taking the lead in making small changes to improve access to justice in areas they control, the judiciary can contribute to a society in which the underlying social values come to reflect the values of freedom, equality, dignity, equity, and fairness and the notion of ‘access to justice for all’ becomes a reality.

NOTES

1. Manila Declaration for a 21st Century Independent Judiciary: <http://http://jrn21.supremecourt.gov.ph/forum_icsjr.html> (10 April 2008).
2. See also the discussion in Chapter One, pp. 1–9.
3. Opened for signature 19 December 1966, entered into force 3 January 1976.
4. Opened for signature 19 December 1966, entered into force 23 March 1976.

5. The Convention on the Elimination of Discrimination Against Women (CEDAW). Opened for signature 18 December 1979, entered into force 3 September 1981.
6. The Convention of the Rights of the Child (CRC). Opened for signature 20 November 1989, entered into force 2 September 1990.
7. The Convention of the Rights of People with Disabilities. Opened for signature 13 December 2006, entered into force May 2008.
8. The International Convention on the Rights of all Migrant Workers and their Families. Opened for signature 18 December 1990, entered into force 1 July 2003.
9. Article 34, United Nations Declaration on the Rights of Indigenous Peoples. Adopted by UN General Assembly in 13 September 2007.
10. During the last national census, in 1999, 65 islands in the country were inhabited; 'The 1999 Vanuatu National Population and Housing Census Main Report; (2000) *Vanuatu National Statistics Office*, p. 16.
11. Vanuatu is on the United Nations list of least developed countries according to the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States <<http://www.un.org/special-rep/ohrrls/ldc/list.htm>> (5 May 2008).
12. Article 95 Constitution of the Republic of Vanuatu.
13. M. Forsyth, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (2007) PhD Thesis, Australian National University, p. 218. Despite this the courts are perceived as being a 'fair' and independent state institution (A. Jowitt and T. Newton Cain, *National Integrity Systems, Transparency International National Country Study Report Vanuatu 2004* (2004), Transparency International: Australia, 20.
14. For an overview of Vanuatu's national economy, see C. Ala, and P. Arubilake,, Chapter 1, *Domestic Economy*', S. Athy and F. van der Walle, (eds), *20 Years of Central Banking in Vanuatu* (2000) Reserve Bank, Port Vila, 12.
15. Human Development Report, Vanuatu Country Report (2007) *United Nations*. <http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_VUT.html> (5 May 2008).
16. A. Jowitt, 'Unemployment in Vanuatu' (2001), 56 *Development Bulletin*, p. 55.
17. Vanuatu National Statistics Office, 'Vanuatu 2000 Labour Market Survey Report' (2000).
18. United Nations Development Programme 'Pacific Human Development Report 1999' (1999), p. 105.

19. A. Forsyth, *Bird that Flies with Two Wings*, 218.
20. This case study can usefully be contrasted with the case study on rights applications in India discussed later in this chapter. Both illustrate judicial reform initiatives that were led by the judiciary; required few resources to implement; and focused on streamlining procedures in order to improve access to the courts. Comparing these two case studies highlights how a similar conceptual approach to improving access to justice can differ widely in implementation due to contextual differences.
21. Art. 95 (3) Constitution of the Republic of Vanuatu.
22. Art. 52 Constitution of the Republic of Vanuatu.
23. Art. 74 Constitution of the Republic of Vanuatu.
24. Art. 78 (2) Constitution of the Republic of Vanuatu.
25. A. Jowitt, 'Island Courts in Vanuatu' (1998) 3 *Journal of South Pacific Law* <http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Jowitt1.html> (18 August 2008). Also Forsyth, *A Bird that Flies with Two Wings*, 220.
26. Island Courts (Amendment) Act 2001.
27. Island Courts (Civil Procedure) Rules 1984, and Island Courts (Criminal Procedure) Rules 1984.
28. Rule 1(2) Island Courts (Supervising Magistrates) Rules 2005.
29. Rule 1 (3) Island Courts (Supervising Magistrates) Rules 2005.
30. S 1 Island Courts (Supervising Magistrates) Rules 2005.
31. 'Chief Justice Makes New Appointments' (14 February 2007) *Vanuatu Daily Post*, Port Vila, p. 2.
32. J. Simo, *Report of the National Review of the Customary Land Tribunal Programme in Vanuatu* (2005), Vanuatu Cultural Centre, Port Vila, p. 34.
33. *Ibid.*, p. 30.
34. It is noted in the constraints that there have not been any follow-up studies regarding the implementation of the reforms, and the strength of the supervision system is one thing that needs fuller research for verification.
35. Simo, *Report of the National Review of the Customary Land Tribunal Programme in Vanuatu*, p. 25.
36. Art. 5 Constitution of the Republic of Vanuatu.
37. Ratification occurred on 14 August 1995, CEDAW (Ratification) Act 1995.
38. R. Tor and A. Toka, 'Gender, Kastom and Domestic Violence' (2004) *Vanuatu Department of Women's Affairs*, p. 27. As this report notes, '...there is a significant marginalization of women from pertinent

- discussion and decisions on areas of social and economic development, governance, and human rights at community and national levels’.
39. Vanuatu National Statistics Office, ‘The 1999 Vanuatu National Population and Housing Census Main Report’ (2000), 104.
 40. Ibid., p. 35.
 41. Ibid., p. 27. In the 1999 census 87 per cent of households were headed by men.
 42. R. Tor and A. Toka, ‘Gender, Kastom and Domestic Violence’, p. 18.
 43. Ibid., p. 30.
 44. M. Mason, ‘Domestic Violence in Vanuatu’, in S. Dinnen and A. Ley, (eds), *Reflections on Violence in Melanesia* (2000), Asia Pacific Press, Canberra, p. 119.
 45. R. Tor and A. Toka, ‘Gender, Kastom and Domestic Violence’, p. 39.
 46. *Public Prosecutor v. Kota* [1993] VUSC 8, in which a woman was kidnapped and returned to her husband, following a customary decision that she must stay with him.
 47. A. Jowitt, ‘Women’s Access to Justice in Vanuatu’, Proceedings of the 1999 Legal Developments in the Pacific Conference, pp. 111, 112.
 48. S 107 Penal Code [Cap 135].
 49. M. Mason, ‘Domestic Violence in Vanuatu’, 129. Additionally, members of the Vanuatu police and Vanuatu Military Forces have been found to have a higher rate of spousal abuse than the general population, p. 122.
 50. S5 Matrimonial Causes Act [Cap 192] requires that the petitioner seeking divorce must prove that her spouse ‘has since the celebration of the marriage committed adultery; or has deserted the petitioner without just cause for a period of at least 3 years immediately preceding the presentation of the petition; or has since the celebration of the marriage treated the petitioner with persistent cruelty; or is incurably of unsound mind and has been so continuously for a period of at least 5 years immediately preceding the presentation of the petition; or...has, since the celebration of the marriage, been convicted of rape or an unnatural offence.’
 51. Part III Matrimonial Causes Act [Cap 192].
 52. *Rihai v. Rihai*, [1996] VUMC 6 < <http://www.pacii.org/cgi-bin/disp.pl/vu/cases/VUMC/1996/6.html> (18 August 2008).
 53. In June 2008 the Bill was passed in parliament, just before parliament was dissolved in order to allow national elections to occur. It was rushed through parliament without proper debate, which created a significant negative public reaction. The President has not signed the Bill, instead referring it to the Supreme Court in order to determine its

constitutionality. The Supreme Court will hear submissions as to the constitutionality of the Bill on 28 August 2008.

54. Rule 1.2 (1) Civil Procedure Rules 2002.
55. T. Hill and S. Farran, 'Making Waves and Breaking the Mould in Civil Procedure in the Pacific: The New Civil Procedure Rules of Vanuatu' (2002), 28(2) *Commonwealth Law Bulletin*, pp. 1108, 1112.
56. S. Randell, *Awareness Raising on the Court Rules Relating to Domestic Violence in Vanuatu* (2003) Blackstone Publications, Port Vila, 11.
57. Part 16 Division 4 Civil Procedure Rules 2002.
58. Rule 16.17 (6) Civil Procedure Rules 2002.
59. In those years the CLC handled about 90 per cent of the Public Solicitor's Office Port Vila-based Magistrates Court cases through a referral system.
60. Art 51 Constitution of the Republic of Vanuatu. This is a provision to allow for people knowledgeable in custom to sit with judges of the Supreme Court or Court of Appeal, in order to try to bring introduced state law and customary law into harmony. The use of people knowledgeable in law and human rights to sit with chiefs is a symmetrical concept, also aimed at developing harmony between the two systems.

Shared Challenges in Securing Access to Justice—The Indian and Sri Lankan Experiences

AYESHA DIAS

1.0 KEY MESSAGES

The Manila Declaration for a twenty-first century Independent Judiciary states: ‘we need to accomplish a 21st century civilization grounded in the rule of law and access to justice for all citizens.’ The Manila Declaration thus asserts two core propositions for the purposes of judicial reform: a twenty-first century civilization must be grounded in the rule of law and must provide access to justice for all; and an independent judiciary is needed to secure the rule of law and to promote and provide access to justice for all.

Judicial reform cannot succeed if the judicial system continues to be unable to provide access to justice for all. Furthermore, the South Asian experience discussed in the following pages indicates that the following lessons warrant broader consideration across the region:

1) Impact on access to justice is, it is argued, a key criterion for evaluating the effectiveness of judicial reform.

2) Judges are uniquely placed to consolidate and enable human rights at the national level by referring to the standards contained in international human rights treaties. Access to justice entails a right of access to judicial and other remedies that serve as suitable and effective grievance mechanisms against violations of rights, be they human rights or other rights granted by law. International human rights law requires states to organize their institutional apparatus so that all individuals can access those remedies.¹ States are also required to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.² This calls

for meaningful access to justice for all, in daily practice rather than rhetorical or abstract commitments.³

3) The India and Sri Lanka case studies indicate that effective access to justice reforms require specifically-targeted measures to improve *access to the courts* as well as measures to ensure *access to justice through courts*. There are many different factors that can act as barriers to securing access to justice for all. The literature on access to justice categorizes such barriers into three broad categories, namely: physical barriers; social and cultural barriers; and barriers arising from concerns about the quality of justice being dispensed.

Identifying and addressing these barriers in the national/regional context is a key task of judicial reform. In designing, implementing, monitoring, and evaluating such judicial reforms the case studies suggest the importance of closely examining the distinction between *real barriers*—physical, social, and cultural; and *perceived barriers*—on the part of rights-holders, claimants, and duty-bearers (governmental or non-governmental). It is vital that reforms seeking to overcome barriers to access to justice are directed at both key, real and perceived, barriers.

Access to justice reform has generally focused on measures to improve access to the courts for disadvantaged, vulnerable, or marginalized groups. While this is important, the Indian and Sri Lankan experiences underscore that providing ‘access to courts’ may not be a sufficient measure by itself to secure access to justice for all. It requires the justice system as a whole to be reformed to enhance the ability of courts to secure the accountability of power-wielders. Such reforms may take the shape of a formal process, carried out in a phased manner or else, as the Indian experience shows, it may be initiated through *judicial activism*⁴ and support from civil society. It also needs a system of checks and balances between different branches of government, so that while each branch remains independent and impartial in its own sphere of functioning, it does not overstep or abuse its respective powers and also discharges its responsibilities. It is important that laws are applied in an even-handed way, and timely justice is delivered to all—rich and poor alike.

For example, the experience of social action litigation (SAL) in India has been significant. SAL goes a step beyond public interest

litigation (PIL), in enhancing justice, and envisages *social action* by victim groups, together with civil society and competent courts, to bring about change through implementing orders and directives issued by such courts that apply human rights standards. SAL, in combination with an outlook of judicial activism within the existing constitutional structure has made significant contributions to enhancing access to justice in India, leading to an enhanced perception and effect of rule of law. Driven by the apex courts issuing a number of judgments against governmental actions and inactions, SAL has been dynamic in filling gaps in the legal framework and expanding the concept of right to life under the constitution to include: the right to fresh water and air; the right to a clean environment; the right to education; the right to shelter; the right to health; the right to free legal aid; and the right to speedy trial and justice. It is argued that the SAL experience in India provides judges throughout the Asia Pacific region with a persuasive and potent precedent to adopt a more proactive orientation in promoting access to justice for the poor and disempowered.

In South Asia, and indeed in much of Asia and the Pacific, a large majority of the populace seek justice not through courts but through a variety of customary and informal dispute resolution mechanisms. Such mechanisms continue to occupy an important place in the justice system in view of their generally easy accessibility for people, their speed, and their effectiveness. Their informal nature may however also present pitfalls, and courts are often called upon to play a standard-setting and watchdog role over such mechanisms.

The traditional approach to access to justice, as mentioned above, has been to focus on how to improve access for disadvantaged, vulnerable, or marginalized groups *to* courts. Whilst this is important, access to justice is a much broader concept, under which access to courts is of undoubted, but possibly limited, value. Experience in India and Sri Lanka indicates that what is more important is access to justice *through* courts and through the justice system as a whole: formal and informal; modern and traditional. From access to justice perspectives therefore, judicial reform is important, provided that such judicial reform is part of legal and justice sector reform which enhances access to justice for all. Access to justice therefore provides both a rationale for judicial reform as well as a set of results-based,

evaluative criteria for assessing the entire range of specific judicial reform measures.

4) Access to justice reforms (and indeed all judicial reforms) can thrive with the existence of 'champions for change' within the justice system. But their sustainability depends on pressure from other participants, including civil society groups. Demand-driven utilization of the opportunities created by such reforms also contributes to the *sustainability* of such reforms. A cardinal rule in developing programmes to enhance access to justice is that the combination of responses should be sustainable, both in terms of human and financial resources.

Projects aiming at improving access to justice work best when stakeholders indicate their suggested responses and the relevant authorities agree to accommodate such responses where feasible and explain to the stakeholders if some of the suggested responses are not presently feasible. Further, though a national or regional level framework ('top-down') is essential, such reform measures should be amenable to correction and should be tailored to meet specific local needs through a 'bottom-up' approach.

The ultimate goal of access to justice is achieved only when everyone in society (especially those who need it most) can readily access justice; and justice truly is for all, especially the disadvantaged, vulnerable, and marginalized groups.

2.0 DESCRIPTION OF REFORM EXPERIENCE

Several shared challenges in securing access to justice for the people, common in south and south-east Asia are discussed below in light of the Indian and Sri Lankan experiences. These challenges include: a high incidence of poverty; lack of information and legal guidance/assistance; corruption; congestion; and backlog of cases in the judicial system. Additionally, there is a sense of injustice, and a widely shared perception that access is mainly for the affluent and for the ruling elites. Thus, the judicial process is often seen as an accessory (if not an instrument) of exclusion, domination, and exploitation of the underprivileged. Its misuse is also seen, as a tool of oppression (for example, to facilitate expropriation of land from poor rural families and 'returnees',⁵ and to target political rivals⁶ as in Cambodia).

The first case study, concerning rights realization in India has been chosen to illustrate a judicial reform project that streamlines application procedures and reduces cost of accessing justice at the highest levels of the judiciary. It illustrates a novel solution, where access to justice is enabled through third parties, particularly civil society groups. Further, it represents an approach that was led by the judiciary and required few resources to implement. The watchdog role of the judiciary over other institutions of government, which has evolved and strengthened under this approach, is worth examining and emulating.

The second case study, of a UNDP-funded project in Sri Lanka, illustrates approaches that can be taken in a situation where there is funding/support for a bigger project that addresses a number of different access to justice issues at one and the same time. It highlights the strengths and pitfalls of implementing large-scale projects and ways to address these pitfalls. It also discusses specific issues relating to rebuilding justice systems in a post-conflict situation and involves some approaches that attempt a harmonization of customary authority and the state legal system.

2.1 CASE STUDY: RIGHTS REALIZATION, INDIA

This case study presents a unique example of how constitutional provisions on fundamental rights and access to justice can be innovatively used by the judiciary and civil society, to address socio-economic challenges as well as gaps in the law, to enhance access to justice.

The Indian reform experience involves more than judicial application of constitutional rights. It involves conceptual development of such rights by the judiciary referring to international human rights law and standards, and it involves an endeavour to realize such rights through forging partnerships between the judiciary, the disadvantaged or excluded victim groups, and NGOs and civil society.

The Indian experience of SAL is unique and distinct from mere PIL. Like PIL, it does involve litigation on behalf of a class, relating to issues of public interest. But, SAL goes further and envisages *social action*, by victim groups together with civil society and competent courts to bring about change through implementing orders and

directives issued by such courts, applying human rights standards. Thus, the goal of SAL is more orientated towards enhancing justice for all, *particularly the underprivileged*.⁷

2.1.1 Problems/Challenges

The weak socio-economic conditions of a large section of society in India in the post-independence era presented a challenge to providing meaningful access to justice for all. The legal framework and static judicial system were not by themselves sufficient to provide people with effective access to courts in the first place. Poverty and illiteracy of people compounded this problem. As the Supreme Court of India once commented:

...the weaker sections of Indian society have been deprived of justice for long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. The majority of the people of our country [India] are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings...⁸

There existed gaps in the law and in certain rights, for example, the right to a clean environment, and the right to dignity (against ill-treatment by police and other governmental authorities) were not expressly recognized as enforceable rights. The interpretation and implementation of law, with respect to the rights of people were unsatisfactory and inadequate. As a result, people were often at the mercy of wrongful actions and inactions by governmental authorities.

Thus, social and economic conditions compounding the effects of expensive, complex, and time-consuming judicial processes presented barriers to access to justice. The lack of access to information, legal aid, and resources worsened the situation. Aggrieved individuals and communities, especially the underprivileged and marginalized, often found no meaningful justice in the world's largest parliamentary democracy.

The four principal challenges were to develop: a high-level judicial mechanism for securing justice and protecting, where necessary, evolving or shaping legal rights, especially for the underprivileged; cost-effective and efficient justice delivery systems, taking into

consideration the inability of some people to approach courts under the existing rigidly formal processes; empowerment of aggrieved persons, especially the disadvantaged, to access justice through the courts and other dispute resolution institutions; and an effective watch-dog role for the judiciary over other branches of government, particularly those concerned with facilitating access to justice and implementation/protection of the rights of people.

2.1.2 Action Taken

The principle provisions of the Constitution of India, the use and interpretation of which facilitated this gradual reform from within the judiciary, assisted by civil society groups, are:

- Article 14 (which recognizes 'equality' as a fundamental right for every 'person');
- Article 19 (which enumerates several fundamental rights of a 'citizen');
- Article 21 (which enshrines the 'right to life' as a fundamental right for every 'person');
- Article 32 (which provides a fundamental right to directly petition the Supreme Court of India in case of violation of fundamental rights); and
- Article 226 (which provides the right to petition the various high courts in case of violation of any fundamental or legal right).⁹

The Constitution of India recognizes the primacy and prescribes the broad functions of the legislature, executive, and judiciary in their respective domains. The seeds of judicial reforms within the context of SAL, as discussed in this case study, can be traced to the Supreme Court's gradual assertion of its position as the final interpreter of the constitution. In 1967, the Supreme Court of India (by a slender majority of 6:5), held that the Indian parliament had no power to amend Part III of the Constitution of India (comprising fundamental rights) so as to take away or abridge the fundamental rights.¹⁰ However, thereafter in 1973, the Supreme Court modified (or overruled in part) this principle (again by a slender majority of 7:6), to coin the term '...basic structure or framework of the constitution...' and held that even though parliament may amend Part III of the constitution, it could not alter its basic structure or framework.¹¹

In a case in the 1950s the Supreme Court held that the provisions of Article 21 of the constitution would be satisfied if the deprivation of life and liberty of a person was in accordance with procedure established by a law, not examining the constitutional validity of such law.¹² Further, it held that rights under Article 19 and 21 of the constitution were distinct. However, this view was reversed, and famously discussed, in a landmark case in 1978.¹³ The court held in this case that the procedure established by law should also be just (as opposed to arbitrary), fair, and reasonable.

Article 32 of the constitution provides a fundamental right to directly petition the Supreme Court of India in case of violation of fundamental rights. Such a right was construed to be exercisable only by an aggrieved person. This strict requirement on *legal standing of a person to petition the court*, called locus standi, restricted the benefit of Article 32 to those having the required resources.¹⁴ The vast majority of aggrieved people, principally the poor, socially or otherwise disadvantaged, or incapable class of people were unable, in reality, to avail of this provision of law.

V.R. Krishna Iyer and P.N. Bhagwati were pioneers in adopting a novel solution to this problem. They relaxed the rules on locus standi, thereby permitting any concerned person to petition the courts, for protection of the fundamental rights of any person or class of persons. In 1981, Krishna Iyer espoused liberalization of locus standi to meet the challenges of the time; to provide justice to those otherwise unable to seek redress and restore their faith in the rule of law, and to check and correct the abuse of public (government) power.¹⁵ Critically examining the state of affairs with respect to access to justice in the country, he described it as one that: 'tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims.'¹⁶

Bhagwati further stressed that the rule of locus standi was one of ancient vintage and that it arose when private law dominated the legal scene and public law had not yet been born.¹⁷ Relaxing the rule, he held that where a legal wrong or a legal injury is caused to a person¹⁸ by reason of violation of any constitutional or legal right,¹⁹ and such person is²⁰ unable to approach the Court for relief, any member of the public can maintain an application

for an appropriate direction, order, or writ in the high court. This relief is possible under Article 226. Furthermore should the fundamental rights of such a person be breached in any way, judicial redress for the legal wrong or injury caused to that person (or determinate class of persons) can be sought from the Supreme Court under Article 32.

Relaxation of the rule on *locus standi* heralded the beginning of SAL, which as Bhagwati stressed, is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of the constitution.²¹

As the Supreme Court noted, the strategy of SAL has evolved with a view to bringing justice within easy reach of the poor and disadvantaged sections of the community.²² The Supreme Court and the High Courts started initiating cases on their own account (termed '*suo motu*'), whenever violation of fundamental rights came to the notice of the courts, through any means, including publication in the media.²³

The reform process commenced and gathered pace through the efforts of some judges in the Supreme Court and the High Courts, together with public interest lawyers and other civil society groups, evolving a framework for SAL, based upon procedural innovations and recognition of new legal rights, evolved through judicial decisions in a common law system. In recognizing new rights, the courts read components of the '*...directive principles of state policy...*'²⁴ into the right to life under Article 21 of the constitution.²⁵

The Supreme Court used its powers under Article 142²⁶ of the constitution to address gaps in the legal framework for protection of fundamental rights of persons. The court did this by laying down guidelines, which have the force of law pending passage of appropriate legislation. For example, the court laid down guidelines to address the issue of sexual harassment of women in workplaces.²⁷ It drew from various international and municipal instruments, including CEDAW,²⁸ and among other things, provided a definition of sexual harassment, as well as steps for prevention, criminal prosecution, and other redress mechanisms.²⁹

2.1.3 Outcomes

The SAL framework in India has led to an enhanced perception and effect of rule of law. The apex courts have issued a number of judgments against governmental actions and inactions concerning the fundamental rights of people. This has enhanced timely judicial review of government actions and also required positive action by the government for securing fundamental rights. The apex courts have also expanded the concept of right to life under the constitution to include: the right to fresh water and air;³⁰ the right to a clean environment;³¹ the right to education;³² the right to shelter;³³ the right to health;³⁴ the right to free legal aid;³⁵ and the right to speedy trial and justice.³⁶ The Supreme Court has also addressed gaps in the legal framework for protection of fundamental rights of persons, by laying down guidelines that have the force of law.³⁷

The salient actions taken by the Indian courts can be summarised as:

- Taking advantage of fundamental rights in the constitution, including the right to petition the Supreme Court and the High Courts for protection of fundamental rights.
- Relaxing the strict requirements on legal standing (*locus standi*).
- Allowing cases to be initiated on the basis of a simple letter addressed to a judge or courts, and also allowing judges to take notice and commence judicial proceedings themselves, on issues concerning fundamental rights of people.
- Creating court-appointed Commissions of Inquiry (comprising lawyers, academics, social workers, or district judges) to inquire into issues raised in a petition and report back to the court.
- Retaining jurisdiction over the matter even after the court has issued its directives and orders, to ensure compliance with such directives and orders.
- Monitoring of the court's directives and orders through court-appointed Commissions on the basis of which further directives and orders are issued by the court, as and when needed and appropriate.
- Addressing the absence of express enforceable rights by reading the right to life into Article 21 of the Constitution of India.

- Invoking the Supreme Court's powers under Article 142 of the Constitution of India to fill gaps in the legal framework for protection of a person's fundamental rights.

It is argued that SAL in India provides judges throughout the Asia Pacific region with a persuasive and potent precedent to adopt a more proactive orientation in promoting access to justice for the poor and disempowered.

2.1.4 Successes and Constraints to Implementation

Notwithstanding the success of SAL in India as a viable and durable approach to judicial reform, it faces some constraints, that need continued monitoring and action. Constraints include: the lack of understanding and support by some constituents of courts and lawyers; the need to strengthen capacity of judges and other players to adopt and sustain SAL, especially after prominent judicial champions have retired from the Bench (court); and the need to make the media and public aware of the 'silent revolution' in access to justice.

While there have inevitably been problems associated with SAL, such problems have been recognized and addressed. Problems that have arisen, include misuse. There have been instances where vested/private interests are alleged to have sought to abuse the system of SAL for their own needs and the courts have come down heavily on such attempts, variously describing them as 'politics interest litigation', 'publicity interest litigation', or 'private interest litigation'.³⁸ Recently, the Supreme Court lamented that:

...the system of public interest litigation, which was initially created as a useful judicial tool to help the poor and the weaker sections of the society who could not afford to come to the courts, has in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together.³⁹

The Supreme Court has addressed this problem by creating a screening procedure by the Court itself, before a petition is admitted as a SAL case, as well as guidelines and mechanisms pertaining to SAL cases.

There may be backlash with some individuals, judges, and lawyers accusing the Court of exceeding its powers and authority. This has led to healthy public debate and discussion regarding specific SAL decisions leading either to their reformulation or, in most cases, to public affirmation and support of the decisions and orders issued in SAL cases. Additionally there may be some decline in applications with some judges, out of abundant caution or sheer indifference, refusing to admit certain SAL petitions. Gender or ethnic biases have been addressed by a combination of judicial training and education about SAL accompanied by mobilization of media and public opinion and criticism.

Finally, the sustainability of the SAL approach has, most importantly been an issue, after the 'champions for change' have retired from the Bench. This is where the experiences reported in this volume regarding judicial ethics and judicial training can be drawn upon to help sustain the SAL approach in India, and indeed to promote it elsewhere in efforts to enhance access to justice for all. Moreover, demand-driven utilization by stakeholders of opportunities created by reforms helps prevent backsliding and reinforces sustainability.

2.1.5 Key Questions and Know-how

Access to justice reforms such as SAL can thrive with the existence of 'champions for change' within the justice system. Sustainability, however, depends on pressure from other participants in the process, including civil society groups. To make it sustainable and acceptable as a viable means of securing access to justice to the underprivileged, and to protect the interests of the public at large, it is also necessary to take appropriate steps and lay down proper guidelines to prevent misuse of the system by vested/private interests.

There is an endemic issue in India, and indeed elsewhere, of lacking or limited enforcement of the decisions and orders issued by the Courts. This issue needs to be addressed both by mobilizing public support for enforcement and by invoking powers to punish for contempt of court. The SAL experience has demonstrated the effectiveness of giving stakeholders a role in monitoring compliance with and enforcement of judicial orders and directives. But it is

important to recognize that this is an issue not peculiar to SAL. It is an issue pertinent to all judicial reform initiatives to ensure that the road to hell is not paved with good intentions and to ensure that obligations of both conduct and results are discharged. The issue of enforcement of the decisions and orders issued by the Courts must be seen as part of larger rule of law and accountability issues. Many laws exist only on statute books. Selective or complete lack of enforcement of laws remains an endemic and chronic problem that must be addressed over the long run, through promoting a rule of law culture.

2.2 CASE STUDY: EQUAL ACCESS TO JUSTICE PROJECT, SRI LANKA

The case study on the UNDP Equal Access to Justice Project helps us understand the challenges in securing access to justice in a complex setting, involving an armed conflict and a natural disaster, in addition to socio-economic factors.⁴⁰ Particularly, the adoption of a human rights-based approach in the design and implementation of this project provides useful lessons. The case study deals with a big, nationwide project that is broad in the range of its activities and in terms of stakeholder-involvement from both demand and supply sides.

2.2.1 Problems/Challenges

Sri Lanka presents reformers with multiple challenges of programming in conflict and post-conflict areas, in the wake of the Tsunami natural disaster, and for economically disadvantaged segments of society.⁴¹

The Equal Access to Justice Project was conceived in 2004 when a cease-fire agreement was in place and the country seemed to be moving towards peace. It sought to address the lack of equal access to justice for the disadvantaged, including poor racial minorities, amongst other groups. The situation of such groups results in a lack of empowerment of the poor and is intimately connected with the persistence and continuation of poverty.

However, the situation changed dramatically with the Tsunami of December 2004 and the periods of escalating conflict in the north and east of the country. These events contributed to numerous grievances since large numbers of people were displaced, livelihoods

compromised, and people continue to face security concerns. Therefore, it became necessary to alter the focus of the project to address the most pressing justice and human rights issues that currently face the most vulnerable groups in the country.

In the case of the Tsunami victims and those forced to flee from their homes in conflict areas, the need was to obtain new documents and the project flexibly responded to that need. It was possible to do so because the project was designed as a multi-stakeholder project and did not focus exclusively on the courts. It is worth reiterating that an access to justice project should not narrowly focus on access to courts, but should also and comprise an outreach component to those in need.

2.2.2 Action Taken

The project was designed with the Ministry of Constitutional Affairs and National Integration (MOCA) as the executing agency and included the government, civil society, and other actors as partners. The implementation structure comprised of the usual project support office and project steering committee, as well as regional committees and local working groups. The latter included a number of project partners and enabled customization of programmes to meet local needs and conditions.

The project adopted a human rights-based approach to ensure access to justice and enlisted the cooperation and assistance of all actors, including civil society groups in the justice sector, to design and implement the project.⁴² This approach was 'top-down' as well as 'bottom-up' in project design and management. The top-down approach permitted the design of a framework plan and programmes, whereas the bottom-up approach enabled the designers to receive feedback in order to adjust and/or redesign the plan with a realistic picture of the situation on the ground and also enabled customization of plans and programmes to meet individual components/regions of the project area. Such an approach also provided the flexibility to respond to the special needs of a country in transition.

The programmes undertaken were varied and included Legal Documentation and Mobile Clinics, Legal Aid Service Desks, Legal and Human Rights Awareness, and Support to the Prison System.

The Mobile Clinics, introduced as an important response to the Tsunami, operated in the eastern region, bringing together different departments in one place to offer services such as provision of birth and death certificates, ID cards, motorcycle licences, land registration, legal aid, and the like. The village heads were present on the day of the clinics to provide the necessary confirmation of details set out in the new documents issued, and the clinics provided supporting services, such as passport photographs, free of charge. The presence of the village heads gave more publicity to the project schemes among the local public and also increased acceptance of the project schemes.

Free legal aid service desks were set up in collaboration with partners, such as the Legal Aid Foundation, to cater to the needy. Awareness raising programmes were also conducted to take the steps necessary to identify and reach out to the most disadvantaged or hardest to reach groups in the areas of operation, and involve civil society partners, who have the necessary knowledge of local issues and conditions.

Under the Prison Support System, the project worked closely with the Inspector-General of Police and the Commissioner General of Prisons, to develop a comprehensive prisons database system in Colombo's largest prison where there was as yet no accurate record of pre-trial detainees and inmates. Further, the project supported initiatives to ensure the provision of an attorney during questioning by the police and regular visits by the Legal Aid Foundation Coordinator to the closest prison to provide services to inmates and their families.

Though it was not a peace or human rights initiative, in facilitating equal access to justice, the project offered the potential to positively influence the climate for peace and the protection and promotion of human rights.

2.2.3 Outputs and Outcomes

The outputs of the project have included: development of mobile clinics; provision of essential administrative-legal services formerly unavailable (or difficult to obtain) to people; establishment of legal aid and legal service desks to assist in providing basic legal advice/service to people; establishment of legal and human rights awareness programmes to create awareness among the people of their rights,

and avenues for protecting/securing their rights; and development of the prison database system, which could result in improvement of the delivery of legal services to prison inmates.

However, these project outputs have made only modest contributions to the anticipated project outcomes and objectives. Further success of the project requires a comprehensive justice sector assessment in the country, and a more systematic approach to applying a human rights-based approach to all aspects of the project.

2.2.4 Successes and Constraints to Implementation

While some project objectives have been achieved, reviews and an evaluation of the project point to several shortcomings. There are gaps in establishing a baseline and incorporating the voices of claim-holders in designing and implementing the project. The involvement of civil society groups has been limited and similarly, the engagement of the Ministry of Justice with the project has been below expectation. Continuing guidance from higher management has been lacking, and accountability of the management for performance of project has been limited.

Given the change in the situation on the ground and the need to focus on facilitating access to justice to disadvantaged groups, the UNDP Equal Access to Justice project faces several challenges which need to be focused on in the coming years, namely: engaging the most-disadvantaged groups, conflict-affected groups, internally displaced persons (IDPs), estate sector workers, pre-trial detainees, female-headed households, and victims of gender-based violence; promoting human rights-based approaches throughout the project; continuing the mobile legal and documentation clinics in conflict-affected areas; ensuring the effectiveness of the legal aid services provided; and developing the capacities of community-based duty-bearers.

2.2.5 Key Questions and Know-how

A combination of 'top-down' and 'bottom-up' approaches to project design and management are essential for designing programmes over a large project area (for example, a large part or whole of a country). The former approach permits design of a

framework plan and programmes, whereas the latter enables their refinement. The use of regional committees or local working groups, involving local partners is particularly useful in customization of programmes to meet local needs and suit local conditions, enabling more effective implementation.

A baseline survey and a comprehensive assessment using participatory methods including conflict-affected people, should help map the capacity gaps of duty-bearers and claim-holders and identify the main access to justice issues facing the poor and disadvantaged throughout the country. The results from this assessment could provide a solid baseline against which to design a longer term project, and establish a comprehensive monitoring and evaluation framework for the sector.

In a situation of conflict, this experience indicates that any project that claims to be using a human rights-based approach should be designed to enable shift of focus so as to ensure priority to conflict-affected populations and minorities whose rights are, inevitably, most susceptible to abuse and deprivation, and whose situation may not readily be diagnosed and addressed from the outset owing to rapidly changing conditions.

3.0 ANALYSIS OF THE EXPERIENCE

The Indian and Sri Lankan case studies present the following key points that need to be considered by stakeholders when initiating similar reform efforts:

- As in the Manila Declaration, strive not just for increasing access to justice but to accomplish a twenty-first century civilization grounded on the rule of law and access to justice for all citizens.
- Lay a foundation for the reforms in the country by assessing and creating awareness of the need for such reforms and selling the idea to concerned authorities in the judicial system and supporting sectors.
- Anticipate and draw a plan for meeting challenges in educating people of different socio-economic backgrounds and design programmes and judicial access systems that can be accessed by such people.

- There is no single template solution to address access to justice needs; rather, it is imperative to identify the difficulties and needs in each country/region and tailor appropriate programmes/solutions.
- Sustainability of the reform is an important factor to be considered. Human and financial resources for the entire reform process are equally important.
- Place importance on periodic internal and external evaluations and correction of lacunae/errors in system.
- From the perspective of empowering people, consider their rights and availability of access to information. Strengthen education/legal aid, right and access to information.
- Examine and highlight the societal benefits of empowering people. And also its beneficial effects on other institutions in the country.
- Examine demand for programmes being planned with respect to access to justice issues (horizontal/vertical, women, locational access) identified locally.
- Examine judicial attitudes/bias as an element of access to justice—judges embedded in their social backgrounds and interests.
- Examine and plan for integrating and developing administrative infrastructure.
- Design an implementation framework to consider the strengths and weaknesses of the overall system in the country, for example, the long-term use of local government/administrative offices and kiosks for distributing forms, documents, court material, and information leaflets on accessing justice.
- Secure non-discrimination, inclusion, and participation in judicial processes;
- Work towards ensuring transparency, accountability, and effectiveness in judicial processes.

Much judicial reform has tended to focus on basic institutional frameworks (judges and courts) and on institutional efficiency (using IT and ICT to enhance efficiency and effectiveness.) The question ‘enhanced efficiency and effectiveness for whom?’ has all too infrequently been asked, let alone answered. Too often, reform endeavour has inadequately engaged in the challenge of assessing

the effectiveness of judiciaries in safeguarding and dispensing justice; monitoring the role and impact of judicial reforms has been less than adequate. From an 'access to justice' perspective, this is unacceptable.

Finally, judicial reform must guard against replicating institutional structures (including the goals, values, and principles underlying them) prevailing in industrial countries. Failure to do so will mean that judicial reforms will have little to do with enhancing access, and even less to do with safeguarding and dispensing justice for all.

NOTES

1. Inter-American Commission on Human Rights, 'Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A review of the standards adopted by the Inter-American system of Human Rights', OEA/Ser.L/V/II.129 Do. (7 September 2007), p. 4. <<http://www.cidh.org/pdfper/cent20files/ACCESSper/cent20TOper/cent20JUSTICEper/cent20DESC.pdf>> (4 April 2008).
2. Ibid.,
3. D.L. Rhode, *Access to Justice* (2004), Oxford University Press, United States of America.
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14. *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.
15. *Fertilizer Corpn Kamgar Union v. Union of India*, 1981, 1 SCC 568.
16. *Fertilizer Corpn Kamgar Union v. Union of India*, 1981, 1 SCC 568.
17. *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.
18. Or to a determinate class of persons.
19. Or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened.
20. By reason of poverty, helplessness, or disability, or socially or economically disadvantaged position.
21. *Bandhua Mukti Morcha v. Union of India and Ors*, 1984 3 SCC 161.
22. *Bihar Legal Support Society v. The Chief Justice of India and Ors*, AIR 1987 SC 38; Also, Mamta Rao, *Public Interest Litigation in India: A Renaissance in Social Justice* (2004), Eastern Book Company, 2nd edn.
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37. Art. 142 Constitution of India; and *Vishaka and Ors v. State of Rajasthan and Ors*, AIR 1997 SC 3011.
38. *Ashok Kumar Pandey v. State of WB*, (2004) 3 SCC 349; and *B. Singh v. Union of India*, 2004 3 SCC 363.
39. *Common Cause v. Union of India and Ors*, (2008) <<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=31252>> (4 May 2008).
40. The project was initially launched as a three-year project in August 2004, but has been extended through to December 2008, though with reduced objectives, in order to utilize unspent funds and complete ongoing initiatives. This will lay the foundations for a longer-term project, which will be developed during 2008.
41. 6.6 per cent of Sri Lankans who earn USD 1.00 per day, and 45.4 per cent who earn less than USD 2.00 per day, are classified as living below the income poverty line.
42. According to the *UN Common Understanding*, signed by UN agencies in 2003:
 - 1) All programmes of development cooperation, policies, and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments;
 - 2) Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process; and
 - 3) Programmes of development cooperation contribute to the development of the capacities of duty-bearers to meet their obligations and of 'rights-holders' to claim their rights.

4 Ethics, Integrity, and Judicial Accountability



The Evolution of the Judicial Council—The Nepal Experience

HARI PHUYAL

1.0 KEY MESSAGES

In a developing post-conflict country like Nepal, an independent body such as the Judicial Council is a positive and important step towards ensuring the independence and accountability of the judiciary. The establishment of this Judicial Council as an independent body—small in size, with judicial and non-judicial members and full-time leadership—along with the mandate to uphold ethics, integrity, and accountability in the court system is significant and to be commended. The constitutional, legal, and regulatory framework of the Judicial Council provides for action against judges in response to allegations concerning professional competence, and to do so under an appropriate procedure, in an expeditious and fair manner.

Given the experience of Nepal, we have found that rules alone, without effective, consistent, and sustained implementation measures, are however unlikely to achieve significant improvements in ethics, integrity, and accountability. Effective implementation measures require additional steps including ongoing training to judges and court staff, the adoption and implementation of codes of conduct, expansion of supervisory jurisdiction to include court staff, broader law reform, and practical corruption control measures. For this reason, Nepal is still struggling to fully realize the potential of the Judicial Council in safeguarding the integrity and accountability of judges.

The Judicial Council has developed a recording and reporting system to track the professional behaviour and performance of

judges, and a special inquiry and investigation system to deal with complaints. In Nepal, we have found that it takes time to develop lessons learnt and set-up workable concepts and mechanisms. Historically, disciplinary action has often been taken against judges on vague, often politically inspired, grounds. It is in this context that the Judicial Council emerged, and its Act and regulations were developed.

To date, this system still lacks full effectiveness. There continue to be credible reports of corruption in the judiciary, which expose the limitations and growing pains of the Judicial Council. This may point to the need for the institutional accountability of the Judicial Council itself to be discussed, in parliament, by way of an annual report.

The experience of Nepal discussed in this chapter highlights the value of creating an institution such as the Judicial Council; developing and strengthening its operating procedures; and the challenges this presents to the judiciary and the wider legal system. The main outcome of these developments has been the consolidation of the role of the Judicial Council in the Interim Constitution, which protects the judiciary from the corrosion of unethical conduct as much as the arbitrary interference of the executive, and represents a substantial achievement. The ongoing challenges to operationalize effective accountability mechanisms are however significant—existing as they do within a post-conflict environment of massive constitutional and political change, limited available resources and capacity, and recognition that effective change requires both planning and time for all steps to be completed. These principal challenges include: sustaining visionary leadership; establishing a full-time secretariat and staff and building its professional capacity; developing standard operating procedures and practices including formalizing the decision-making process; extending training to judges, court staff and the public; improving coordination across the justice sector; and fully embracing transparency as the basis for accountability.

While it remains premature to offer any final conclusions, a number of useful lessons have already been learned which are outlined below. Perhaps most important, our continuing experience addressing these challenges indicates that constant monitoring and successive refinements of approach are required to ensure we attain our reform objectives.

2.0 DESCRIPTION OF REFORM EXPERIENCE

2.1 PROBLEMS/CHALLENGES

2.1.1 Problems in the Judiciary

The independence, impartiality, and accountability of the judiciary in Nepal, like many other developing nations, remains critical, and efforts to consolidate reform measures are on-going. There is an overall lack of professional awareness of the importance and content of judicial ethics, and a lack of sufficient training to address this knowledge gap.

In 2007, Transparency International reported corruption at all levels of courts in Nepal.¹ This finding is supported by a recent report of the Supreme Court Bar Association.² For example, in spite of the code of conduct providing that judges should not meet a party to a case (except in the courtroom), it is reported that a former Home Minister, against whom there was a corruption case pending in the Special Court, visited the Chief Justice at his official residence and was subsequently acquitted. This created a hue and cry from the Bar and the public. Even though the Chief Justice did not refute the report, neither the judicial council nor the parliament attempted to discuss the issue. This incident illustrates how Supreme Court judges continue to publicly disregard ethical standards and consider themselves immune from accountability, which, in turn, undermines attempts to change behaviour and projects perverse role models for the lower courts.

More generally, in the system as a whole there are commonly-held concerns about chronic delay in proceedings, lack of implementation of the code of conduct for judges, and an absence of a code of conduct governing the behaviour of other court officials. Together, these concerns lead to an erosion of public trust in the justice system.

Additional concerns, held within the courts themselves, arise from other serious problems in the judiciary, such as insufficient or old fashioned and complex laws and court procedures, and court staff who are mostly unaware of modern case management skills. These problems frustrate litigants, and would-be litigants, and cause the judiciary to lose public trust. The Strategic Plan of the Judiciary³ identifies these problems, but there are few concrete efforts to reform such laws and procedures, or to improve case management.

2.1.2 Evolution of Judicial Accountability in Nepal

Up until 1990, and the promulgation of the fifth constitution, judicial independence was a problem in Nepal. The separation of powers was only conceived in 1948 in the first constitution.⁴

Under the first, second,⁵ and third⁶ constitutions, judges of the Supreme Court could be removed on grounds of proven bad conduct, incapacity to perform duties, physical or mental incapacity, or for committing a serious offence. Both the parliament and the judicial committee acted as the accountability mechanisms. While accountability of judges, except Supreme Court judges, was delegated to the Supreme Court, the judicial service was administered by the civil service, and came under the direct control of the Executive.

It was only in the third constitution that judges gained the right to defend themselves before the investigating committee. The fourth constitution⁷ repeated the same process, but added one more ground, bad faith, as a ground of removal. Under the fourth constitution, the Executive took action against a number of judges for being involved in 'inappropriate activity'. This vague terminology, going beyond the earlier grounds of judicial and professional capacity, resulted in severe encroachment by the Executive on the independence of judges.

Historically, there was also no independent process of appointment of judges. The grounds of removal, as set out in the constitution, were not defined in any law or regulation. No independent body existed to receive complaints against judges, or to carry out an independent and impartial inquiry and recommend appropriate action, such as, warning, suspension, removal, or prosecution. There were no rules governing the accountability process. In the absence of clear rules of judicial ethics, integrity, and obvious accountability, the position of judges was insecure. Perhaps unsurprisingly, the courts on the whole failed to deliver impartial justice and to protect the human rights of the people.

2.1.3 Towards Judicial Independence and the Judicial Council

The fifth constitution of 1990 provided for a democratic framework of governance, with clear separation of powers. District, Appellate, and Supreme Courts were provided constitutional status, strengthening

judicial independence. The Chief Justice and Supreme Court judges became subject to impeachment on the grounds of incompetence, misbehaviour, or failure to discharge duties of office in good faith.⁸ A judge's right of defence before the Inquiry Committee was guaranteed, and the scope of prosecution for corruption was created. Any judge of the subordinate courts could be removed on the same grounds as a Supreme Court judge and prosecuted by the Judicial Council. Under this constitution, the Judicial Council was authorized to form an Inquiry Committee to submit a report with an opinion to the Judicial Council.

The sixth constitution,⁹ introduced as an Interim Constitution during the immediate post-conflict period, now empowers the Judicial Council to have experts in the Inquiry Committee, and a removed judge may be subject to prosecution by the Commission of Investigation of Abuse of Authority. It also provides for a confirmation hearing by parliament as part of the appointment of Supreme Court judges. This is intended to increase transparency and democratic scrutiny in judicial appointments, but whether there will be any negative impact on judicial independence is yet to be seen.

The *Judicial Council Act* was promulgated in 1991, together with an accompanying Regulation, which for the first time defines conditions of discipline and grounds of removal of a judge from the subordinate courts. The Judicial Council may issue a warning, and, if the judge fails to improve performance, activities, or behaviour, legal action can be taken.

2.1.4 Developing a Code of Conduct for Judges

The code of conduct is a recent phenomenon in Nepal. It was first adopted before the *Bangalore Principles* were developed, and it is still in the process of developing. Internalization of the code by the judges and its implementation through the training to change the behaviour of the judges is still a challenge to the judiciary of Nepal.

2.1.5 Absence of a Code of Conduct for Court Staff

In a recent case, a client successfully recorded and published a series of conversations with a court employee while bargaining the amount of money to favour a case through different judges,

including the Chief Justice. This incident contributed to a discussion to have a code of conduct for court staff. One of the challenges for the court system is the higher number of court staff lacking training to develop professional skills and understanding of principles of ethics and implementation of a code of conduct. Unlike other countries, such as the Philippines, a code of conduct for court staff is absent in Nepal.

Court officials are still considered as government employees. They are recruited under the *Civil Service Act*, with separate laws to those governing the service conditions of judges. The Judicial Service Commission only promotes and recommends departmental actions. The Strategic Plan of the Judiciary proposes that recruitment of court staff is to be by the judiciary itself; however, it does not state anything about the need for a code of conduct. There have been increasing calls to bring the discipline and accountability of the court staff, along with responsibility for developing a code of conduct for them, within the responsibilities of the Judicial Council.

In the area of ethics, integrity, and accountability, there are at least two major challenges facing the judiciary of Nepal, namely: systemic corruption; and the functioning of the Judicial Council. A key question for the judiciary of Nepal is; how will the Judicial Council implement the provisions of the Interim Constitution, and the *Judicial Council Act* and its regulation, to combat corruption and enhance judicial discipline, uphold ethics, and maintain a balance between the independence of judges and their accountability?

2.2 ACTION TAKEN

2.2.1 Establishment of the Judicial Council

Formalizing the establishment of judicial independence was an important element of the fifth constitution. The drafting committee of this constitution concluded that an independent body—a Judicial Council for appointment, transfer, and accountability of the judges—should be established for this purpose. This council was to be small in size, with a majority of judges, one non-judge, and a representative of the government. The composition of the Judicial Council was refined in the sixth constitution, to introduce a representative of the Nepal Bar Association to replace one of the judicial representatives.

2.2.2 Functioning of the Judicial Council

When the Judicial Council was created in the fifth constitution, it had no legal framework, infrastructure, human resources, or professional experience. A bill was subsequently drafted and passed by the parliament, together with accompanying regulations. Under the constitution, *Judicial Council Act* and its regulations, the functioning of the Judicial Council was determined as follows: any person may file a complaint against a judge to the Judicial Council. Once the complaint is received the Secretary needs to immediately approach the Judicial Council, the Chief Justice, or a designated member. If the Judicial Council deems necessary, it may constitute a Preliminary Inquiry Committee. In relation to such a complaint, the Secretary may also take the assistance of other organizations. In case of a verified complainant, a notice of decision is provided to the complainant. However, despite clear international principle that a decision on accountability of lower courts judges should be subject to review, there exists no such provision within the Judicial Council's regime. Hence, if a judge decides to challenge the decision of the Judicial Council, that judge is bound to use the extraordinary jurisdiction of the Supreme Court.

If a complaint or report against a judge is verified, a Preliminary Inquiry Committee may be established, to submit a report to the Judicial Council prior to formation of an Inquiry Committee. In line with the international standard, the preliminary inquiry is undertaken confidentially. When such a process is initiated, the concerned judge will be provided an opportunity to submit an explanation to the Judicial Council relating to the allegation(s). In case of failure to submit the explanation, or where an explanation is found unsatisfactory, the Judicial Council shall forward its recommendation to the Chief Justice. However, if the report or complaint is found baseless, the proceedings may be closed. During the time when the formal inquiry takes place the concerned judge may be suspended pending the decision of the Inquiry Committee.

The other means of maintaining judicial discipline is through the periodic inspection of the performance of a judge in the work place. The chief judge of an Appellate Court must submit a regular inspection report of a district court judge to the judicial council.

Such reports evaluate the work of a judge—either positively, or by instigating action against him/her. The judge's performance inspection report, job description, performance report, and evaluation are then reviewed when assessing grounds for the appointment of a judge to a higher court.

The judicial council, as mandated by the Act, must maintain performance inspection reports of the judges of the Supreme, Appellate, and district Courts. These reports which include their service, performance, and similar records as officers of the Nepal Judicial Service, are only accessible to the Judicial Council or an Inquiry Committee. Finally, the Judicial Council is empowered to monitor the implementation of the code of conduct for the judiciary.

2.2.3 Operation of the Judicial Council

In order to systematize the operation of the Judicial Council, its administrative systems had to be developed from scratch. This involved introducing system of maintaining records, which included the date of birth and date of recruitment of sitting judges and court staff. A system of regular review of the private property of judges was created, and inspection reports are maintained.

Recently, a judgment review system was introduced, where at least ten judgments of a judge are to be reviewed to check quality. However, danger of interference on legal interpretation is an issue to be balanced by the Judicial Council. A complaint procedure has also been designed and implemented, with a Preliminary Inquiry Committee reviewing complaints before transmission to the Inquiry Committee. The *Judicial Council Act* was amended and an inspection report system introduced. For the first time in the judicial history of Nepal, the grounds of discipline and removal of the judges are defined. The code of conduct is annexed under the mandate of the Judicial Council. The Judicial Council has recruited staff, introduced a filing and recording system, organized several interactions on the role of the Judicial Council, and published bulletins on the activities of the Judicial Council.

2.2.4 Activities of the Judicial Council

One of the major achievements in the development of the Judicial Council was the definition of the grounds of incompetence, bad

conduct, or failure to discharge duties of office in good faith. In accordance with international standards, any inquiry against a judge remains confidential within the Judicial Council. Only the statistics relating to actions taken are made public through bulletins. These bulletins report that action taken against judges is much lower than the number of complaints received. The Judicial Council suggests that this low number is accounted for by complaints closed when found baseless. At the same time, it appears that the Judicial Council may be mindful that excessive exercise of accountability may affect the working efficiency and independence of judges, and may be seeking to maintain a balance between accountability and what might be perceived as interference with the independence of the judiciary.

The Judicial Council is empowered to take action only against judges of the Appellate and District Courts. In one case, however, bearing in mind its ultimate obligation to maintain judicial discipline, it decided to form an Inquiry Committee in an allegation of corruption by a Division Bench of the Supreme Court. The Committee, after an uncontroversial inquiry, came up with findings which corroborated allegations against the judges. When parliament failed to start impeachment proceedings, the Chief Justice persuaded the judges concerned to resign. In another case, concerning a similar allegation against a judge of the Supreme Court, an Inquiry Committee was established which found that the allegations were substantiated. Again there was no impeachment process, and once more the Chief Justice intervened and the judge was technically demoted to the lower court. These initiatives of the Judicial Council, despite questions regarding its jurisdiction, have been applauded by the legal community and the media.

There have been a number of complaints and reports of corruption against judges in the Judicial Council itself. Some judges were investigated and some received warnings. Initially, the Judicial Council had power only to recommend the removal of a judge. However, after the first amendment to the *Judicial Council Act*, the Judicial Council is now empowered to initiate prosecution against judges on charges of corruption. The Judicial Council has used this power in the case of one complaint where corruption was substantiated.

The Judicial Council is mandated to recommend judicial reform measures, though to date it has not directly used this power. It has,

however, reported to have provided reform suggestions through institutional participation in different programmes. The Strategic Plan of the Judiciary mentions reform of old, outdated, and archaic laws and procedures, but the Judicial Council has not been offered a role in any reform process. There has been an initiative by the Ministry of Law and Justice, supported by the United Nations Development Programme, to revise the penal code and the civil code and their accompanying procedures, in which the Judicial Council is participating. Sometimes delays caused by the existing lengthy investigation procedure, give the benefit of the doubt in favour of a judge or court staff member being corrupt. For this reason, more efficient and fairer court procedures will not only benefit litigants, but should also help the Judicial Council to promote integrity and accountability in the judiciary.

A code of conduct for judges is still being developed by the Judicial Council. Initially, the Court Management Committee, overriding the jurisdiction of the Judicial Council, prepared the first code of conduct, which was approved at a conference of judges organized by the Judges Society. However, this code failed to adequately address international standards, such as those set by the *Bangalore Principles on Judicial Conduct*.

A delegation from the Supreme Court participated, at the initial stage, in framing the *Bangalore Principles on Judicial Conduct*, in 2002, and contributed to its development. In a long overdue overhaul, the Judicial Council has decided to improve the code of conduct and prepared a revised draft. At the moment, the Judicial Council, after launching an awareness and validation process of the improved draft code through interactions with the judges in the different regions, has formed a committee to finalize the draft code. It has also promoted this revised code of conduct in various conferences held by the Judges Society. The Council is vested with the power to monitor the code of conduct, but no mechanism has been framed to monitor compliance.

2.2.5 Commission of Investigation of Abuse of Authority

In order to check corruption, the power to prosecute a judge following removal from office by the Judicial Council is provided to the Commission of Investigation of Abuse of Authority. This is

a major achievement, as the judiciary of Nepal is protected from undue interference from the Executive that was experienced in the past, but is accountable before an independent body.

2.2.6 Training on Judicial Ethics, Integrity, and Accountability

Judicial education plays an important role in promoting accountability, if it is supported by other measures, such as benefit incentives and structural reforms. Judicial education itself is new in Nepal, so ethics and the code of conduct have only recently been given priority in training. Since 2004, the National Judicial Academy has started training judges, but it is yet to reach all judges and court staff across the country.

The Judicial Council has organized several interactions with judges relating to its jurisdiction and function. It has also organized programmes for quasi-judicial bodies on judicial discipline and judging skills.¹⁰ The council has also conducted several programmes to improve adherence to the code of conduct by judges.

The National Judicial Academy, in its drive to strengthen the judiciary, has recently introduced a course on judicial ethics and integrity. Some course materials have been developed by the Academy, with the support of AusAID. Greater collaboration between the Judicial Council and the National Judicial Academy would increase the impact of these efforts on judicial behaviour and accountability.

2.3 OUTCOMES

2.3.1 Safeguarding Independence

The main outcome of these developments has been the consolidation of the role of the Judicial Council in the Interim Constitution, which, in post-conflict Nepal, represents a considerable achievement. If there was no such mechanism to guard judicial independence, there would have been a significantly increased risk of arbitrary executive actions against judges. The Judicial Council is, however, struggling to produce outcomes quickly enough to respond to long-standing public demand for greater judicial accountability.

2.3.2 Complaints

According to the latest data, out of 113 complaints lodged with the Judicial Council in 2007, some 85 cases were suspended due to the

lack of evidence and 28 are currently being investigated. In the past, action has been taken against some 22 judges resulting in either removal or demotion. A number of warnings to judges have also been issued.

Three Supreme Court judges were found guilty by the Judicial Council of being engaged in inappropriate activities (that is, corruption); two of whom have resigned and one has been demoted. Another District Court judge was prosecuted. Such information is circulated through the bulletin of the Judicial Council, which is distributed to the sitting judges and to the legal community. These activities have created an awareness of the Judicial Council, and the recognition among judges that they are accountable. However, the Judicial Council's potential has not been fully realized due to the limited number of disciplinary actions taken against judges accused of corruption or other inappropriate activities.

2.3.3 Training

The Judicial Council has organized a number of interactions and workshops with the judiciary relating to its jurisdiction and functions. The National Judicial Academy has also organized trainings on judicial ethics, integrity, and accountability in collaboration with the AusAID public sector linkages programme (PSLP), in 2007. Such programmes are useful interventions to raise awareness on principles of justice, ethics, integrity, and accountability. They have not, however, been sufficiently comprehensive, numerous, or coordinated to bring visible results, to date.

2.3.4 Code of Conduct

The Judicial Council has been playing the principal role in introducing a new code of conduct for the judiciary. The draft code covers a number of areas including ethics, independence, integrity, impartiality, equality, competence, hard work, enforcement, and accountability. The Judicial Council has referred to different international and comparative codes, but has mainly relied on the *Bangalore Principles on Judicial Conduct* and its commentary. Though the code of conduct is still in draft format, when it does come into force, it will become an important outcome of the Judicial Council,

and may contribute to a much-needed improvement in judicial standards of behaviour.

2.3.5 Administrative Capacity

Personal records, inspection records, evaluation reports, and complaints' records are now being kept by the Judicial Council. These documents are valuable for the management of judicial personnel. Documentation is now available to inform: decisions on promoting a judge to a superior court; disciplinary action; and other accountability measures. Such records appear to be maintained manually, but are still important outcomes of the Judicial Council.

2.3.6 Publications

The Judicial Council has published some bulletins and occasional collections of papers presented during various workshops and other interactions. These are valuable documents to explain its internal functioning, and assist in promoting the transparency and accountability of its work.

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

Finding a constitutional solution to protect judges from the Executive's arbitrary actions, and inscribing qualifications for appointment and accountability of judges, is itself a success story for Nepal.

It is perhaps too early to talk of visible impacts in the performance and activities of the Judicial Council; however, there have been a number of positive achievements, or stepping stones, within the Nepali context. These include the promulgation of the *Judicial Council Act 1991* and its Regulation, defining the grounds of misconduct, and the establishment of a Secretariat with a full time secretary and staff. Maintenance of personal and work performance records of the judges has commenced. Initial training has been conducted with interaction and publications to promote understanding of the role and work of the Judicial Council, and concepts of judicial ethics and accountability. The inquiry system

within the Judicial Council has developed guidelines for handling complaints. Bulletins of the Judicial Council show the number of actions taken against the judges. These have succeeded in creating awareness among the judiciary of being accountable. Even though allegations of corruption are still widely reported, there has been some positive impact on the attitude of judges. Nevertheless, in the context of post-conflict Nepal, the Judicial Council is seen as a damage control mechanism. If such a mechanism functions effectively, an independent accountability process can develop and improve over time.

The composition of the Judicial Council, with the presence of a nominee of the Nepal Bar Association gives the legal profession a voice. This representation will also be valuable in designing and implementing a code of conduct for the legal profession. It is increasingly being realized that a focus on ethics, integrity, and accountability for judges in isolation does not work, but that the wider legal profession must also be subject to accountability processes. Further discussions are taking place to include the Attorney General as a member of the Judicial Council as well as a lay person. Though the consistent coordination between the different organs of the judiciary is yet to emerge, potential synergies between the Judicial Council; Nepal Judicial Service Commission; Supreme Court; National Judicial Academy; and Judges Society, are being developed. Co-organization of training and information programmes, mutual support, and collaboration does exist. The Judicial Council now needs to develop strategies to strengthen and maximize the potential of such linkages.

3.2 CONSTRAINTS TO IMPLEMENTATION

The Nepali experience shows that mere constitutional structures are not sufficient to create an entirely independent, impartial, and accountable judiciary: though they can arrest further deterioration. It is only recently, after the adoption of the Strategic Plan of the Judiciary, that constructive self-criticism from within the judiciary has emerged, together with other national and international pressure to operationalize accountability mechanisms. Besides constitutional provisions, planning and visionary leadership will be instrumental for meaningful and lasting changes to take hold.

The Judicial Council of Nepal runs its offices with many constraints. One of the paramount constraints appears to be its professional capacity. It lacks a full-time president and lacks members with any specialized background. Nor does it have a fully functional Secretariat. The Secretariat does not have a website, electronic files, staff, or financial resources. There is no Strategic Plan for the Judicial Council to state its vision, mission, and objectives. It holds an office in the annex of the Supreme Court building and has not acted on having an infrastructure suitable to its nature of work, such as a place to house sensitive information. The Judicial Council should be the data bank of judicial information of various kinds, but even the detailed profiles of judges are not properly maintained. Hence, a professional Secretariat, full-time president and members with specialized knowledge, are clearly required for more effective implementation of the Judicial Council's mandate.

Actions taken by the Judicial Council against judges are found to be mostly based on professional competence, but there remains some lack of predictability in inquiry procedures. There is also some lack of consistency in decisions taken concerning similar allegations, either due to changes in the leadership of the Judicial Council, or due to 'some other reasons'. The decision-making process, therefore, requires further development before it meets international standards.

The Judicial Council works with a consensus model, in which all members must agree in order to reach a given decision. This leads to the possibility that if even a single member does not act impartially, then the independence and impartiality of the whole Judicial Council is jeopardized. In spite of its attempts at transparency, the Judicial Council is still a relatively mysterious organization, more inclined to do its work behind closed doors, and is yet to fully embrace the principle of transparency as the basis for increased accountability.

The other major constraint of the Judicial Council is the non-application of the definition of judicial misconduct. In the first amendment to the *Judicial Council Act 1991*, the grounds of bad conduct, unethical behaviour, and other grounds for action are defined. It appears, however, that those grounds are rarely referred

to in an objective manner, and there also is a reluctance to assign punishment commensurate with the offence. This has been labelled by the Nepal Bar Association as a kind of protectionism within the judiciary. The constitutional and legal framework alone have proved insufficient to ensure ethics, integrity, and accountability in the judiciary. What matters in practice, is how impartially and effectively the legal definitions and procedures are implemented by the Judicial Council, and this requires a change in the culture of the judiciary, as well as democratic accountability of the Judicial Council's activities.

The Judicial Council lacks a fully effective inquiry system. The recent constitution adds a provision for a specialist to be included in the inquiry body. A special unit is needed— acting autonomously within the Judicial Council structure—to carry out investigations. Presently, the Judicial Council's staff, including the Secretary, comes from the judicial service. As a consequence, they are transferred at short notice to other work resulting in a lack of continuity and skills within the Judicial Council. In order to develop the professional capacity of staff, the Judicial Council should have the power to hire permanent staff, consultants, or advisers.

Enhancing knowledge on principles of justice, ethics, integrity, and accountability is another area touched on by the Judicial Council. Some of the programmes for dissemination of knowledge on principles of justice and ethics are of value. These programmes, however, are too few—far less than would appear possible given the existing capacity of the Judicial Council. In addition, the Judicial Council is yet to utilize the resources of the National Judicial Academy in the implementation of training on ethics, or on enhancing its research capacity.

The Judicial Council should also coordinate with other judicial institutions, the Office of the Attorney General, the Nepal Bar Association, and the Nepal Police. Only in this way will it be possible to effectively implement a code of conduct for all justice sector actors. The mandate of the Judicial Council creates an open-minded institution that is intended to bring together all relevant stakeholders to enable coordination and collective action on cross-cutting issues. The Judicial Council, however, being a newly established body, is yet to address these new challenges.

3.3 KEY QUESTIONS AND KNOW-HOW

It is premature to draw any final conclusions on the Judicial Council of Nepal's long-term impact. However, Nepal's experience already indicates that an independent body, such as a Judicial Council, is suited to manage the appointment and monitor accountability of judges. When analysing the impact of an institution such as the Judicial Council, two elements need to be considered, these being the practical effectiveness of the institution, and whether the institution is a truly independent body.

From the experience of Nepal in creating, setting up, and operating an institution such as the Judicial Council, a number of lessons have been learned including that an independent body, like the Judicial Council, needs to be embedded in the constitution to provide legal protection, importance, and longevity. Its small size makes it manageable and promotes efficient decision-making, and its composition includes non-judges to embrace the views of other stakeholders. The council ensures the basic guarantee against encroachment of the Executive over judicial independence. Even the lower courts' judges are protected from the Executive and thus can maintain independence while deciding cases against Executive actions. The rules of procedural fairness are largely followed when taking actions and a balance between the independence of the judges and need of accountability is maintained. However, the performance of the Council to date suggests that constitutional and legal provisions alone are not sufficient to guarantee accountability.

The Judicial Council is mandated for the maintenance of ethics, integrity, and accountability of judges. Its mandate is fairly broad, allowing it to prepare a code of conduct, and define and implement robust grounds for discipline, misconduct, and other actions, including removal and prosecution. It has been mandated to initiate reforms suitable to promote accountability, as well as conduct research and deliver training to promote awareness, increase skills, and change behaviour. However, the Judicial Council has not yet been given the necessary staff and resources to fulfil these wide-ranging functions. Professional management and administration is required for the Judicial Council to do its work efficiently and effectively, and a full-time president and membership are necessary.

In a country like Nepal, which suffers from archaic laws and procedures, and outdated case management, accountability measures need to be supported by reform in the court system as a whole. Case backlogs and sluggish procedures, poorly trained court staff, inadequate infrastructure, all nourish corruption. Reform of the judiciary must be holistic and the leadership in the judiciary must be prepared to actively support this process.

Court staff are an integral part of the functioning of the judiciary, yet, they come from the Executive branch of government and follow rules as prescribed by the Executive. To date, the Judicial Council lacks any jurisdiction to act if court staff, who behave unethically go unpunished or suffer only the inconvenience of being transferred to another court. To be effective, the Council's jurisdiction should be extended to court officials.

In spite of the establishment of the Judicial Council and action taken against the judges, there are credible allegations that due to corruption the judiciary continues to lose public trust. The donor community in Nepal, who have supported judicial reform, are frustrated with the results. Except for the support to the Strategic Plan, other investments from the donor community are considered as critical. For example, the donor community supported the Commission for Investigation of Abuse of Authority (CIAA) to enhance its capacity development for corruption investigations and filing cases against government servants. The CIAA did file some good cases, but the Special Court, under the vertical control of the judiciary, was reportedly involved in corruption in such cases. The Judicial Council and the leadership of the judiciary are in a position to repress such activities, but appear unwilling to act. Future donor funding may depend on stakeholders demonstrating the necessary political will and courage to act against overt corruption. There are some suspicions in government of misuse of funds provided to the judiciary for the construction of buildings and to purchase equipment to modernize the judiciary. At present, the Judicial Council cannot look into allegations of misappropriation of such funds. Either the Judicial Council should have jurisdiction to look into such allegations, or there must be a separate, independent, and impartial mechanism to do this.

Finally, in a context where judicial integrity has historically been undermined by material gifts in return for favours, an institution

like the Judicial Council is crucial for the enhancement of ethics, integrity, and accountability of judges. Simply taking action against a few judges is not sufficient. Its impact on ethics, integrity, and accountability should be capable of objective verification. Only then will public trust in the judiciary be likely to return.

NOTES

1. Transparency International 'Global Report on Corruption' (2007).
2. Nepal Supreme Court Bar Association 'Report of the Committee on Promotion of Public Trust of the Judiciary' (2007).
3. Strategic Plan of the Judiciary (2005).
4. The Government Act of Nepal, 1948.
5. The Nepal Interim Government Act, 1951.
6. The Constitution of the Kingdom of Nepal, 1959.
7. The Constitution of Nepal, 1962.
8. Art. 87 (7) Constitution of the Kingdom of Nepal 1990. The Judicial Council was set up pursuant to Art. 93.
9. The Interim Constitution of Nepal, 2007.
10. Such as Chief District Officer, Land Revenue Office, District Forest Office, and so on.

The Philippine Experience

MYRNA FELICIANO

1.0 KEY MESSAGES

A number of key messages emerge from the recent and current experience of the Philippines in promoting judicial ethics, integrity, and accountability. These are:

First, judges and members of the judiciary must be guided by a defined code of ethical standards and accordingly held accountable for violating the code. Compliance with an enforceable and defined code of ethics not only entails greater accountability, it also enhances the individual integrity of judges and engenders respect and confidence in the judiciary. Second, transparency in judicial appointments protects the integrity of the judiciary by opening to public scrutiny the exercise of the political power of appointment. Third, the judicial conduct complaint process should be streamlined to ensure that disciplinary proceedings are heard and decided fairly and expeditiously. Finally, judicial leadership and ownership of judicial reforms are necessary to encourage participation of members of the judiciary and ultimately ensure the success of reform programmes.

These messages were distilled from the Philippine experience outlined below. The paper starts with a historical overview of significant milestones and proceeds to identify problems that were encountered and the corresponding lessons learned. These include, among others, the sensitive and difficult issue of how the Philippine cultural tradition of 'utang na loob' tends to compromise judicial independence by perpetuating political influence in judicial appointments. The paper culminates in formulating key questions, some of which remain to be answered. Does the reform programme enjoy support of the leadership? Is the programme based on actual needs? Is it comprehensive and professionally designed? Is it manageable and feasible? Is the training programme building on

sound foundations of selection of ethical candidates to judicial office? Is the discipline procedure fair and balanced? Can funding be augmented to support reform measures? Finding the answers to these questions has universal and recurrent application for judicial reform actors throughout the region.

1.1 INTRODUCTION

Integrity is generally regarded as moral soundness, a complete or uncompromising adherence to ethical standards. However, a society's ethical standards of right or wrong conduct are influenced by many factors including time, culture, tradition, and even religion. They tend to be highly subjective and variable, depending on how the factors that influence them change. In a mixed society like the Philippines, diverse and sometimes even conflicting ethical standards are common. Therefore, it is important to set the baseline standards that should be generally applied and against which conduct should be measured.

Codes of conduct normally serve this purpose, and most professions committed to uphold integrity have one. In the Philippines, the Supreme Court has promulgated a Code of Professional Responsibility¹ for members of the Bar and a Code of Judicial Conduct for members of the Bench. But having such codes alone does not give the judiciary integrity nor make it ethical. The judiciary can have integrity only when the members themselves embody integrity.

Reform programmes intended to instil ethics, integrity, and accountability in the judiciary face the following challenges: having a code that is relevant and responsive to present realities and provides a strong basis to enforce judicial accountability; ensuring that the right person is appointed to the Bench; implementing a fair and balanced judicial complaint process as redress against improper conduct of incumbent judges; and having leaders in the judiciary who genuinely acknowledge the need for reforms and inspire its members to uphold ethical standards and participate in and own the reform programme.

The following discussion looks into the Philippine experience in facing these challenges.

1.2 CODES OF JUDICIAL CONDUCT

The Department of Justice issued Administrative Order No. 162 on 1 August 1946, which promulgated the canons of judicial ethics for the guidance and observance of all judges. This served as the first code of conduct for Filipino judges, who were then still under the Department of Justice's supervision. Following the transfer of the administrative supervision of judges to the Supreme Court of the Philippines (SCP) under the 1987 Constitution, the SCP adopted the Code of Judicial Conduct. The Code, which consists of five canons and implementing rules, took effect on 20 October 1989. On 1 June 2004, the SCP adopted a New Code of Judicial Conduct for the Philippine Judiciary.² The New Code follows the *Bangalore Principles on Judicial Conduct*, with certain amendments tailored to suit the distinct legal and judicial culture in the Philippines.³ Orientation seminars on its provisions are being conducted, and an annotation is being prepared by the Philippine Judicial Academy.⁴ In 2007, the SCP applied Section 5, Canon 6 of the New Code for the first time in a case that involved no less than a Court of Appeals Justice.⁵

A corresponding Code of Professional Responsibility governs the conduct of lawyers as officers of the court, including those of retired members of the judiciary.⁶ It prescribes standards of ethical conduct and provides, among others, that complaints against lawyers for unethical conduct be coursed through the Integrated Bar of the Philippines for investigation and recommendation, and filed with the SCP as the ultimate arbiter.

1.3 TRANSPARENCY IN JUDICIAL APPOINTMENTS

The judiciary can be perceived as ethical and considered to embody integrity when only individuals who demonstrate ethics and integrity are appointed judges or justices. Selecting the right candidates, in turn, depends on how rigid and reliable the screening process is. As indicated in the *UN Basic Principles on the Independence of the Judiciary*, the quality of people appointed to the Judiciary is linked to the appointment process.⁷

In the Philippines, the President appoints members of the judiciary.⁸ As the executive power of appointment is by nature political, it is prone to partisan political considerations. Therefore, the 1987 Constitution of the Philippines provided safeguards to

shield the judiciary from political influence. It created a Judicial and Bar Council (JBC) to screen and prepare a shortlist of three nominees for every vacated position from whom the President should choose.⁹ The selection and nomination process preceding the appointment is open to public scrutiny. This is intended to deter arbitrariness in the appointment of judges and justices and provide an opportunity for the public to be vigilant and initiate corrective measures, as necessary.

Appointments of members of collegiate courts demonstrate more clearly the apparent tension between the political nature of the appointing power of the president and the independence of the judiciary. The procedure for nominating and screening candidates to judicial positions and the requisite educational attainment for prospective members of the judiciary are safeguards built into the constitution and relevant laws to ensure that only the most qualified and deserving are appointed. However, partisan political motive is almost always imputed against the president's appointment of senior members of the judiciary. In particular cases, the imputation may be called for, and this is why transparency is vital.

The recent case of *Kilosbayan and Bantay Katarungan Foundation v. The Executive Secretary and Sandiganbayan Gregory S. Ong*¹⁰ illustrates how transparency in the selection and nomination for judicial appointments could be useful in protecting the integrity of the judiciary. The case involves the appointment of a member of the SCP. Petitioner *Kilosbayan*, a civic/non government organization, learned about the impending appointment of respondent Ong, to the SCP. Contending that the respondent was not a naturalized Filipino as required under the 1987 Constitution, *Kilosbayan* brought a suit to block the appointment. Citing documentary evidence gathered from the respondent's declaration of nationality and personal circumstances in his petition for admission to the Philippine Bar, the SCP ruled in favour of *Kilosbayan*.

The case is symbolic in many ways. On the one hand, it made judicial history in the Philippines as the first case where the SCP annulled a presidential appointment of one of its members. The appointment subject of *Kilosbayan* was alleged to be politically motivated. Whether rightly or wrongly imputed to be so, *Kilosbayan* shows that the President's political power to appoint members of

the judiciary is not without limit. The judiciary, even at the highest level, is not without power to protect itself from the appointment of members that do not conform to law.

On the other hand, the case invites attention to the reliability, and even efficiency, of the screening process in the JBC. The appointment of the respondent in *Kilosbayan* does not appear to be procedurally infirm. The JBC had complied with the requisite screening and nomination of three candidates, and the President chose from the requisite list of three nominees that the JBC had submitted. Had the JBC screened the candidates more accurately, it would have discovered the respondent's alleged deficiency and reconsidered nominating him for appointment. It is therefore worth considering whether the set procedure in the JBC for screening prospective members of the judiciary remains effective or must already be revamped to include more stringent measures.

2.0 DESCRIPTION OF REFORM EXPERIENCE

2.1 THE ACTION PROGRAMME FOR JUDICIAL REFORM, 2001–6

The 1987 Constitution vests the SCP with the power of '...administrative supervision over all courts and the personnel thereof.'¹¹ This power includes, among others, identifying the need for reform and the corresponding reform measures in the judiciary.

Over the years, the SCP noted that instances of corruption have been increasingly eroding the public confidence on the judiciary. The SCP acknowledged the need for reform to complement its education and training programmes. It undertook several studies and stakeholder consultations to assess the extent of changes needed. One of these projects, the Technical Assistance to the Philippine Judiciary on Justice and Development from the United Nations Development Programme, provided the basic data required for a comprehensive plan for reform. This resulted in the *Blueprint of Action for the Judiciary*, the basis of the SCP's long-term reform plan.¹²

Following the Blueprint and the vision and mission that former Chief Justice Hilario G. Davide, Jr. had espoused, the SCP adopted the Action Programme for Judicial Reform (APJR) in November 2001. The APJR is a concrete reform measure to establish a strong foundation for the long-term development of the judiciary. It aims

to make the justice system work more efficiently and build trust and confidence in the judiciary. To manage and coordinate the various projects under the APJR and provide overall policy direction, the SCP created a Project Management Office. Originally attached to the Office of the Chief Justice as an ad hoc unit, the Project Management Office is now a regular office under the direct administrative and technical supervision of the Chief Justice.¹³

2.1.1 Developing Institutional Integrity, Ethics, and Accountability

The APJR's component on 'Integrity Infrastructure Development' addresses ethics and integrity issues in the judiciary and judicial accountability. It aims to improve public trust and confidence in the judicial system, lay down the institutional integrity foundation, reduce or eliminate graft and corruption in the Judiciary, and achieve and sustain efficiency and effectiveness in operations and impartiality in judicial processes. The SCP undertakes several projects aimed to implement the objectives of this component. These projects include the education programme on the New Code of Conduct for Judges, the E-Payment system, and specific projects under the Integrity Development Review (IDR) initiative.¹⁴

The SCP, through the PHILJA, conducts regular education programmes on ethics and integrity. In 2006, the Court conducted 39 orientation seminars on the New Code of Judicial Conduct and the Code of Conduct for Court Personnel. A total of 11,846 justices, judges, and court personnel were oriented on its provisions.¹⁵

The SCP also started implementing an E-payment system that facilitates online payment of court docket fees to lessen situations involving extended custody of money. The software necessary for the E-payment system has already been completed and pilot tested. It was launched in the Offices of the Clerk of Court in the RTC and Metropolitan Trial Courts (MeTC) of Quezon City and Makati City in May 2006.¹⁶

The SCP conceived the IDR in response to the need to assess comprehensively the perceived weaknesses and vulnerabilities of the judiciary, improve its performance and productivity, implement a change management programme and communicate these efforts effectively. The IDR specifically aims to provide effective assessment

tools and technique, review the administrative and financial systems in the judiciary, design and install corruption reform measures, and assist the SCP in establishing an institutional set-up or process to effectively implement these measures after the comprehensive review. Through the IDR, the SCP hopes to develop a sustainability plan that includes a communication strategy to inform and engender support of the judiciary's stakeholders; a report on the Review and Enhance of Performance and Integrity (REPI); proposed performance and integrity enhancement measures and a corresponding development and implementation plan for these; a strategy to sustain these initiatives and gains; and a guidebook for conducting REPIs.¹⁷ Among specific projects undertaken as part of the IDR was the 'Strengthening the Integrity of the Judiciary' project. The SCP launched the project on 4 February 2008 to establish and adopt a corruption prevention programme in the Judiciary.¹⁸

The IDR is not another study or a one-shot activity; neither is it donor-driven nor is it consultant-led. As a court-driven initiative, the IDR has some inherent advantages over those that are donor-driven or consultant-led. The IDR tends to be less prone to suspicion of external influence. Having been conceived in-house, the IDR tends to be regarded as the result of the judiciary's self-evaluation that is not constrained by limitations that donors are bound to observe nor borne in an idealistic and theoretical view by external consultants who have no first-hand, historical knowledge of the peculiar culture in the Philippine judiciary. These, in turn, enhance the credibility of the IDR and tend to elicit more support for the IDR both within and outside the judiciary.

This is not, however, to prejudge donor-driven or consultant-led initiatives for judicial reform as less preferable than court-driven ones. For one, it is too early to realize the effects of the IDR, much less evaluate its effectiveness. But even if it were not, it would be difficult to come up with empirical data in support of a conclusion to prefer one over the other. Indeed, each has its own strengths and weaknesses. Although they tend to be more realistic and responsive, court-driven initiatives are often stalled by the judiciary's meagre resources. On the other hand, donor-driven and/or consultant-led programmes for reform undeniably have greater potential to meet their objectives owing to the vast resources available to make them

happen. Therefore, a healthy balance between the two, including a proper and more conscientious handling of donor-driven or consultant-led initiatives, would tend to bring about the best in both approaches and maximize the benefits for the judiciary as a whole.

2.1.2 Ethics and Integrity in Judicial Appointments and Promotions

The SCP continually considers means to improve the process of appointing judges and justices in the Philippines including ensuring that only those who observe the highest standards of ethics and integrity are appointed following a procedure that is transparent and open to public scrutiny. For incumbent members of the judiciary, the SCP created the Committee on Judicial Career Development to come up with a plan to review and update the system of promotions in the judiciary and ensure that it is transparent and relevant.¹⁹

The 1987 Constitution created the Judicial and Bar Council (JBC) under the administrative supervision of the SCP to screen and select prospective appointees to any judicial post and to prepare an exclusive list of three nominees from which the president may choose whom to appoint. The constitution further excludes appointments to the Judiciary from Presidential appointments that require the confirmation or consent of the Commission on Appointment of the Philippine Congress. The JBC is composed of the Chief Justice as *ex-officio* Chairperson; the Secretary of Justice and a representative of Congress as *ex-officio* members; a representative of the Integrated Bar of the Philippines, a professor of law, a retired member of the SCP, and a representative of the private sector as regular members. Although the president is still the one who appoints the regular members, the constitution has fixed and staggered the term of the members and required that the Commission of Appointments consent to the President's appointment.²⁰

The JBC performs its mandate by prescribing guidelines and criteria to ascertain whether a prospective appointee to a judicial position meets the minimum required constitutional qualifications and possesses the essential attributes of 'proven competence, integrity, probity, and independence'. It also prescribes performance-based criteria for the promotion or lateral appointment of

incumbent members of the judiciary who seek a promotional or lateral appointment.²¹ The JBC also ensures compliance with additional legal requirements for prospective members of the judiciary including, among others, completion of pre-judicature programmes prescribed by PHILJA.²²

The JBC further adopted the Rule to Further Promote Public Awareness and Accessibility to the Proceedings of the Judicial and Bar Council.²³ This rule conforms to the JBC's obligation to observe and maintain transparency in its proceedings. The JBC has thus devoted significant time and effort in conducting public interviews of all applicants for the vacant positions in the SCP and the Court of Appeal.

2.1.3 Judicial Accountability and Discipline of Judges

The system of judicial accountability in the Philippines generally distinguishes between justices of the SCP and all other members of the judiciary. SCP justices, on the one hand, may only be held accountable through impeachment on specific grounds and following the procedure provided under the 1987 Constitution.²⁴ On the other hand, all other members of the judiciary who fail to meet the standards required in the performance of judicial functions may be held administratively liable pursuant to rules that the SCP promulgates in the exercise of its constitutional power of administrative supervision over members of the judiciary. For instance, the Revised Rules of Court provide specific causes that disqualify judges from hearing certain cases²⁵ and the procedure for disciplinary cases against judges.²⁶ Even complaints for disbarment, suspension, and discipline against retired justices and judges for acts committed during their tenure in the judiciary must be referred to the SCP for appropriate disposition.²⁷

Judging from the sheer number of cases being filed against members of the judiciary, it appears that the measures in place to promote judicial accountability and discipline of judges are publicly accessible and widely utilized. It is however important to take this assessment one step further and examine whether or not popular use of these measures alone contributes to the ultimate objective of promoting or imposing judicial accountability and discipline.

From 1986 to 2005, the SCP *en banc* meted out administrative penalties to a total of 1327 RTC judges facing disciplinary cases. It is interesting to note, however, that this figure represents less than half of the total cases actually filed against judges. From 1998 to 2005, an average of 58 per cent of the cases filed against RTC judges were dismissed for being frivolous and vexatious, or written anonymously. The rate of dismissal was highest in 2003 at 83 per cent, and about 95 per cent of the total cases dismissed from 1998–2005 did not even reach the investigation stage.²⁸ The dismissal rate is even higher in the collegiate courts. In 2005, eleven cases were filed against Court of Appeal justices, and one against a justice of the *Sandiganbayan*. All cases were dismissed.²⁹

Aside from reactive remedial measures, the SCP also implements a system of judicial audit as a proactive internal accountability measure to regularly monitor compliance with standards of ethical conduct and performance of judicial functions. Following the restoration of democratic rule in the Philippines in 1987, the SCP reorganized the judiciary and issued guidelines for the administration of justice.³⁰ The guidelines include a general reminder for members of the judiciary to embody the constitutional requirements of ‘... proven competence, integrity, probity, and independence...’ and strictly comply with defined standards in exercising specific judicial functions, including writing decisions, exercising judgment, and management of court proceedings and personnel. More particularly, the guidelines authorize the SCP’s Office of the Court Administrator (OCA) to send ‘...teams of staff attorneys and personnel to conduct visitations of the different courts [to be done] periodically and without previous notice.’ These visits give audit teams the opportunity to ‘...observe proceedings, conduct dialogues, and make audits of case dispositions...’ as bases for reporting their observations and recommendations to the SCP.³¹

2.2 PROBLEMS/CHALLENGES

2.2.1 Judicial Appointments

Vacancies in the judiciary contribute significantly to the congestion of court dockets. They overload incumbent judges and highlight even more the disparity between the workload of judges and the level of their compensation. Overall vacancies in the judiciary remain high.

The JBC finds it increasingly difficult to meet the constitutional requirement of nominating three qualified candidates for each vacant judge position, especially in far-flung areas. More lucrative practice in the commercial Bar easily lures even serious applicants away from the judiciary.³² Additional qualification requirements under the law also tend to further constrain the already limited number of potential appointees. The pre-judicature requirement of Republic Act No. 8557 mentioned above presents such a challenge. The JBC assesses compliance with this requirement based on certification from PHILJA that the applicants have successfully completed PHILJA's pre-judicature programmes. If the compliant applicants for a particular position are not sufficient, the JBC would formally advise PHILJA. PHILJA would then submit additional candidates that include applicants who have conditionally completed the pre-judicature requirements.³³

Furthermore, transparency in the selection process is not uniform. The present JBC rules prescribe public interviews only for positions in the SCP, Court of Appeal, *Sandiganbayan*, and Ombudsman. It would therefore be a challenge for the SCP to order public interviews of applicants for all judicial positions.

2.2.2 Politics in Judicial Appointments

Because the President appoints members of the judiciary, and the exercise of the President's appointing power is by nature political, politics poses a continuing threat to the independence and integrity of the judiciary. The cultural context in the Philippines further tends to breed such threat. Filipinos tend to view the world in terms of personal relationships; it is not the merit of the case, 'not what you know, but whom you know' that often matters.³⁴ Therefore, the cultural tradition of 'utang na loob' or debt of gratitude engenders the belief that an appointed public official is perpetually indebted to the appointing power and whoever endorsed the appointment. Since courts ultimately resolve political contests, some politicians exert means to influence the appointment of judges and justices, with a view to collecting such 'debt of gratitude' at a later, more opportune time.

Likewise, the public generally regards as politically tainted the appointment of the regular members of the JBC. And political

interference in the selection of regular members of the JBC tends to be extended to the selection and appointment of judicial officers. Administrative measures to depoliticize appointments in the JBC, and insulate judicial appointments from partisan politics, should be adopted. Among others, regular members should serve only for one term and should not be eligible for reappointment.³⁵

2.2.3 Lack of Fiscal Autonomy in the Judiciary

Although the constitution gives the judiciary fiscal independence,³⁶ the judiciary, in actual practice, still depends on the political branches of government for its budget. The SCP's budget has shrunk from about 2 per cent of the national budget in the early 1990s to 0.84 per cent in the current year. This translates into a tragic lack of decent halls of justice, poor court facilities, low salaries, etc. According to Reynato Puno, 'The Congress wants a world class judiciary, but they give us a third world budget.'³⁷

2.2.4 Filing of Frivolous Administrative Cases Against Members of the Judiciary

The high rate of dismissal of cases tends to show that most administrative cases filed against members of the judiciary are frivolous. Filing of frivolous cases is an abuse of judicial processes. It defeats the purpose of implementing a system of judicial accountability and misuses the filing of a complaint as a means to harass judicial officers. If a judicial conduct complaint process is to serve its purpose as a tool to strengthen judicial accountability, then appropriate measures should be in place to prevent misuse of the process.

Investigating these cases, or even just receiving and docketing those that do not reach the investigation stage, unnecessarily depletes the already limited resources of the judiciary. The investigation of every complaint, regardless of whether the case is sufficient in form and substance, causes unnecessary delays, not only in the resolution of the cases themselves, but more importantly in the resolution of regular cases filed before the courts.

Regardless of the merit of these cases, being called to face an administrative charge in itself already tends to adversely affect the public perception of judges. Until they are dismissed, mere pendency of cases distracts and adversely affects judges' and justices'

performance of their judicial functions. Moreover, defending against an administrative case entails additional expenses for judges and justices. For instance, Rule 140 as amended does not provide specific rules for preventive suspension, which is often without pay. To soften the economic impact on judges of these cases, the SCP should consider possible forms of assistance, or explore alternative modes to resolve a complaint or grievance before it is filed as a full-blown administrative case.

2.2.5 Negative Public Perception of the Judiciary

It is a well-settled principle of judicial ethics that ‘...propriety and the appearance of propriety are important in the performance of all of the activities of a judge’³⁸ and ‘judges shall avoid impropriety or the appearance of impropriety in all of their activities,’³⁹ whether in public or in private. Positive public perception of a judiciary that embodies ethics, integrity, and accountability is integral in having one. The judiciary in the Philippines was not spared in the widespread public perception of corruption in government. Believed to be at least as corrupt as its co-equal legislative and executive branches, the members of the judiciary allegedly include ‘hoodlums in robes’. The proverbial ‘wheel of justice’ was regarded to turn so slowly, if it does at all; and poor litigants were perceived to have a very poor chance of obtaining justice from the courts.

Even the OCA itself seems to suffer from a negative public image. Despite possessing useful information that could potentially uplift the image and the credibility of the judiciary by, among others showing its efforts and achievements in policing its own ranks, the OCA tends to be seen as reclusive or even anonymous.⁴⁰

2.3 ACTION TAKEN

Because of the eleven-month duration of his term as head magistrate, Artemio V. Panganiban chose to focus the Court’s reform activities in 2006 on the ACID problems that plague the Judiciary. ‘ACID’ is an acronym that stands for limited Access to Justice; Corruption; Incompetence; and Delay in the delivery of quality judgments.⁴¹ Similarly, upon his appointment as Chief Magistrate on 7 December 2006, Reynato S. Puno pledged his full support to continuing efforts in achieving a well-functioning

judicial system dedicated to upholding the Rule of Law to protect individual rights and provide redress from injustice under a system that ensures access, as well the impartial and speedy resolution of cases.⁴² Instituted shortly after his installation as chief justice, the IDR is now being pursued during his term.

To address the 29.59 per cent vacancy rate, the JBC agreed to expand its functions by mounting an active search campaign for qualified applicants.⁴³ The JBC members have travelled to designated cities in *Luzon*, *Visayas*, and *Mindanao* to receive applications and to interview applicants. By reaching out to more lawyers in the provinces, the JBC hopes to increase the chances of nominating the legal profession's best and brightest for appointment to judicial positions. The JBC also started publishing vacancies and names of applicants in two newspapers of general circulation and in a local newspaper where the vacancies exist. A JBC website linked to the SCP's website provides information on JBC policies, rules, and regulations pertaining to the search, screening, and selection processes and where application forms can be downloaded. It is likewise a means where vacancies are made public, and where queries are answered through an e-mail box feature.⁴⁴ These measures not only invite observation, feedback, or information on applicants, they also inform and encourage applications from the public.

The SCP has adopted a resolution to provide the JBC with increased autonomy for administrative and financial management.⁴⁵ Many local government units contribute resources to the lower courts located in their territory. Some local governments include annual contribution to local courts in their annual budgets, but most do not. These contributions come in many forms—monthly and travel allowances given personally to judges, cars for judges, office space, equipment and furniture, payment of charges for electricity, communication and other utilities, repair and maintenance of physical plants, office supplies, and contractual personnel. These are acceptable stop-gap measures for as long as they do not compromise the independence of the judiciary.⁴⁶

The low salary of judges was partly addressed by the doubling of judicial compensation through the enactment of Republic Act No. 9227.⁴⁷ This law was enacted through the combined efforts

of Senator Francis Pangilinan, who sits as a JBC member, and the advocacy of civil society groups, and members of the academe.

The SCP adopted a resolution prescribing measures to protect members of the judiciary from the filing of frivolous administrative cases and strengthen the confidentiality of disciplinary cases. It instructed the OCA to determine and include in its report and recommendation if a disciplinary complaint against any Justice of the Court of Appeal, CTA, or any judges in connection with a pending case, is clearly unfounded or baseless and intended merely to harass. If the SCP approves the recommendation, the complainant may be required to show cause why they should not be cited for contempt of court.⁴⁸ This Resolution supplements or modifies Rule 140 of the Revised Rules of Court and the Implementing Guidelines in the Evaluation of Administrative Complaints that the Supreme Court approved in 2002.⁴⁹

In addition to stemming incidents of corruption, the SCP addresses problems of competence among judges and justices by defining measures of competence based on actual cases brought before it. The maxim 'ignorance of the law excuses no one from compliance therewith' found in Article 2 of the Civil Code has special application to judges because under Rule 1.01 of the 1989 Code of Judicial Conduct, '...judges should be the embodiment of competence, integrity and independence.'⁵⁰

The SCP recognizes that not every judicial error bespeaks 'ignorance of the law' and that if committed in good faith, does not warrant administrative sanction. This, however, applies only to cases within the parameters of tolerable misjudgment. Where the law is straightforward or the procedure is so simple and the facts so evident as to be beyond permissible margins of error, to still err amounts to 'ignorance of the law'. It cannot be excused as a mere lapse in judgment when there is blatant and conscious disregard of basic rules of procedure.⁵¹

And as a constructive measure to recognize members of the judiciary who embody integrity and ethical moral character in their public and private lives, the SCP, through the Society for Judicial Excellence, conducts the annual 'search for outstanding judges and clerks of court' in first and second level courts. Aside

from integrity and moral character, the search also considers demonstrated competence, efficiency, effectiveness, independence of mind, judicial decorum, and knowledge of the law. The award consists of financial incentives and enhances the chance of a one-step promotion.

Some measures that tend to compromise the independence of the judiciary are admittedly imbedded in the constitution. The judiciary, however, is not without opportunity to demonstrate its independence by not bowing down to pressure from other branches of government. Admittedly, these gestures do nothing more than symbolically assert independence without realizing any tangible result. Instead, these gestures are expected to engender the respect and confidence of the public for the independence and commitment to integrity of the judiciary.

The APJR recognizes that a system of public information and communication is a key component of a well functioning system of justice and judicial process and a mechanism to fight graft and corruption.⁵² Thus, the important accomplishments of the OCA in the area of curbing corruption in the judiciary and strengthening its integrity through a system of judicial audit are being systematically communicated to the public through print and broadcast media, including the public website of the SCP.

In addition, the Project Management Office plans to include in the OCA's responsibility, authority and accountability for implementing the integrity infrastructure and preserving the integrity of the judicial system. As part of reform plans, the OCA and other key offices of the Supreme Court will start using computerized systems in recording, tracking, monitoring, evaluation, research, submitting reports, analysing information, and communication on a regular basis. The computerization of the case management system, judicial libraries, and judicial archives and their integration into an enterprise-wide network with the OCA as operator of corresponding oversight management applications are a critical priority that will be addressed soon. These ongoing reforms shall likewise be made known to the public, as a wider understanding and appreciation of the OCA is expected to help build a judiciary that is truly worthy of public trust and confidence.⁵³

2.4 OUTCOMES

The JBC's aggressive search for judicial candidates has resulted in a decrease in the total number of vacancies in the judiciary. As of December 2006, the vacancy rate decreased to 25.2 per cent, or 569 vacancies in the 2258 judicial positions available, with an additional 176 pending appointments in Malacañang at the end of 2006. Had these appointments been acted on, the vacancy rate would have fallen even further to 393, or 17.4 per cent.⁵⁴ More than just an improvement in the situation of overloaded incumbent judges, this decline in the number of vacancies can be interpreted as improvement in the public perception of the judiciary. It appears that the judiciary is now becoming more attractive to practitioners, and this may be an early sign that the judiciary's reform measures are achieving positive results.

The JBC's intensified efforts to improve transparency in the selection and nomination process through publication of vacancies and short-listed candidates has achieved positive results in protecting the integrity of the judiciary. The landmark case of *Kilosbayan*⁵⁵ is significant not only because it demonstrates how the judiciary can assert its independence from the other branches of government and the far-reaching scope of judicial power; it is also a concrete example of the benefits of transparency. *Kilosbayan* shows that opening to the public the process of selecting and nominating judges and justices educates them about JBC rules and pertinent policies. It gives them the opportunity to be vigilant and scrutinize the process and, as a result, minimizes arbitrariness in the exercise of the president's appointing power.

While perceptions varied, there was general agreement that, while politics can never be totally removed from judicial selection, the present process is far better than the processes of judicial appointment solely by the President under the previous constitution. The JBC process has continued to improve following the promulgation of rules, written criteria, publication requirements, and public interviews. Apparently, media and NGO representatives do attend interviews, especially for candidates to judicial positions in the Court of Appeal and SCP. Transparency has also been increased with the establishment of a JBC website where the JBC announces vacancies, including the names of judges

and justices who will retire in the current year, the list of applicants and interview dates.⁵⁶

Rule 140 used to pertain to disciplinary cases against RTC judges only. The latest amendment now clarifies the procedure for filing complaints against justices of the Court of Appeal. The SCP now continues to penalize, under the amended Rules, judges who fall short of the stringent standards provided under the Rules and the New Code of Judicial Conduct. One hundred and one lower court judges were sanctioned administratively in 2005.⁵⁷ Out of the cases dismissed that year, one proved to be symbolic. The SCP did not only cite the complaint for being baseless, it also fined the complainant.⁵⁸ In 2006, the number of lower court judges who were administratively penalized went down to 74.⁵⁹

The SCP continues to provide guidance on the breadth and scope of 'ignorance of the law' by deciding cases that constitute ignorance of the law among members of the judiciary. Examples of judicial conduct that were penalized for failure to follow the law or procedure, which is sufficiently basic, are: failure to conduct hearing to lift writ of attachment and violation of the three-day notice rule;⁶⁰ procedural shortcut by disregarding certain requirements relative to a case of nullity of marriage;⁶¹ acting in a case where his court lost jurisdiction;⁶² non-observance of the inclusion provision of the Omnibus Election Code;⁶³ and issuance of default order without hearing stated on the motion thereon.⁶⁴

Although the extent of corruption remains difficult to measure, the prevailing view is that there is less corruption since the implementation of the APJR and the promulgation of the New Code of Judicial Conduct in 2004. Public perception of significant corruption remains and continues to be an obstacle to the administration of justice.⁶⁵

After readministering the 1994–5 'Study of the Judiciary and the Legal Profession' in 2003–4,⁶⁶ the Social Weather Stations (SWS) saw some improvements but also recurring problems. The new SWS study finds 69 per cent of lawyers satisfied, and only 27 per cent dissatisfied, with the general performance of trial judges in the Philippines. Lawyers presently have very mixed feelings on judicial procedure in the Philippines, with 49 per cent satisfied and 48 per cent dissatisfied, which is essentially the same as in 1995.

Corruption remains a major problem. As in 1995, one quarter of present lawyers say 'many/very many' judges are corrupt. However, although half (49 per cent) say they know a case in their own city or province where a judge took a bribe, only 8 per cent of such lawyers said they reported the bribery, the main excuse of those keeping silent being that they could not prove it.⁶⁷ Another survey of the public perception of the sincerity of public agencies in fighting corruption found that of the nine agencies surveyed, the SCP and the *Sandiganbayan* received a 'moderate' net sincerity score, while the trial courts received a 'mediocre' net score.⁶⁸

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

Reforms to improve judicial appointments succeeded in making the appointment of judges and the regular members of the JBC transparent. By giving the public an opportunity to question abusive exercise of appointing power, transparency helps ensure that only ethical persons with integrity and other qualifications required by law are appointed. Transparency in the appointment process complemented the vigilance of the petitioner in the landmark case of *Kilosbayan*.⁶⁹

The amendment of Rule 140 and the subsequent adoption of the New Code of Judicial Conduct and the Code of Conduct for Court Personnel should be considered achievements in themselves. They demonstrate the openness of the leadership in the judiciary to change, regardless of whether the change was because of a prior mistake or oversight, or an admission that the rules have already become outdated and must be updated to conform to the realities of the present time. Openness of the leadership to change made the reform possible. The SCP's exercise of its power of administrative supervision over the courts is largely discretionary. It could have opted not to institute any change in the rules, and one would be hard put to demonstrate arbitrariness in such exercise of discretion.

It would be difficult to establish a conclusive correlation between the newly clarified rules and the continued filing of frivolous administrative cases. For one, none of the amendments introduced seem to directly address the issue. What seems clear is that despite

the amendment, the rate of filing of frivolous administrative cases against judges remains significantly high.

The recent case against a Court of Appeal justice⁷⁰ illustrated that ‘...failure to follow basic commands embodied in the law and rules constitutes gross ignorance of the law, from which no one is excused and surely not a judge.’ This is the first time that the Supreme Court applied the provisions of the New Code of Judicial Conduct.⁷¹

Successful implementation of some reform programmes can be attributed, to a large extent, to the leadership in the judiciary. Unequivocal support from, and direction given by, the leadership therefore plays a vital role in driving these activities to actual implementation. Continuity in pursuing these projects despite the change in leadership substantially contributes to long-term results.

3.2 CONSTRAINTS TO IMPLEMENTATION

The complainant’s interest to obtain redress through an administrative case on the one hand, and the supposed right or interest of judges to protect their reputation on the other hand, appear to be contending rights that are difficult to balance solely by amending procedural rules. Alternatives to address the abuse of the judicial conduct complaint process should be considered.

Some of the problems identified, including the eligibility of regular members of the JBC for reappointment, or the inadequacy of provisions giving fiscal autonomy to the judiciary, may be beyond the SCP’s power of administrative supervision. They may not, therefore, be adequately addressed by reform initiatives undertaken in the exercise of that power. No significant change could be effected without the corresponding amendment of applicable laws. Any efforts at reform are subject to the time required and uncertainties inherent in the established process in the legislature for amending laws.

3.3 KEY QUESTIONS AND KNOW-HOW

1) Does the programme enjoy support of the leadership? Was it conceptualized from a practical, management perspective? Ethics, integrity, and judicial accountability are precisely the responsibility of the leadership. And owing to the hierarchical nature of the structure of the judiciary as defined in the constitution, no other

office in the judiciary is in a better position to enforce these outcomes than the highest office that exercises administrative supervision over the rest. The on-going implementation of the APJR is made possible by the strong commitment starting with former Chief Justice Davide, followed by former Chief Justice Panganiban and now Chief Justice Puno. The commitment of leadership not only inspires the stakeholders to appreciate the rationale behind the programme, it also facilitates the use of the judiciary's resources for its implementation.

However, this is not to conclude that only initiatives originating from and pushed by the leadership could be expected to succeed. Success of reform programmes owes much to realizing at the earliest opportunity inherent strengths and those constraints that are already immutable and could only be worked around. Therefore, decentralized judiciaries that do not have a leadership, that is, by nature unitary and definite could similarly succeed by devising programmes designed to be driven instead by the wider base of judicial members.

2) Is the reform programme based on the actual needs and current situation of the judiciary that the leadership genuinely recognizes to exist? Do training programmes on ethics, integrity, and accountability activities actually respond to the present needs of the judiciary? Genuine recognition of an actual need would be important to ensure continuity of the programme despite subsequent change in leadership. Thus the APJR was not realized overnight. It was the product of various stakeholder consultations and studies and its recommended actions are backed by objective, verifiable data.

3) Is the proposed programme comprehensive and professionally designed? Ethical problems in specific areas of the judiciary are actually not localized. They depend on the many other external but interrelated factors that need to be addressed as well. Incidents of corruption may just be manifestations of the inadequacy of economic benefits for judges. Otherwise, individual reform initiatives would end up being merely isolated stop-gap measures. Reform is a dynamic process that requires management more than legal or judicial expertise. The APJR was highly regarded because it was crafted with full recognition that its implementation would require more than legal expertise. The Project Management Office,

which was organized to coordinate the implementation of the various projects under the APJR, is complemented by experts in such areas of management as change process and communication.

4) Is the magnitude of the programme manageable, considering available human and physical resources and time intended for its implementation? Reform initiatives on ethics, integrity, and judicial accountability sometimes tend to be overly ambitious. Realistic and concrete targets should instead be set. Implementing the reform programmes in stages over a realistic timeframe should be considered a viable alternative. Piloting of reform programmes in selected units of the judiciary prior to a full-scale implementation should be explored as a viable strategy to actually test the projected benefits of the programmes. This provides an opportunity to fine tune the programmes as the experience on their actual implementation may require. Among the reform programmes that the Philippine judiciary pilot-tested include court referred mediations and case flow management system.

In the same way, the judiciary also explores the benefits of decentralizing some of its administrative powers, within the constraints provided under the constitution. The latest initiative of the Philippine judiciary along these lines is the creation of the Regional Court Administrative Office in Region 7 and designation of its Regional Court Administrator, Deputies, and Assistant Court Administrators.⁷² However, the Court recognizes the inherent danger of opening the courts to local political influence as a result of decentralization. This is particularly true in courts where budgets are subsidized by counterpart funds from the local government. In exchange for the subsidy, key court personnel recommended by persons of influence in the local political arena are often appointed. To address this, SCP prescribed detailed guidelines in the detail of locally-funded employees to lower courts. The guidelines, among others, require prior permission from the OCA and identify only those positions that detailed local employees may hold.⁷³

5) Do judges and justices already practice ethics and integrity or otherwise possess the requisite qualities even before their appointment as members of the judiciary? The integrity of the judiciary depends on the individual integrity of its members. It is important to adopt a selection process that would best ensure that

only the most qualified are included in the short-list of prospective members of the judiciary. This is particularly true in reform programmes that aim to address, among others, issues of ethics and integrity. Ethics and integrity are values that cannot be learned later in life. One who has not personally imbibed ethics and integrity cannot be expected to do so despite the requirement to do so under any code of conduct.

Apart from evaluating the qualifications of the applicants, the JBC looks into the applicants' track record and personal background by considering their educational background, Bar ratings, published books and papers, awards and employment records, length of service in the judiciary, and quality of decisions—reversals, affirmations, and speed in the disposition of cases, among others. It is noted, however, that gender and/or ethnicity are not yet formally considered in the selection of candidates.

6) Is the disciplinary procedure fair in all respects, not only to the complainant but also to the respondent members of the judiciary? Rule 140 of the Revised Rules of Court provide the procedure for disciplining judges of regular and special courts and justices of the Court of Appeal and the *Sandiganbayan*. Further streamlining the judicial complaint and discipline system under Rule 140 of the Rules of Court should be considered, including utilizing Bench-Bar committees to make informal resolution of appropriate grievances and avert filing of a full-blown disciplinary case. This would also promote dialogue between judges and lawyers and prevent minor grievances from escalating into full-blown disciplinary cases; assigning *pro bono* lawyers for judges; and providing time limitation for the SCP to render judgments on administrative cases against judges and that priority should be given to administrative matters pending against judges who are retiring or applying for promotion.

The New Code of Judicial Conduct and Rule 140 requires continuing studies to enhance judicial discipline and develop better procedures for judicial discipline cases; and formulating and implementing a records management system on complaints and administrative cases filed against all justices and judges. In addition, the judiciary should design and establish accessible complaint-desks to allow wider public access and serve as venue to receive information and/or evidence on corrupt practices of judges.

7) Are there alternative measures or practices that may augment the limited budget of the judiciary? Financial and/or logistical constraints have always been a challenge for the judiciary in effecting wider and more effective reform programmes. Relying on the judiciary's annual budget alone is not sufficient. Partnerships with other organizations are also very helpful. These are potential sources of funding or financing support for judicial reform projects provided that independence is preserved.

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5 Judicial Education and Skills Development for Judges and Court Staff

The Cambodian Experience

SATHAVY KIM AND LY TAYSENG

1.0 KEY MESSAGES

Cambodia has been striving to build its judiciary from scratch from the legacy of war, where it has been estimated that only six judges or lawyers survived the Khmer Rouge regime.

Since 2002, the government established the Royal School of Judges and Prosecutors (RSJP) which was the first professional school for training judges and prosecutors in Cambodia's history. In 2005, RAJP graduated its first class of 55 judges and prosecutors. These graduates carry with them knowledge and skills to practise their judicial profession, which they will contribute to the development of the judiciary in Cambodia. In this way, justice is better served to the people.

This chapter outlines the steps taken, and the challenges addressed, in this quest not only to rebuild the competence of the judiciary but, at the same time, to build the capacity of the training institution to perform this role. A number of key messages for readers across the region have emerged from this experience.

First, shortage of resources defined the immediate post-conflict period and has created major challenges for RSJP. These shortages have included budget, equipment, human resources, and experienced professional know-how. After some years, the school is now fortunate to be well equipped with the infrastructure, furniture, and tools required for training and administration.

Developing training capacity has however been particularly challenging. RSJP has encountered difficulties in identifying sound experience of judicial professionalism from within the Cambodian judiciary as the basis for training newly recruited students, owing, on the one hand, to the shortage of local experts who are experienced in

training and, on the other, to international experts who are familiar with Cambodian law, culture, and needs. There is a lack of sound judicial culture and professionalism in Cambodia's post-conflict situation, and the limited opportunity for role-models to exchange experience of judicial practice between courts. These constraints have created the imperative for RSJP to conduct Training-of-Trainers' programmes. This capacity-building has been useful but has met with varying success owing to its ad hoc nature, the insufficiency of funds to pay trainers adequately, and the lack of ongoing support from donors. While donors have certainly supported ToT, they have seemed reluctant to provide the required ongoing resources and incentives for local trainers, who are otherwise busy conducting their professional duties, to participate and to develop adequate written course materials. So, our experience in this regard has indicated that more extensive donor support is required to develop the capacity-building of local trainers and the development of core training materials in post-conflict situations where these resources have been substantially depleted.

RSJP has now developed a twenty-four-month structured curriculum for initial judicial orientation which aims to develop judicial know-how including skills, knowledge in substantive laws and procedures, and judicial attitudes and behaviour. This programme is still being developed and evaluated, though it is already recognized that there is a need to provide more skills-based curriculum. It is generally agreed that judges must be equipped with many skills in order to dispense justice, in particular, to analyse circumstances, apply principles of the law and deliver judgments which promote and protect human rights. In addition, as the result of conducting a training needs assessment in 2005, RSJP is now launching a programme of continuing legal education for in-service judges, many of whom were appointed in the immediate post-conflict period without the advantage of a formal legal education.

Another feature of the post-conflict situation has been the RSJP's dependence on the assistance of donors. Whilst all support has been of benefit to the RSJP, this support has not however always been coordinated to respond directly to the needs of the school, but rather, to respond to project designs of the development partners. Both management and support staff at the RSJP have little

experience in judicial education, and so have depended largely on the assistance and support of external funding agencies. However, the funding agencies often change their experts and staff, which makes it difficult for the RSJP, as it must deal with newcomers who have little knowledge.

It has also been challenging for the RSJP to coordinate the support of the various development partners, having to figure out what kind of support it needs, when and how such support is required. But it has been very difficult to coordinate that assistance. The training approaches of one donor takes the training in different directions to that of another. RSJP has endeavoured to manage this situation by inviting donors to participate in programme planning at the beginning of each year. RSJP has also needed to coordinate the content of training provided by each development partner. There have been some instances where the content in different programmes overlapped. Trainers from common law and civil law jurisdictions sometimes adopt different training methodologies. In this regard, RSJP's management has provided the trainers guidelines and principles on the conduct of training and some legislative texts which can be used as a reference when developing their training. Evidently, our experience has been that coordinating donor support has required a major focus from RSJP's already sparse resources, which would otherwise have been available for the delivery of training to judges. Perhaps donors could become more aware of these 'hidden costs' for their counterparts?

RSJP has also experienced that it is essential to work closely with other justice sector institutions and courts of all levels. While the government has a plan of actions for reform which is very well prepared, and the strategic actions are clearly identified, the government has not effectively implemented its plan as adopted in the reform strategy. It is noted that there seems to be a lack of persistence and proper coordination in undertaking the plan's actions by the justice sector's leadership. At the time when each institution is striving for self-improvement, it is hard to invite their participation in reforming other institutions. Each institution is more concerned with its day-to-day work, scope of responsibilities, and internal problems, rather than partnering with other justice institutions to reform the sector as a whole. In our experience, this

challenge requires a more coordinated leadership approach to training and development.

2.0 DESCRIPTION OF REFORM EXPERIENCE

2.1 PROJECT CONTEXT

Cambodia's recent history dictates that the rebuilding of the professional competence of the judicial corps is an immediate and major national imperative. As a post-conflict country, Cambodia has been striving to rebuild its judiciary from scratch, because there were only a handful of survivors, estimated at six only, who received legal education before the Khmer Rouge came to power.

In 1982, the Cambodian government established a School of Public Administration and Law for training legal and judicial officers. The graduates of that school have been appointed as judges, prosecutors, or other government officers. The curriculum for the training consisted of three-month or six-month courses on politics, administration, and law. In addition to schooling in Cambodia, some graduates were sent to study in Vietnam or Eastern Europe before being appointed as practising judges and court officers. From 1993 to 2002, judicial education was principally conducted by the Ministry of Justice (MoJ) for practising judges, prosecutors, and court officers.

From 2002, the Cambodian government has implemented its programme for enhancing institutional and individual capacity in the judiciary. It has initiated this by adopting the Legal and Judicial Reform Action Plan. Consequently, the government established the Royal School for Judges and Prosecutors (RSJP) on 5 February 2002.

The RSJP is administered by a director and a Council of Administration comprising of eight senior justice sector counterparts and stakeholders. The RSJP director ensures the daily operation and administration of the school, supported by a secretary general, a training team and department, and a secretariat.

Judicial education is conducted by local and international trainers selected by RSJP from the ranks of experienced judges and law professors. A pool of foreign judges and professors from a number of countries are also contributing to the training at RSJP. They are from France, Japan, Australia, Canada, and the United States, among others.

On 21 January 2005, the Royal Government of Cambodia (RGC) established the Royal Academy of Judicial Profession (RAJP). RAJP is comprised of RSJP and the Royal School of Court Clerks (RSCC). RAJP is currently administered by a president, a director of RSJP and a director of RSCC, and supported by a general secretariat comprising a general secretary, accountants, and secretarial staff.

Currently, RSJP is training the third intake of students and practising judges, prosecutors whereas RSCC has just completed a training programme for practising court clerks. By end March 2008, RSCC will also have recruited students for its first education programme. This paper will however focus on the training of judges rather than examine the experiences of training court clerks as part of judicial education in the Cambodian context, as the RSCC has only recently commenced its operations.

2.2 PROBLEMS/CHALLENGES

It is the first time in the history of the Cambodian judiciary that a professional school for training judges and prosecutors has been established. It follows that not only does the competence of the judiciary need to be rebuilt in Cambodia but, at the same time, the capacity of the training institution needs to be built to perform this role—also starting from scratch.

This has meant that all leaders and staff of RSJP have had to learn to perform their roles, while at the same time providing judicial education to newly recruited students. Therefore, the management and operation of the school depends largely on the innate efforts and commitment of the school leaders along with continued support from foreign experts.

The initial education programme of the RSJP was undertaken by both local trainers and international trainers. On the one hand, local trainers have acquired a great deal of practical experience in their own courts and have good knowledge of judicial proceedings, but did not have adequate experience in training both practising judges and newly recruited students. Consequently, the quality of training was largely compromised. Those trainers who were also legal educators, tended to avail themselves of techniques and tools used for training students at university. They structure lectures to the extent of their own knowledge of existing laws, regulations, and

the practice adopted by the courts, without extensive research for experience from other developed judicial education institutions. On the other hand, international trainers are from different legal and judicial cultures, and may lack detailed understanding of Cambodian law and needs. It has, therefore, been quite challenging for the RSJP to find sufficient satisfactory trainers for both new and existing judges.

Cambodia lacks human resources in the legal and justice sectors. This makes it difficult for RSJP to identify appropriate local trainers amongst practising judges, prosecutors, or lawyers in Cambodia. This is especially the case when seeking to recruit competent and reputable persons to give lectures or organize workshops. There are no permanent trainers at the school. Most trainers are practising judges and prosecutors who are also required to concurrently perform their principal jobs at their own courts. Therefore, the training schedule sometimes needs to be postponed or adjusted when it coincides with the hearing date of trainers. Moreover, the ability of the trainers to prepare their lectures, training materials, and to undertake training is limited.

Additionally, the RSJP faculty does not have adequate access, or tools to, conduct research to develop and improve their training or materials. All trainers are required to prepare their own training materials. The quality and standard of these materials, therefore, very much depends on the education and experience of each trainer. The school has faced difficulties in terms of the technical and financial resources required for standardizing textbooks and training materials to be used by trainers. The budget was insufficient, and there was no clear plan to support trainers to conduct research, prepare textbooks, and to purchase textbooks from other countries. Each trainer would try to develop the content of his or her lecture by using all resources available to them. For instance, trainers may use the precedents or case files that they have personally decided as a case study or using their own lecture-notes prepared for teaching students at university, as a reference. What this means, in practice, is that RSJP is often dependent on 'taking the best it can get' from busy judges and lawyers who are willing to serve as trainers, and this sometimes means that training methods and materials are unavoidably compromised. Maintaining training quality on a day-

to-day basis presents very real challenges for developing countries like Cambodia.

In addition to shortages of know-how, human resources, financial resources, and education tools, there is a serious lack of sound judicial culture and professionalism in Cambodia's post-conflict situation. As a result, there has also been only limited communication, or dispersal of, judicial practice from one provincial court to another, or from higher courts to lower courts. Some jurisdictions in developed areas which have experience in more complex cases and have better trained judges would have higher levels of professionalism than other courts in less developed jurisdictions that have less competent judges. Therefore, the RSJP has often encountered difficulties in identifying sound experience of judicial professionalism from within the Cambodian judiciary as the basis for training newly recruited students.

2.3 ACTION TAKEN

2.3.1 Strict Recruitment Procedures

Being conscious to the above challenges, RSJP conducts strictly competitive recruitment processes with a view to recruiting only highly competent students. The examination is organized in two phases with a view to testing the writing and argumentative abilities of candidates. RSJP organizes written examinations on civil law, criminal law, and general culture in order to test technical knowledge of the candidates, and oral examinations for testing personalities and argumentative abilities of candidates.

To be eligible for examination, candidates must hold at least a bachelor of law degree. The oral examination is the process for interviewing candidates by different juries. There is one Grand Jury, as well as one jury each for: public law; commercial law; labour law; French language; and English language. The members of these juries were appointed by the chairman of the council of administration, and are composed of senior officials from the office of the Council of Ministers, courts, and public institutions. The interviewing test is mainly focused on substantive laws in force in Cambodia.

The final result is attained by the addition of a candidate's final score in the written and oral examinations. So far, it has been observed that successful candidates are from various backgrounds, ranging

from new law graduates, practising or trainee lawyers, officials of the MoJ, court clerks, and staff of non-government organizations (NGOs) and international organizations (IOs).

2.3.2 Development of Curriculum for Initial Education Programme

OVERALL CURRICULUM—As it is the first time for the RSJP to adopt an education curriculum, the RSJP looked into and adopted the model being using at *Ecole Nationale de la Magistrature* (ENM) in Bordeaux, France. The curriculum was initially designed with extensive assistance and support by French judges and experts, with some adaptation to suit the Cambodian context, shaped by the limited availability of materials and human resources.

The ultimate objectives of judicial education are to provide students with know-how which aims to develop the technical skills required for performing judicial work, such as judgment writing, conduct of hearing, interrogation skills, general knowledge in substantive and procedural laws, use of technology, culture, economic and social aspects of Cambodian societies and global events, and promoting judicial behaviour and attitudes which are distinct from other legal professionals or ordinary citizens. This means that judges must be seen as highly ethical, professional, and esteemed people.

DIVISION OF JUDICIAL EDUCATION CURRICULUM—Overall, the new judicial orientation curriculum spans twenty-four months in duration and is structured in five phases. Phase 1 takes approximately two-and-a-half months to finish introductory subjects, such as: the role of judges as determined in national substantive and procedural laws and international instruments; the importance of judges in a democratic society by virtue of the principle of the separation of powers and other principles recognized by a democratic constitution; their places in the judicial structure; etc. The topics include both theoretical and practical matters. When preparing the contents of the topics, it is necessary for trainers to bear in mind that the newly recruited students are law graduates, law lecturers, and legal practitioners such as court clerks and lawyers. They have a variety of different legal and judicial backgrounds, and have already

acquired a certain level of theoretical education at the university or practical experiences in their workplace. Therefore, the trainers must conduct their lectures in a way that allows both types of trainees to learn harmoniously.

The second phase takes approximately another two months, and focuses on teaching substantive laws which, due to their necessity, may directly or indirectly affect judicial integrity. Judges and prosecutors should have acquired an understanding of concepts and relevance in substantive laws which include criminal law, civil law, administrative law, labour law, commercial law, constitutional law, international economic law, media law, land law, human trafficking, and international and regional legal frameworks. The next phase gives students approximately three-and-a-half months to master sufficient knowledge in judicial methods. This phase focuses mainly on procedural law and judicial methodologies. Students are taught civil procedure, criminal procedure, civil and criminal judgment writing, and case management, among other subjects.

Upon the completion of eight months of schooling (Phases 1–3), all trainees are required to undergo an internship programme for a period of twelve months at provincial/ municipal courts throughout the country. The internship programme is organized in collaboration with intern supervisors who are practising judges or prosecutors of the courts where trainees are sent. During the internship, trainees are required to assist their supervisors in relation to the performance of court work, as well as to observe the conduct of court process of other judges and prosecutors. Intern supervisors give guidance on day-to-day court operations, conduct of proceedings, and supervise the intern on work performance, personal, and ethical behaviour. Supervisors may report to the RSJP management during one of their occasional visits, or to the RSJP in Phnom Penh directly. The school's management also follows up frequently with supervisors to monitor the internship and receive feedback regarding the performance of the interns.

The final phase is the specialization phase and takes about four months. Trainees are required to return to the RSJP upon completion of their internship. To assess the outcome of their internship, trainees are asked to make presentations on what they have learned, to their classmates. This phase is also an opportunity for trainees to raise

practical questions and discuss challenges they faced during the internship and seek solutions from their trainers. They may also make recommendations and suggestions to the RSJP's management to improve the education curriculum and methodologies. Consequently, RSJP develops additional education programmes aimed at giving students a specialization as judges or prosecutors. This focuses on substantive laws which are necessary for judges and prosecutors and include forensic investigation, criminology, special criminal law, forestry law, and human trafficking.

By the end of the specialization phase, the RSJP uses the remaining one month to let students have direct contact with the specialized agencies and technical tools available in Cambodia. During this month, the RSJP organizes study trips and excursions to various ministries, courts, UN agencies, specialized IOs, NGOs, law firms, and private enterprises. At this stage students learn to undertake experiments on some matters which require specific and highly-technical skills, including how to handle drug trafficking cases and deal with expert medical witnesses and tests in court.

2.3.3 Development of Continuing Legal Education

Further to the Initial Education Programme above, the RSJP also organizes Continuing Legal Education (CLE), or in-service training, for practising judges and prosecutors. This aims to provide better knowledge of developments in, and evolution of, legislation and related matters. It also provides judicial officers with an opportunity to meet, discuss, and exchange their experiences with their peers from different courts. It is important for the RSJP to conduct CLE as there is no other means of ensuring that Cambodian judges are kept abreast of developments in laws, nor is there an alternate way in which to maintain an acceptable level of professional competence and develop new judicial skills.

Before organizing the CLE, the RSJP proposes particular topics and sends them out to all court houses together with an application form to be filled in by judges and prosecutors who are interested in a particular training topic. The interested judges and prosecutors can fill out the applications by electing their preferred themes before sending the form back to RSJP. Given the rapid development of legislation and related requirements for updating knowledge and

skill for practising judicial officers, it is compulsory for all judges and prosecutors to participate in the CLE programme.

CLE is conducted in the form of lectures, workshops, or conferences on technical, ethical, and cultural topics. The RSJP retains flexibility in the organization of CLE in terms of topics and duration. It has been the experience with most jurisdictions that judges find it difficult to leave their courts for any length of time to undertake the CLE as each court is short of judges to undertake its daily work. Many judges have difficulty in attending the school from the provinces because of transportation and accommodation problems. Therefore, the school invites all interested judges and prosecutors to participate in the training for an appropriate period of time, usually one week or less. In addition, the school takes into account certain prerequisites including: the regularity of court performance and the relevance and necessity of training topics for particular judges.

CLE programmes are mostly led by experienced Cambodian judges and prosecutors as they have insight into the problems of their peers. Themes for training are selected on the basis that they should relate to two or more judicial roles relevant to the roles of both prosecutors and judicial police officials. In this way, training can be made jointly (for example, co-presentation by a prominent prosecutor and a prominent judicial police officer). Themes covered in CLE, include: ethics and codes of conduct; impartiality of judges and prosecutors; sexual crimes and bloodshed crimes; criminal procedure; courts and judicial police; criminal evidence and scientific development; listening to minors' responses; public policy in combating drugs; violence and juvenile crimes; incest and court; civil procedure; divorce; succession; labour law; hearings; Universal Declaration of Human Rights, and the application of the European Convention on Human Rights.

It is generally agreed that judges must be equipped with many skills in order to dispense justice. Judges must be able to analyse circumstances, apply principles of the law, and deliver judgments according to law, which promote and protect human rights.

Cambodian judges are facing numerous challenges due to the rapid development of legislation and the complexity of legal and judicial matters in Cambodia. For instance, in 2003, the RGC and the UN agreed to establish an Extraordinary Chamber within the Courts of Cambodia (ECCC). This court is hybrid in nature,

meaning that its operations and proceedings are governed by both Cambodian and international laws. The purpose of the ECCC is to prosecute the most senior leaders of the Khmer Rouge for the offences committed in the period of 1975–9. Such offences are embedded in either Cambodian laws or international instruments ratified by the RGC. Because of the technicality and complexity of offences and applicable rules, the RSJP has closely collaborated with the administration office of the ECCC to conduct several training sessions in 2004 and 2005 for Cambodian judges and prosecutors on international criminal law, international humanitarian law, and other international human rights instruments.

2.3.4 Training-of-Trainers and Associated Issues

The RGC understands that ToT is imperative for the faculty at the RSJP, and it has sought appropriate support from the French government. French cooperation in Cambodia has commenced its technical and financial support for the preparation of training infrastructure, curriculum, and ToT. By virtue of this assistance, the RSJP appointed its first batch of five trainers to receive further training at the ENM. This was followed by other training. The UNDP has also funded visits of trainers. ToT training was conducted in Cambodia or in development partner countries. The RSJP's trainers made official visits to acquire experience from judicial education institutes in the Philippines and Japan. In addition to overseas training, the RSJP also organized ToT at its premises with the participation of senior practising judges and prosecutors, sometimes with the support of international experts from France or other countries.

None of the trainers at school are full-time, nor do they have dedicated resources—their engagement is very ad hoc. All trainers hold additional positions elsewhere as judges, prosecutors, university lecturers, advisers, and so on. Whilst trainers draw on their experiences in other roles, there is insufficient time for them to focus on their roles as trainers at the school. The school also uses some assistant trainers; they are not formally bonded to the school, are not uniformly instructed, or paid to attend the sessions they have prepared. Overall, their involvement is insufficiently organized and appreciated. Therefore, morale and productivity levels are generally limited.

There are insufficient funds available to pay for more staff and to remunerate existing trainers competitively. As a result, trainers focus on their work at the school less than on other private work. Because of this lack of focus and commitment, there have been numerous incidences of trainers not being able to attend the school to deliver scheduled training sessions. This is disruptive to the training schedule. It also reduces the students' motivation to study, as any preparation they do is wasted, and furthermore, students are then not able to prepare for any substituted session if there is one. There have also been alarming incidents of trainers failing to develop any training materials at all.

According to the assessment in 2005, many of the trainers interviewed recognized the limits of their ability to provide a high standard of judicial education, including the use of modern technology. Generally, they were receptive to the idea of ToT programmes, and a number of ToT sessions were conducted in conjunction with development partners. However, this ToT has remained ad hoc, rather than part of a sustained programme, and has met with varying success for a number of reasons. Domestic and international trainers are extremely busy and do not have time to engage in capacity building as it was not the primary focus of their work. Development partners want to come, deliver their projects and leave. There is some reluctance on the part of domestic trainers to undertake ToT training, but donors are not usually willing to pay for the domestic trainers to participate in capacity building and preparation for training. Consequently, there is no incentive for them to give up their time to fully commit to the training. Additionally, language barriers using international trainers present logistical difficulties.

2.3.5 Development of Training Materials and Resources

Resources available to students generally are limited. There are many instances where students do not have access to current laws. In order for students to make decisions based on law, and for them to be able to take advantage of recent thinking on the law, resources must be made available.

It was noted that in many instances training materials were not made available prior to the training and times were not made

available at all. The students can neither prepare for classes, nor study afterwards. Even when materials are available they are not of a consistently high standard.

To develop training materials, the RSJP entered into cooperation with the Japan International Cooperation Agency (JICA) in 2003. Through such cooperation, the JICA dispatched long and short-term experts to assist the RSJP in the development of training materials on civil procedure and the civil code. There are few reference or resource books available in the school library and most of these are not in Khmer. Moreover, most students do not yet have access to, or are in the habit of using the internet for their research during their study.

The challenge facing the RSJP in relation to the preparation of training materials is to update and improve the content of the training materials used at the RSJP and law universities as there are not sufficient substantive or procedural legal texts. While the RGC is drafting four fundamental codes,¹ the functioning of Cambodian courts is mainly based on the few substantive and procedural rules adopted during or prior to the United Nations Transitional Authority in Cambodia (UNTAC) period (1991–3). There have been incidences where the content and focus of materials prepared for training judges at the RSJP overlapped with that of the law universities. Other times, there have been differences between what is learned at the RSJP and what is taught at the universities on the same subjects. As a result, the RSJP has made a great effort to harmonize its training materials both in civil and criminal matters.

It must also be noted that language is a barrier for students to study and undertake research. Despite the use of Khmer, French, and English being prevalent throughout Khmer society, generally there is a lack of English/French language ability amongst students. All classes, when taught by foreign trainers, must be consecutively or simultaneously translated into Khmer from French or English. The quality of translation work conducted for the school has generally been inconsistent. A great deal of information has been miscommunicated or not communicated. Whilst many of the translators are amongst the best in their field, the field is small and does not have access to international standards of best practice. This reduces and greatly limits opportunities for academic and experimental

development. The school needs a pool of specifically trained legal language facilitators for translating both training materials and the teaching of foreign trainers.

2.3.6 Coordination of Donor Support for Training

A number of development partners have been supporting the RSJP either on a permanent or occasional basis. It is challenging for the RSJP to coordinate the support of the various development partners. The RSJP has had to figure out what kind of support it needs when and how such support is required.

As a newly-established training institution in the post-conflict context, the RSJP faces many challenges, including a shortage of human resources, financial resources, and materials. Therefore, the RSJP welcomes all kinds of support necessary for the proper and smooth operation of the school. Nevertheless, RSJP has prioritized the partner's assistance to focus on the development of human resources (including ToT and support for hiring competent supporting staff) and training facilities (such as books and office equipment).

On a permanent basis, French cooperation and the JICA have dispatched long-term experts to assist the RSJP in producing training materials, conducting training, advising on preparation of curriculum, and coordinating other technical and financial support to the RSJP. Occasionally, AusAID, GTZ, the European Commission, the United Nations for Children Funds, the UNDP, East-West Management Institute, and the ILO also provide support to the RSJP. This assistance has been in the conduct of training on specific topics such as: gender issues, intellectual property rights, code of judicial ethics, human trafficking, drug trafficking, human rights, and labour law.

The RSJP plays a crucial role in coordinating the partnership with these development partners. RSJP works with French cooperation in relation to training on criminal code and code of criminal procedure and with the JICA in respect of the training on civil code and code of civil procedure. In addition to these long-term partnerships, at the beginning of each academic year, the RSJP confirms with other development partners their continued assistance. Such participation supports training on particular topics based on the partners' specialty and the main areas of

activity. The allocation of time and topics for training is then determined by taking into account the actual needs of the judiciary, the availability of the resources for training on a particular topic, and appropriate scheduling of programmes with a view to ensuring the quality of that training.

Another challenge for the RSJP is to coordinate the content of training provided by each development partner. There have been some instances where the content in different programmes overlapped. Trainers from common law and civil law jurisdictions sometimes adopt different training methodologies. In this regard, the RSJP's management requires trainers to provide the content of their lectures or talk notes in advance. In this way, it can be ensured that the training is not too difficult for students to follow, and that it is appropriate for RSJP's students taking into consideration their capacity and the legal and judicial system of Cambodia. Often, the RSJP provides the trainers with guidelines and principles on the conduct of training and some legislative texts which can be used as a reference when developing their training.

Whilst all support has been of benefit to the RSJP, support has not always been coordinated to respond directly to the needs of the school, but rather, to respond to project designs of the development partners. This has meant that assistance has been piecemeal—lacking a holistic approach to building the capacity of the RSJP to become a sustainable institution which can produce efficient judges.

Based on the needs assessment in 2005, there is a need for better donor coordination to ensure that duplication of support does not occur, and so that no development gaps are missed. Furthermore, the reality in Cambodia is that it is difficult to gain the trust of students and trainers alike. Consequently, when donor-consultants come to the RSJP for short periods of time, the success of their intervention is limited by the brevity of their visit.

Although the school is receptive to many forms of donor assistance it has found it difficult to meet the narrative and financial reporting obligations that this form of support imposes. Donors, however, have also set neither a high standard nor a consistent precedent. On numerous occasions they have failed to supply the school with reports about work undertaken with or for the school.

To reduce these difficulties, the school invites all development partners who are interested in judicial training to brief them about their planning and invite their participation in the RSJP programme at the beginning of each schooling year. Each development partner is allocated a specific subject. For example, GTZ provides training on domestic violence, UNICEF on child rights and protection, ILO on labour law. Nevertheless, to effectively coordinate work in such an environment, there must be a team with acquired knowledge of various legal and judicial cultures (for example, civil law, or common law).

2.3.7 Coordination of Relevant Government Agencies for Training

The RGC understood that it is imperative for all relevant government agencies to participate and coordinate amongst themselves to implement its judicial reform programme. Consequently, when establishing the RSJP, it appointed a council of administration comprised of all leaders of relevant justice sector institutions. The chairman of the council is the co-president of the council for legal and judicial reform. Its members are the minister of justice, president of appeal court, president of Cambodian Bar association, director of RSJP, Director of RSCC, representative of SCM, a member of council of jurists. This indicates that all relevant actors in the justice sector or executive have roles to play in judicial education in Cambodia. With their concerted collaboration and effort, it will be possible to enhance the capacity of Cambodian judges and their effectiveness in rendering justice. To this end, the RSJP director plays a large role in coordinating with other government agencies in implementing its judicial education programmes.

2.4 OUTCOMES

To improve the quality of training, the RSJP has insisted on professional practices to cover a major part of the curriculum. In addition, it has opened a library and established a website. Improved communication has been established with the courts receiving interns by systematically providing court presidents with information and instructions relating to these internships.

TABLE 5.1: RSJP TRAINING CURRICULUM

<i>Criminal Law</i>	<i>Hours</i>
Prosecution	30
Investigation	30
Methodology of judgment	30
Criminal cases study	15
Simulation 0	15
Total	120
<i>Civil Law</i>	<i>Hours</i>
Comparative study of drafts of Civil Code and Code of Civil Procedure with civil law in force	30
Preparatory procedure (oral argument)	15
Hearing and judgment writing	15
Roles of judges in land dispute law	15
Intellectual property rights	15
Civil cases study	15
Simulation	15
Total	120
<i>Conferences</i>	<i>Hours</i>
Khmer society	40
Social science	40
Legal and judicial reform	30
Human rights	30
Legislative evolution	73
<i>Sub-total:</i>	<i>213</i>
English	96
French	96
Computers	75
Total	267
Total: (120+120+213+267)	710 / 8 months

Source: Royal School for Judges and Prosecutors.

In addition, the RSJP has conducted a judicial needs assessment to contribute to a reduction in corruption in the justice sector; appointed some graduates of the first intake to join the school; established a working group to prepare teaching materials; launched

a policy to attract and keep the trainers; coordinated with the Supreme Court to obtain its assistance to resolve certain principal legal issues; and published a quarterly school leaflet which contains a schedule of activities or other information, which is of interest to the judges and prosecutors.

2.4.1 Improvement of Curriculum

With the concerted support from experts, development partners, and Cambodian trainers, RSJP has been able to finalize a relatively comprehensive training curriculum as outlined in Sections 2.3.2 and 2.3.3. The curriculum is modelled on the French judicial education system. It was developed by selecting and allocating time to subjects according to what had been successfully undertaken in France, and what was considered would be useful in Cambodia. As Cambodia is a post-conflict society with very limited resources, this has resulted, on occasion, that training priorities had to be set quite pragmatically. This sometimes required difficult decisions to be made about which topics are taught. For the training of the first batch of students, the RSJP adopted the subjects and time allocations as shown below (Table 5.1).

Although the RSJP tries to adhere to the pre-established training subjects and time their allocations, it remains flexible in relation to the adjustment of these depending on the availability of trainers and budgets. The RSJP also occasionally tries to take advantage of the availability of prominent foreign and local trainers who can give a presentation about a specific topic relevant to judicial practice, social issues, or judicial behaviour.

2.4.2 Improvement of Training Resources

EXPANSION OF SCHOOL BUILDING AND INFRASTRUCTURE—The RSJP is located in the same campus with the Royal School for Administration. The RSJP's building originally consisted of six classrooms. After renovation, it now has three classrooms, five offices, one computer room, and one extra-room. These classrooms cannot accommodate more than fifty-five students.

In 2004, with financial assistance from GTZ, the RSJP was able to build a dormitory for female students containing a library and conference hall. In 2007, with additional financial assistance from

the Japanese government, RAJP constructed a four-storey building for training judges, prosecutors, court clerks, and lawyers. The school is now fortunate to be well equipped with the infrastructure, furniture, and tools required for training and administration.

DEVELOPMENT OF TRAINING MATERIALS—The legal framework in Cambodia is evolving. When the RSJP was established, Cambodia lacked both substantive and procedural laws. The two fundamental codes (code of civil procedure and code of criminal procedure), which ensure due process and a fair trial were still in draft form. Therefore, the content of the training is progressively adjusted to include both existing procedural law and practice and new principles which will apply after the adoption of these two codes.

Late in 2007, several resources were approved as standard training materials to be used for training students once the codes of civil and criminal procedure are adopted. The training materials on the code of civil procedure were prepared in collaboration with Japanese lawyers and judges, whereas materials on code of criminal procedure were developed with French cooperation. In addition, the RSJP avails itself of the skills and experience of new graduates and local trainers of the school by forming a working group to develop training materials. As a result, the prepared training materials are considered to be standardized and useful for present training needs.

UPGRADING TRAINING TECHNIQUES AND METHODOLOGIES—According to the needs assessment in 2005, students interviewed were not familiar with critical thinking and analysis methods. Students also needed more time to reflect and undertake research, which is not possible within the confines of the current curriculum. Lecture-based training is not adequate for students to acquire necessary skills and knowledge for the practice of being a judge and prosecutor.

Therefore, the school has improved its training methodology by providing a mixture of participatory and interactive methodologies. These encourage students to apply their knowledge in a practical way rather than analysing it theoretically. For example, the school has now organized a mock trial scenario in both criminal and civil cases.

Prior to the period of UNTAC in 1991–3, a number of those serving as judges and prosecutors were trained in Vietnam and former Soviet bloc countries. Between 1994 and 2002 the Ministry of Justice had the principal responsibility for judicial training. In 2002 the training of judges and prosecutors was made the responsibility of the RSJP, now part of the RAJP (itself established in 2004). In 2005, the RAJP graduated its first class of 55 judges and prosecutors. At present there are 227 judges and prosecutors actively at work in Cambodia. It is the first time in Cambodian history that judges and prosecutors are properly trained by a Cambodian judicial education institution. These graduates carry with them knowledge and skills to practise their judicial profession, which they will contribute to the development of the judiciary in Cambodia. In other words, justice is better served to the people.

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

Since its establishment, the RSJP has made tremendous efforts to work hand-in-hand with government agencies and development partners in order to mobilize partnerships and funds required for the implementation of judicial training. The progress and development of the RSJP/RAJP training programme and other activities very much depend on the concerted efforts of all stakeholders.

The RGC is strongly committed to supporting the initiative taken by the council of administration. The council is well aware of the legal and judicial situation in the country, and they have the great responsibility of organizing and implementing the judicial policy in an appropriate way in line with the national reform agenda of the RGC.

The success of judicial education at RSJP does not entirely rely on the commitment of the judicial leadership. The funding agencies such as French cooperation, JICA, GTZ, AusAID, UNDP, ILO, UNICEF, EWMI, USAID, have also greatly contributed to this success. These organizations provide financial support and expertise to assist RSJP in establishing its training programme, teaching schedule, and ToT. The knowledge and skills learned from foreign

experienced legal professionals and judges by the RSJP's students and local trainers has been extremely useful.

The RSJP has implemented a strict recruitment procedure. Although the quality of legal education provided at universities would not possibly meet international standards, the RSJP was able to recruit highly capable law graduates from state and private universities through a competitive examination process. Some students have obtained masters degrees in law from internationally recognized universities in other countries. Students are talented and capable of learning and acquiring new professional skills necessary for the practice of being a judge. They have demonstrated their competence through presentations, argumentation at mock trials, and written and oral examinations. The quality of students contributes largely to the success of judicial training at the RSJP.

The RSJP's management and supporting staff have also played crucial roles in assisting the administration of the school. They support the faculty with their preparations, communication with students, translation and distribution of documents, coordinating with different funding agencies, and liaising with government agencies. Their continued commitment (despite low pay) has also contributed to the success of the institution.

The commitment and contribution of the faculty also contributes to the success of the RSJP. They are very busy with their work in the courts, and the RSJP is unable to provide competitive pay commensurate with what they may earn from other work. They are, however, willing to do research, prepare their lectures, and teach regularly at the school. Some of them are very senior judges, court presidents, and high ranking officials of the MoJ. They have greater responsibility in their workplace but are enthusiastic about teaching students at the school.

It must be noted that both existing judicial officers and new graduates from the RSJP are conscious about the reform of justice. Through the school's activities, they have become aware of the challenges and problems faced by their jurisdiction. Many have, therefore, adopted pro-reform behaviour, and some are open to changes so that the needs of the court users can be met more effectively.

3.2 CONSTRAINTS TO IMPLEMENTATION

Although the RSJP/RAJP has successfully implemented its judicial training programme to a large extent, the state of justice in Cambodia is only gradually improving. There are several identifiable constraints to the implementation of the RSJP's education programme.

The RGC has committed itself to reforming the judiciary and supporting the judicial education programme of the RSJP. Financial support from the RGC to allow the judicial education institution to function well is, however, not sufficient. The RGC needs to increase the budget for RSJP so that it can hire competent staff, facilitators, and provide competitive salaries to experienced trainers. With sufficient support, the RSJP would be able to have permanent local trainers, and produce proper training materials. With permanent faculty, it would be much easier for the school to provide ToT and other training for trainers on substantive law and teaching methodologies. They would also be able to focus exclusively on their teaching responsibilities with a view to improving the quality of judicial education at the school.

Both management and support staff at the RSJP have little experience in judicial education. They depend largely on the assistance and support of external funding agencies. However, the funding agencies often change their experts and staff. This makes it difficult for the RSJP, as it must deal with new-comers who have little knowledge of the needs and operation of the school. In some instances, the funding agencies have attempted to impose upon RSJP to accept their project design which is not realistic or relevant to the needs of judicial education in Cambodia. At times, however, the school has had to accept their proposals in order to maintain a good relationship and to gain support for other activities.

In 2006, the fifty-five graduates of first class were appointed to work at provincial and municipal courts across Cambodia. They face numerous challenges when working with other practising judges and prosecutors, both during their internships and after their appointment to a court. Most are young graduates, while their fellow judges and prosecutors are elder, senior, or superior. These senior colleagues do not often welcome the initiative of the younger graduates, and often they cannot change their established practices. Most senior judges and prosecutors have not received a proper legal education. Their

knowledge and skills are not up-to-date with the rapid developments of legislation and judicial practice. This situation has prevented newly appointed judges and prosecutors applying their knowledge and skills to improve justice in Cambodia.

It is also important to put in place an effective monitoring and evaluation mechanism for evaluating trainers, school personnel, students, and subsequently the performance of practising judges and prosecutors. The RSJP/RAJP has conducted some monitoring on the performance of students during their schooling and internship. There is, however, no concrete plan for evaluating the performance of trainers and practising judges and prosecutors. The experience in Cambodia has been that it is not appropriate to conduct the evaluation of trainers or judicial officers by students or people less senior to them. That notwithstanding, without such evaluation mechanisms, the effectiveness of judicial education may be reduced.

Judicial officers at all court levels are not properly trained before being appointed to take on their work. They have adopted a practice by making the best of what they have and only do what they feel comfortable with in performing their functions. They lack substantive knowledge in conducting research. Judicial officers also have a large amount of freedom to adopt their own work practices. Furthermore, these are not often reviewed or scrutinized by the MoJ or the SCM. Moreover, it seems that the education currently provided by the RSJP does not adequately focus on changing attitudes or cultivating a culture of professionalism. It is generally observed that there is a lack of culture of judicial professionalism in the Cambodian judiciary because such culture would have been destroyed by chronic civil war for the last two decades and most judges and prosecutors are new to their task.

In preparing the Plan of Action and implementing the prioritized actions, RGC in 2001 established the Council for Legal and Judicial Reform (CLJR.) The CLJR was given the mandate to initiate and encourage the implementation of the Legal and Judicial Reform Policy and Programmes. The council is supported by a Permanent Coordinating Body (PCB) made up of the key line-ministries and institutions of the justice sector, and is in charge of relations with political-level stakeholders to ensure their ongoing commitment

to the reform process. The CLJR and PCB have however not been as persistent and effective as they should be, and their actions have often been confined by the available human resources and budgets, as well as the level of collaboration that relevant ministries and judicial institutions are able to provide. Although the plan of action for reform is very well prepared, and the strategic actions are clearly identified, the RGC has not effectively implemented its plan as adopted in the reform strategy. It is noted that there seems to be a lack of persistence and proper coordination in undertaking the plans' actions by the justice sector's leadership.

The reason for this is that the CLJR/PCB has no hierarchical authority over other stakeholders in the reform process. Their role is mainly as a collector of information and as a forum for issue-raising. It has no authority to implement the ideas developed or resolve issues raised by other reform actors. Further, the Supreme Council of State Reform has made some decisions on improving the judiciary; however, the implementation of these decisions has been slow. Reforms have been less effective than they should be due to a lack of interest and commitment on the part of key reform actors. In addition, there is a lack of effective communication and other implementation mechanisms to operationalize the reform policy developed by RGC agencies throughout the court system. Consequently, despite the RSJP having greatly improved its standard of judicial education, its contribution to the improvement of justice in this country is still minor at this early stage, in light of these significant strategic constraints to reforms in the justice sector as a whole.

At a time when each institution is striving to improve itself it is hard to invite their participation in reforming other institutions. The experience has been that each institution is more concerned with its day-to-day work, scope of responsibilities, and internal problems, than about partnering with other justice institutions to reform the sector as a whole.

3.3 KEY QUESTIONS AND KNOW-HOW

Constraints and challenges in providing judicial education are still large. Historically, Cambodian governments have regarded the justice sector as a low priority compared with development

of other sectors. This prioritization would also be the case in other post-conflict countries where political stability and national reconciliation would be higher priorities. However, whilst technical and financial resources are lacking for the rebuilding of the judiciary, Cambodia can manage those constraints and challenges by making the best of what it has.

It is now necessary for the government to further firmly commit itself to the improvement of the justice sector. The judicial education cannot be effective without strong support and commitment from the RGC and other justice sector leadership. The RGC has expressed its desire to increase the number of judges and prosecutors from 227 to approximately 500 in the whole country—to more than double the judicial population. To make this possible, the RSJP/RAJP will continue its mandate to train newly recruited students and practising judges and prosecutors. Facing new and rapid development in judicial practice, social change, and newly passed legislation, the RSJP/RAJP will continuously revisit and review its existing curriculum, improve its training facilities and methodologies, and consider its role in improving justice in the country.

As for the training curriculum, according to the need assessment conducted in 2005, it was mentioned in the interviews conducted that most lectures focus on substantive legal areas. This was despite many students not understanding the basic principles applicable to the skills and disposition required of a judge. Therefore, it is recommended that the school should focus on the development of judicial skills (legal research, decision-making, and judgment writing) and disposition (professional attitudes and judicial values) in addition to substantive law topics.

This means that the curriculum must include both theoretical training on the different areas of the law, as well as instruction to develop practical skills such as advocacy techniques and how to draft various documents including judgments. The needs assessment conducted in 2006 also made similar findings. As a result, it is intended that a skills-based curriculum should be developed including the following skills: critical thinking; legal research and analysis; decision-making; legal writing; interviewing; examination of witnesses; collecting, preserving, and weighing the importance of evidence; investigating a case; managing a trial; and

alternative dispute resolution. Such skills, even without in-depth knowledge of certain substantive legal areas, will enable students to find an answer to the matters before them in court based on fact and logic.

As for its faculty, the RSJP/RAJP will need to involve more local trainers and international experts who have practical experience in legal and judicial training. Experience shows that it is preferable to have a pool of permanent experienced trainers at the RSJP who can fully commit themselves and focus their efforts on preparation of materials and training. To do this, the RSJP would need to increase its budget and provide more support to trainers including legal assistants, translators, textbooks, and other materials necessary for training. Without reasonable and competitive pay and support, it is hard for the RSJP/RAJP to engage experienced practising judges and prosecutors to work extensively for the school.

It is important for the RSJP/RAJP to continue to set up and implement effective mechanisms for monitoring its performance and evaluating its impact. In addition to the needs assessments for the training of students, the RSJP will need to consider an evaluation (in conjunction with other relevant judicial leaderships) on the performance of its graduates in undertaking their work at court. Performance assessment would need to include the working relationship with their fellow judges and prosecutors, their contribution to the improvement of the existing practice of the courthouse, and their relationship with other court users. Without a proper mechanism, the contributions of the RSJP/RAJP to the improvement of justice in Cambodia will merely be confined to an annual increase in the number of judges and prosecutors.

With a view to improving the effectiveness of judicial education and the state of justice, it is essential that the RSJP/RAJP works closely with other justice sector institutions such as CLJR, MoJ, SCM, and courts of all levels. More discussions and debates should be conducted in order to identify challenges and issues facing the judiciary so that all relevant stakeholders can consistently and coherently participate in judicial reform activities. Through this, justice will be better served to the people of Cambodia.

The RSJP/RAJP will also need to continue its leading role in coordinating and mobilizing all technical and financial support

from development partners and other stakeholders. With their support, the RSJP/RAJP can expand and accelerate its activities in educating judges and prosecutors as well as participating in other public interest activities. Such partnerships will enable the RSJP/RAJP to include relevant regional and global experiences in the development of its judicial education programme. In this regard, the RSJP/RAJP should seek to extend its collaboration with other regional judicial education institutes, for example, in the Philippines and Australia.

NOTES

1. These are: a civil code; a code of civil procedure; a criminal code; and a code of criminal procedure.

The Nepal Experience

ANANDA MOHAN BHATTARAI

1.0 KEY MESSAGES

Emerging experience in Nepal has shown that judicial education is foundational to promoting standards of justice and has helped the courts of Nepal to address a number of challenges that have arisen from within the justice system and outside it in the post-conflict environment. Internal challenges include the concept and definition of ‘justice’, judicial culture, and related issues of impartiality, competence, efficiency, and effectiveness of judicial officers. External challenges are caused by emerging international economic, human rights, and legal orders. In recent years, judicial education has enabled better identification of the challenges that face the judiciary, better consideration of what steps should be taken to meet those challenges, and the development of skills and dissemination of knowledge at all levels of the judiciary. Given that Nepal is in a historical transition from conflict to peace and from authoritarian rule to democracy, we have found that judicial preparedness for its role in transitional justice is imperative. Embracing an expansive concept of justice, judicial education has assumed a dynamic role in helping Nepal’s transitional society to secure a just, humane, and peaceful order, and is already actively instrumental in promoting standards of justice.

The Nepali legal and judicial system is at a unique confluence where common law norms are blended with local legal tradition and where international and domestic legal systems closely interact. While it is still too early to evaluate Nepal’s experience in training judges, a number of lessons are already emerging based on available anecdotal evidence. Judicial education in Nepal is a very recent

experiment where many lessons are yet to be learnt. It is, however, an interesting case study on the subject.

First, constraints imposed by the shortage of resources have required the National Judicial Academy of Nepal (NJA) to plan and act strategically and to focus its resources selectively on addressing agreed priorities in order to avoid being stretched too thinly. This has meant that some difficult decisions have had to be taken on what needs can and cannot be addressed from the outset. Because of resource shortages, the existing mandate of the NJA includes lawyers and para-legal staff. In our experience, however, this is too broad. It creates major difficulties both in preserving credibility and the semblance of judicial independence, and in meeting divergent training needs effectively.

Next, the capacity of training institutions to perform these roles also needs to be developed. In order to act as reform vehicles, judicial education institutions must be effective and efficient. A focus on developing the internal capacity of an institution's management staff and faculty and strengthening of related recruitment and appointment policies is critical. Additionally, strengthening of research capacity is required. Research capacity supports initiatives to maintain and improve the quality of education, and enables policy makers to make informed interventions with the broader objective of promoting improvements in the delivery of justice.

Developing the capacity of the NJA to meet the judiciary's needs has required a number of special measures in institutional capacity-building. These have included faculty development and ToT, which has built on established principles of adult learning. Undertaking a systematic training needs assessment (TNA) has also been an essential investment in identifying how the programme can assist judges to perform their roles better.

Training programmes should address local needs, as when informed by considerations of local needs, judicial education can empower judges and the other pillars of the justice system to design strategies and systems that better protect basic human rights in a particular context. This then, leads to the realization of constitutional aspirations of ensuring justice for the people, and promoting standards of justice in society.

In addition, we have found that judicial education institutions need to be sensitive to the interests of all stakeholders. When designing the institutional structure for introducing judicial education policy makers should take note of the challenges faced by the justice system in a particular country; identify actors involved in the system; assess the knowledge, skill, and behaviour related needs within the system; and bring together the various actors in the justice sector to a common forum. In this way, a suitable legal and institutional framework can be developed for judicial education. Functionally also, training institutions should represent the interests of all stakeholders. The primary goal for judicial education is the competent, fair, credible, and expeditious dispensation of justice.

Education programmes provide knowledge, skills, and outlooks which are critical for continuous improvement and reform. This brings to the fore issues of ethics, integrity, and accountability without which the judiciary is not worthy of public trust. The skills that the participants acquire help them to engage in continuous reassessment of the effectiveness of the system and consideration of how it can be improved. Thus, judicial education should be guided by a vision of continuous capacity enhancement which extends beyond the post-conflict situation.

Where training is initiated through donor assistance, we have found that active steps are required to develop genuine local leadership and ownership of the programme and understanding of its practical benefits for judges as not being imposed from outside. In Nepal's case, we have been fortunate in the leadership provided by the Supreme Court in steering the training programme and in seconding high-calibre personnel to ensure its success. As the programme grows, so does its credibility and the confidence of the judiciary in its usefulness. In due course, it is hoped that a methodical process for monitoring and evaluating judicial training will be introduced with the benefit of donor assistance.

Programmes should be monitored and evaluated to ensure they deliver results. A critical element of judicial education is the establishment of effective monitoring and evaluation systems. Judicial education and related strategic interventions must be progressively reviewed and monitored to ensure that they

successfully contribute to broader justice reform objectives and promote the public's trust.

There is a need to develop a close and mutually respectful partnership. Developing countries need the assistance of donors. This is no less true of judicial education institutions in these countries. The latter, however, should be allowed to develop and evolve their own agenda. Donors truly help when they allow judicial education institutions a degree of autonomy in setting out priorities and carving out plans to achieve them. For their part judicial education institutions profit considerably from suggestions donors and partner-agencies may have in respect of programme content and delivery.

The effectiveness of judicial training is partly dependent on the coordination and commitment of other government agencies. Developing countries face numerous challenges in terms of resources and clear separation of the scope of involvement. To address these effectively, there is a need for all relevant government agencies to coordinate amongst themselves with their limited resources. The government must ensure that resources are available to perform this function. This, in conjunction with close collaboration with other pillars of the justice system, can enable and empower judicial officers in their pursuit of delivering justice in an efficient and effective manner.

The need for judicial education is gaining importance in every country, with the effect that programmes in developing countries can learn from regional/global experience. These programmes must be guided primarily by local domestic needs and planned in a country specific context. However, as legal systems are influenced by growing internationalization—of human rights values, and emergent international norms of trade, commerce, and services—insulation and compartmentalization of domestic legal systems is slowly becoming a matter of the past. Every country, while developing policy, approaches, strategies, and methodologies for judicial education based on the local context, can learn from comparative, regional, and global initiatives. Synergistic relationships can be developed with an increasingly globalized world, supplementing national efforts through the cross-fertilization of ideas.

2.0 DESCRIPTION OF REFORM EXPERIENCE

2.1 PROBLEMS/CHALLENGES

Nepal is a small, poor, and conflict-ridden country in the Himalayan region of South Asia trying to shape its constitution and improve its justice system in a political environment undergoing massive change.¹ The first democratic constitution of 1990 and the Interim constitution promulgated in 2007 aspire to establish an independent and competent system of justice. But securing justice for the people and promoting standards of justice in all walks of life has been a continuous challenge in Nepal. The judicial system seems to be afflicted by a series of problems such as deficient laws, delays, and procedural anomalies giving rise to docket congestion in several courts. The lack of research supporting judicial reforms and deficiency in communication, and collaboration among various actors and scarcity of financial resources has impeded the effectiveness of the system. The low morale of the judiciary created by the decade-long conflict and continuing suspicion about its impartiality, integrity, and fairness have further compounded these problems.

It is not very long ago that the judicial leadership in Nepal began to give serious attention to systemic, legal, and human resource related problems. The judiciary began to introspect and inquire into the management aspects in the courts in the late 1990s,² when it drew up a comprehensive Strategic Plan (2004–8). It also took the initiative to establish the National Judicial Academy (NJA) in 2000, and the institution was formally established in 2004. In the following discussion, we will examine a number of challenges that surfaced prior to and following the establishment of the NJA in Nepal.

2.1.1 End of Initial Asian Development Bank Support Phase

The initiative to establish the NJA was taken in 2000 under the Asian Development Bank (ADB) funded project titled 'Corporate and Financial Governance'. The project team was appointed in July 2002 to establish the NJA. A range of good initiatives were undertaken by the ADB project team with active engagement of

the three judges drawn from the judiciary, including: ToTs' training to develop the front line faculty, training need survey and analysis (TNA), development of curricula in a number of sectors, preparation of a draft *NJA Act*; and over 30 training programmes for judges, judicial officers, government attorneys, government legal officers, and private law practitioners. The ADB support ended before the NJA could fully establish itself.³ This was a serious constraint, as the establishment of a competent judicial academy for handling institutional, legal, and human resource related issues was difficult, if not impossible, only from the government resources.

2.1.2 Identification of the Target Community

In order to impart judicial education to all major actors of the justice system, unifying reform initiatives under one umbrella made rational use of scarce resources and avoided duplication. It however, necessitated the clear identification of the target community for the institution's activities. In Nepal, judicial power is exercised by a multiplicity of actors including the courts, tribunals, and other quasi-judicial bodies. For capacity building of the justice sector institutions a well-coordinated plan and programmes were necessary.

When the groundwork for the establishment of the NJA was being laid, institutions such as the Police Academy, Judicial Service Training Centre (JSTC),⁴ and Nepal Administrative Staff College were providing training to the police, officials of the judiciary, government attorneys, and officials of the quasi-judicial bodies respectively. There was, however, no training centre for judges and practising lawyers. Therefore, the question facing policy makers was; *who should be included in, or excluded from, the target community of the proposed NJA?* Training of judges by a wing of the Executive was repugnant to the very idea of judicial independence, but creation of multiple training institutions was neither desirable nor feasible in a resource-starved country.

2.1.3 Objective and Focus of Judicial Education

The objective and focus of judicial education is primarily determined by the pre-existing knowledge and skills in the target community. If the community had a sound academic background in law then the obvious focus would be the 'how' (skills), rather than the

‘what’ (substantive) aspects of law. In Nepal, all the judges and an overwhelming number of judicial officers and government attorneys have a law degree and some professional exposure either in the Bar or in the court system prior to assuming judicial duties. However, the poor quality of legal education had a serious impact on their performance. Besides, many para-legal staff of the courts involved in the processing of case files did not possess any law degree. Therefore, properly balancing knowledge, skills and behaviour-related inputs, and adopting the right methodology in judicial education were critical questions to be answered.

2.1.4 Judicial Education in a Deficient Legal Environment

Even though Nepal has experimented with many constitutions over the last 60 years, little attention was given to a comprehensive review of laws. The *Muluki Ain* (national code), a 150-year-old legal code, with patchy amendments, continues in force today and is applied to decide civil, criminal, and family disputes. This code has a very narrow canvas, for instance, there are no laws in many areas such as disappearance, abduction, extortion, criminal assault on property, organized crimes, sexual harassment, marital rape, and domestic violence.⁵ Similarly, the victims of the crimes are poorly attended to by the criminal justice system. There is no comprehensive law on compensation which could be applied to civil wrongs and other disputes where the payment of compensation or costs to the winning party is required. Procedural anomalies, obsolete provisions of law, and the absence of adequate and justice-oriented laws often put the justice system in peril.⁶ The frequent grant of amnesties breeds impunity. Where laws are at fault, it is difficult for judicial education initiatives to achieve desirable results.

2.1.5 Research and Judicial Education

Research is a necessary concomitant of judicial education and judicial reform. Prior to the establishment of the NJA there was no culture of conducting research on law and justice-related issues where reform was necessary. Even though the Supreme Court of Nepal (SCN) had established a research division, its activities were confined to the preparation of annual reports. The Law Commission, due to

structural and financial constraints, was virtually non-functional and research at the university and at the non-governmental level was sketchy. In such a situation it would be very difficult for the NJA to launch effective education programmes without conducting systematic research in law and justice areas to assist the courts in imparting efficient and effective justice.

2.1.6 Institutional Challenges

Policy makers have faced challenges in developing an appropriate institutional framework, facing issues such as: who should lead the NJA? How and from where should its faculty be drawn? Should the institution have a permanent faculty? Could the NJA rely on judges and officers drawn from different wings of the judiciary on secondment and create a wider pool of extended faculty who could be invited to the NJA as and when necessary?

As judicial education was a new area for the judiciary, there was no pre-existing local experience.⁷ There were no judges or officers with a management degree or background who could look after training management or generate resources for the institution's sustainability. Infrastructure development was another serious challenge especially following the end of ADB support for the NJA. Unless the NJA received liberal investment, it would not be possible for it to develop its own infrastructure and manage its logistical requirements.

2.1.7 Overview of Demands

This refers to both internal and external demands, namely; *how should the NJA respond to the internal demand for capacity building and external demands for effective justice?* The internal demand could be catered for by conducting periodic TNAs, developing curricula in line with the new findings and conducting training accordingly. However, *how would the NJA respond to issues such as access to justice or the issues relating to fair and impartial, and effective justice that the society demanded?* In a society with barely 48.6 per cent literacy,⁸ huge poverty, and marginalization of every sort affecting women,⁸ Dalits,⁹ and other minorities,¹⁰ access to justice was a very serious problem. Then there are the demands created by the emerging international legal and economic order which the NJA also needed to address.

2.1.8 Enhancing Public Trust through Judicial Education

The judiciary in Nepal was maligned by a series of allegations of irregularities. The image of the judiciary was, and is still, low in the public eye. Besides, many judges also had a low self-image created by internal conflict and the resultant inability of judicial institutions to deliver justice. Unless all the responsible organs collaborated: to address ethics and accountability issues; to free the judiciary from actual or alleged perceptions of corruption; to improve the judiciary's legal and institutional frameworks; and to help the judiciary deliver impartial, efficient, and effective justice, it would be difficult to enhance public trust in the justice system in Nepal only through judicial education.

2.2 ACTION TAKEN

In a situation where the system of justice is mired in an array of problems, the challenge before policy makers deliberating on judicial education was to thresh out the mandate for the NJA, determine its institutional structure, and create sufficient autonomy. It was also necessary to ensure that the newly created institution interacted and collaborated with the justice sector and other actors both within and outside the country. Only in this way would it be possible to develop synergies for judicial reform through the capacity enhancement of the judiciary's human resources.

In view of the above, the NJA was created as an autonomous statutory body.¹¹ It had a two-tiered management structure comprising a sixteen-member Governing Board and a five-member Executive Committee. While the Chief Justice chaired the Governing Board,¹² the Executive Director, who was to run the day-to-day business of the NJA, headed the Executive Committee. As per the Act, the Executive Director was to be either a sitting or retired judge. The *NJA Act* provided for the representation of all pillars of the justice sector in the Executive Committee.¹³ The objectives of the NJA are: to work towards enhancing competence and professional development judges, government attorneys, court officials, and other officers of the Nepal judicial service and private law practitioners by developing programmes of judicial education; to undertake research in areas of law and justice; and to establish a legal information centre.

The NJA was created not just as an institute for judges and court staff, but also for government attorneys, judicial officials, government legal officers, and private law practitioners. In other words, it was called upon to meet the capacity enhancement needs of: 256 judges working in different tiers of the court; 314 court officers; 3,000 other para-legal staff; 238 government attorneys; 130 government legal officers; and over 10,000 private practitioners in Nepal.¹⁴ Further, the NJA was also required to work towards enhancing the efficiency and professional skills of personnel performing legal tasks in quasi-judicial bodies.¹⁵ The Act created the possibility for the NJA to bring major justice sector actors under its banner and to work continuously for their capacity enhancement in a coordinated manner. Major activities undertaken by the NJA in the last three years are summarized below.

2.2.1 Faculty Development

In line with the idea of not creating an empire, the NJA now works with a small core faculty and a wider pool of extended faculty. The core faculty consists of three Court of Appeal justices, one senior government attorney, and a District Court judge. There are also at least three officers who work as their assistants. Since the end of the ADB project, the NJA has provided ToT on adult learning skills, preparation, presentation, facilitation, use of learning tools, and allied subjects to over 160 judges, government attorneys, lawyers, and other officers of the justice sector. Besides, it has imparted training on curriculum development to 36 persons, and content-based ToT on gender justice, ethics and accountability, and evidence and constitutional law to 62 persons.¹⁶

For faculty development, the NJA also received, in 2007, a small grant from the AusAID Public Sector Linkages Programme, under which two of its faculty went to The University of Queensland and participated in content-based ToT. The NJA today prefers resource persons who have participated in ToT and who have been evaluated positively by participants in successive training programmes.

2.2.2 TNA and Curriculum Development

For any successful training it is necessary to identify the training needs of the target community. A TNA identifies and takes note of

an organization's needs and its approach to reform, the needs of a client group's human resources, and the societal need for accessible and effective justice.

The TNA survey adopts both doctrinal and empirical methods to identify needs. It reviews existing documents such as strategic plans, undertakes consultations with stakeholders, undertakes surveys of prospective participants, and incorporates feedback from workshops, small group discussions, and focus group discussions. Recommendations are then made prioritizing training areas and types of programmes. The TNA is a continuous exercise in judicial education. The NJA has conducted the TNA, once under the ADB project in 2002–3, and a second time in 2006 with the assistance of the USAID Rule of the Law project. The latest TNA identifies both knowledge, skill, and behaviour-related subjects in the priority list. The NJA frequently refers to the TNA while developing basic curriculum for short-term training programmes.

2.2.3 Training and Other Capacity Building Exercises

Within the span of three years, the NJA has reached out to all judges, government attorneys, and the judicial and legal officers through short-term orientation and training programmes. It has also launched a number of programmes for private practitioners. Activity highlights are summarized below in Table 5.2¹⁷

2.2.4 Research and Publication

There are a host of reasons for including research as a prime activity of the NJA. First, it supports judicial education. Second, it is a necessary precursor for designing policy interventions and reforms. Third, research is required to fulfil the NJA's mandate to provide advice and consulting service to the courts, the government, and other agencies for '...correcting the drawbacks, weaknesses, and mistakes identified in the field of law and justice...' and to '...disseminate information on various subjects regarding law and justice.'¹⁸ Since its inception, the NJA has prioritized research and publication. The work completed so far can be categorized into three broad groups: research in problem areas affecting speedy and effective justice, research for improving the quality of judicial education, and policy research for judicial reform.

TABLE 5.2: NJA SUMMARY OF TRAINING ACTIVITIES 2004–7

<i>Impartiality, integrity and accountability Related (leadership and attitude focused)</i>	<i>Competence Related (knowledge focused)</i>	<i>Efficiency Related (both knowledge and skill focused)</i>	<i>Effectiveness Related (more skill focused)</i>
<ul style="list-style-type: none"> • Judicial ethics, integrity accountability • Access to justice, legal aid • Preventing and combating corruption • Good governance • Team building, appreciative inquiry • Protocol and etiquette • Self awareness • Understanding Leadership Roles • Team Work/ Team Building, • Interpersonal Relationships • Learned Optimism 	<ul style="list-style-type: none"> • Courses on substantive procedural and constitutional law, law of writs evidence law Human rights law • Forensic science/ DNA typing and profiling • Law and development • Transitional justice • Legal research and web based research • New Public Management in the Judiciary • Women, Children, Dalits Indigenous and Minorities Issues, WTO, Victims and their rights 	<ul style="list-style-type: none"> • Court management • Case flow management, • Bench and court room management • Record management • Mediation • Information and communication technology • Fair trial • Calendar system and delay mitigation 	<ul style="list-style-type: none"> • Judicial skills, • Judgment and order writing • Human rights, gender justice • Execution of judgment, • Writing charge sheets, appeals, written memorials • Correct Nepali Writing • Legal Profession and administration of Justice • Art of Advocacy • Art of Drafting, writing legal opinion

Source: NJA Annual Report 2006–7; Author 2008.

2.2.5 Activities in Specifically Focused Areas: Thematic Training

The NJA has undertaken a number of programmes in sectoral areas such as gender justice, juvenile justice, programmes on Dalit's¹⁹

rights, and commercial and banking law. These are the areas where significant constitutional and legal changes are occurring in Nepal. In selecting these programmes the NJA was guided by both internal and external demands.

Internally, there was a need for the NJA to design a specifically focused programme different from general orientation activities to date. Institutionally, it was also required to take up issues of women, juveniles, and Dalits who are all vulnerable, and where access to justice was a serious challenge, due to discrimination, neglect, and marginalization. While constraints in accessing justice are felt most acutely by Dalits, the dispensation of justice in other areas is also marred by legal, institutional, and procedural wrangling and anomalies. In areas of gender and juvenile justice there was also a need to take many landmark decisions handed down by the SCN down to the District Court level.

Externally, the programme on commercial and banking law was the priority of the government—banking, industrial, and international institutional sectors that are lobbying with the government to establish a commercial Bench of judges in Nepal. Therefore, the NJA was called upon to undertake preparatory capacity building for judges who might be appointed in commercial Benches. In all of these areas the NJA is also involved in some ways in appropriate policy formulation for accessible and effective justice.

2.2.6 Problems of a Transitional State and Justice

Given that Nepal is in a historical transition from conflict to peace and from authoritarian rule to democracy, judicial preparedness for its role in transitional justice was desirable. High impunity exacerbated by institutional weakness in addressing issues relating to the judiciary is affecting the quality of justice being delivered. The NJA echoes the view that peace, justice, and reconciliation are three pillars for conflict transformation and a comprehensive roadmap for improving law and strengthening justice sector institutions is mandatory for the peace process to be a success. The NJA already introduced the subject of transitional justice and peace transformation by inviting experts in Nepal and from abroad and later developing its capacity in this subject. Since 2006, transitional justice has been included in almost all NJA

programmes. It is also canvassing for comprehensive legal reforms, and the need to curb the practice of blanket amnesties in the name peace and reconciliation.

2.3 OUTCOMES

2.3.1 Establishment of NJA: A Permanent Institution for Judicial Education and Research

After twice reissuing of the NJA Ordinance, the *NJA Act* was finally passed in 2006 which gave the institution a permanent status as an autonomous body. Getting the bill through parliament, however, was not an easy task. A major issue that came up in the parliamentary hearing was the budgetary gap created due to the end of ADB support for the NJA. The question was raised as to how funding requirements would be met for the NJA's activities. Then there were departmental preferences. For instance, while the Ministry of Law, Justice, and Parliamentary Affairs (MoLJPA) was in favour of continuing with the JSTC, some sections of the SCN preferred a structure whereby the NJA was a department of the SCN.

The NJA received the strong backing of the Full Court of the SCN. This removed the reluctance of the government to pay for judicial education which finally opened the door for parliamentary endorsement. Following its enactment, the NJA is now recognized as an integral institution for three pillars of the justice sector—the courts, government attorneys, and the Bar. It is also the institute for government law officers and has now been accepted also as the principal institution for judicial education and research within the judiciary.

2.3.2 Emerging Local Ownership

Following the end of ADB support, the NJA decided to continue where the ADB project had left off. Now after three years of independent operation, there is emerging local ownership in terms of curriculum development, training, and the production of training materials. The NJA has now prepared short-term training curricula with the support of stakeholders²⁰ and experts for groups including District Court judges, officers of the court, district government attorneys, assistant district attorneys, private attorneys, Bench officers, and government legal officers. The NJA conducted twenty-

one training programmes in the first year (2004–5), twenty-five (2005–6), and thirty-one in the second and third year (2006–7), respectively. Through these programmes, the NJA has now reached all of its primary target groups, namely; the judges, the government attorneys, and the government law officers. It has also done some training programmes for private practitioners. However, as their number is very large, these are at best symbolic gestures in capacity building.

While designing the curricula for district level officers and judges, the NJA aims at imparting knowledge and skills relevant to their duties. By providing them with new tools and resources, increased predictability and uniformity in their work is promoted. The programmes for base-level participants are longer than the ones for senior judges and officers. Higher-level programmes are shorter and more focused on skill and leadership development than on knowledge per se. The identification of problems and coalition building for bringing about reform is also the priority for senior judges and officers. Emphasis is given to leadership related topics that cater to both the needs of individual participants as well as the institutional need for improving the quality of its human resources and creating momentum for reforms. Progressively, the NJA's target community has come to understand the difference between university and judicial education.

2.3.3 Momentum for Legal Reforms

Even though the impact of judicial education on the work of participants is yet to be properly assessed, it is now felt that the education programmes launched by the NJA have helped the judges, attorneys, and other officers to better understand the limitations of prevailing laws. This has brought to the fore the need for a robust legal framework for making the dispensation of justice more accessible and effective in Nepal. Judges are now raising issues of legal reform at various fora. This has also contributed to creating a positive environment for the promulgation of separate penal, civil, and procedural codes which had remained low priority for the Executive and the Legislature for many years. The NJA also perceives that skills and knowledge developed in training are slowly being reflected in the work of its target community.

Improvement of the quality of judgments and adoption of court management techniques are indications of this.²¹

Some programmes conducted by the NJA have had an instant impact on policy formulation. One such programme is the ToT and training on judicial ethics and accountability conducted under the AusAID PSLP. After the conclusion of the programme, ethics and accountability received instant attention. Many SCN Justices asked for the reading materials. The community of judges took the initiative to revise the existing code of conduct in line with the *Bangalore Principles*. One member of the NJA faculty, who participated in the in-Australia training on the subject and later collaborated with the project team in Nepal, was called to work on the review team to finalize the code of conduct of judges in Nepal. The Draft Code of Conduct has now been submitted to the Full Court of the SCN which is shortly expected to adopt it.

2.3.4 Growing Interest and Changing Attitudes to Training

The activities of the NJA, and the training methodology adopted by it, are receiving attention in the institution's target community. For instance, in 2007 the SCN Justices showed interest to participate in the ToT, not because they wanted to be NJA faculty, but they saw merit in developing effective communication and presentation skills. Accordingly, an adult learning programme was designed including such skills as effective communication, presentation and facilitation, adult learning principles and process, and participatory training/learning methods. These topics were discussed at a retreat programme organized for them. This programme was very much in the interest of the NJA as many SCN Justices are invited to take sessions at the NJA. Similarly, a number of other sessions such as appreciative inquiry, leadership building, DNA typing, and transitional justice, have received cross-sectoral interest.

The research publications of the NJA have been positively received.²² Over time the NJA is emerging as a centre for judges, jurists, and scholars. Many judges and jurists have given talks and discourses on various aspects of law and justice. These visits, and emerging strategic alliances with organizations such as the UNIFEM and the International Commission of Jurists, are likely to add significant value to the work of the NJA.

3.0 ANALYSIS OF THE EXPERIENCE

3.1 SUCCESSES IN IMPLEMENTATION

The NJA has certainly taken some positive directions in terms of capacity building of the judicial community, research and publication, and creating a positive environment for improving the dispensation of justice in Nepal. It has established itself as a central institution for judicial education and research in the Nepali justice sector. However, three years is too short a period for evaluating the success of any institution and in a country mired with difficulties, the term 'success' in itself is a relative concept. In what follows, therefore, several factors contributing positively to what the NJA has achieved so far are highlighted.

3.1.1 Support of the Supreme Court of Nepal and Other Stakeholders

The NJA has been receiving the support of the SCN from the beginning, both at the institutional and individual levels. For instance, the SCN has given office space to the NJA. The SCN and the AG's Office have also deputed judges and officers to the NJA to work full-time with their salary being borne by them. The SCN and the MoLJPA have been instrumental in securing a building and space for the NJA at a prime location in Kathmandu. This is now being renovated to make it suitable for the NJA. It now seems that in less than a year's time the NJA will have its own office space. The SCN and other stakeholders have always been supportive in nominating participants for the training and also in making available documents for the research undertaken by the NJA. For its part, the NJA also listens to the needs of its stakeholders and designs programmes accordingly. The ToT for SCN Justices and the programme on commercial and banking law for Appellate Court Justices are examples of this.

3.1.2 Financial and Other Support

Though not sufficient on its own, a major source of funding for the NJA is the government. These funds are used to pay the salary of employees appointed by the NJA and for implementing the annual programmes.²³ Funds for partnership activities come from partner

organizations. Support from partners and donors is progressively developing both in terms of logistical support or partnership in training. For example the NJA received some computers and other equipment from USAID, and it conducted several programmes with the support of UNIFEM and SARIQ (a regional NGO). In 2007, a small but very meaningful grant from AusAID was received to conduct ToT, hold training programmes, and prepare training manuals and reading materials. Very recently the USAID and EU are showing interest in supporting the NJA. In monetary terms the support received has not been substantial. However, it does indicate a positive attitude on the part of donors, and this adds significant value to the NJA's work. Currently, around one-third of activities are partner supported.

3.1.3 Effective Leadership and Team Work

The credit for whatever the NJA has achieved up to now goes to the dynamic leadership of the institution. The first Executive Director was a justice with an impeccable track record who was known for his commitment to the cause of human rights and the rule of law. After he was elevated to the SCN, the present Executive Director, a long-term Professor of Law and Dean at the Faculty of Law and retired SCN Justice, was appointed. For a large part of the period under review, members of the founding core faculty, who had a very good chemistry among themselves, worked at the NJA. The quality of the programmes was thereby maintained, and supported by the broad adoption of many practices developed by the ADB project team including thrashing out the objectives and expected outcomes of each programme; developing module and session plans; identifying appropriate resource personnel; calling a meeting with resource personnel before the actual training; conducting end of session evaluations and undertaking end of programme evaluations, documentation, reporting, and review.

3.1.4 Broad Consensus on Training Methodology

There is now a broad consensus on the methodology employed in training and interaction programmes. For each training programme a core faculty member is designated as coordinator who enjoys

sufficient autonomy in the design of the training plan for a particular programme. The plan is then submitted to the faculty meeting, and once approved, it is executed.

The NJA uses adult learning techniques and problem-based discussions in training that recognize the experience of the participants and emphasize learning rather than teaching. Efforts are made to create a positive environment for learning. The facilitators are asked to leave sufficient space for interaction and design group work to be followed by presentations. Practical sessions for judges and Bench officers on such topics as writing judgments and orders, include peer review evaluation sessions. In some programmes the participants are taken on visits to centres such as the reform house for juveniles, shelters for the survivors of trafficking, or the DNA lab. Through this, they have an opportunity to talk with other stakeholders in the justice sector. This gives participants an opportunity to find out for themselves what is working well and what is not in the dispensation of justice.

3.1.5 Goals Identified Through Strategic and Training Plans

The NJA prepared a Strategic Plan and the Training Plan in 2006 with the support of USAID. The Strategic Plan set out the vision, mission, and values, as well as the strategic and operational goals of the NJA. Similarly the training plan identified areas and topics for training each of the prime target groups of the NJA. Due to budgetary and other constraints, the NJA has not been able to strictly implement the plans; however, these have helped the NJA to focus on the direction it needs to develop as an institution.

3.2 CONSTRAINTS TO IMPLEMENTATION

The outcomes achieved by the NJA indicate at best only some positive trends and achievements in selected areas. The NJA faces numerous challenges and constraints, the more important of which are enumerated below.

3.2.1 Resource Constraints in Achieving Vision and Mission

The vision set out in the strategic plan of the NJA is ‘...to become a capable institution...’. Its mission is to establish a ‘...professiona-

lized system of continuing judicial education...by providing required knowledge, skill, and other professional development opportunities to and addressing respective needs of its client groups'. Through this, the NJA is to meet the '...quality needs of the national judicial system which strives for an impartial, competent, inexpensive, speedy, and accessible justice.'²⁴

The Strategic Plan of the NJA identifies many activities to strengthen its institutional and human resource capacities. It also highlights ways to develop networking and coordination with the institution's various stakeholders in order to provide quality training, conduct excellent research, and establish and strengthen legal information systems by 2010–11. The Training Plan provides the list of professional training programmes identified by each of the prime target groups. In order to execute the activities and programmes enumerated in the Strategic and Training Plan the NJA requires large human and financial resources which are absent today.

This apart, the *NJA Act* itself mentions several functions and duties which are yet to be implemented. For instance, it is yet to establish a legal information centre, or develop plans or mechanisms for linking judicial education with judicial administration and career development, or act as liaison with the government and international agencies on matters relating to judicial education.²⁵ As of now it has not conducted any programme for non-gazetted court staff or the staff of the Attorney General's Office or the MoLJPA.²⁶ Currently training for these groups is being selectively undertaken by the JSTC. Resourcing is a serious constraint however in reaching its full constituency. Even though the Act empowers the NJA to own property, generate, and raise funds through grants or loan with prior approval of the government, to date very little has occurred in this regard. Considering the vast demand for its services, the existing funds and human resources are insufficient to meet these challenges.

3.2.2 Very Broad Mandate

A related issue is the broad mandate of the NJA. One can understand the rationale against creating multiple training institutions for training justice sector actors. However, the requirement to train

officials of the quasi-judicial bodies, not appointed by the Judicial Council, and private practitioners who have totally different needs and interests, is too broad a mandate for a single institution. Consequently, the NJA needs to either enhance its institutional capacity, or trim its mandate.

3.2.3 Faculty Development Challenges

The NJA today operates with the support of a small group of core faculty and a wider resource pool of extended faculty. The core faculty and a majority of extended faculty are drawn from judges, attorneys, and officers of the Nepal Judicial Service. There are a number of advantages in including such a broad group in judicial education. First, the instructional corps keeps itself abreast with the latest developments in respective areas of interest and expertise. In addition to training the participants, this faculty also uses the knowledge and skills developed for training in their respective work. Secondly, the faculty develops an understanding of the aims of judicial education and develops a sense of belonging to the vision, mission, goals, and activities of the NJA. Finally, extended faculty provides a pool of experienced trainers that may at some point be drawn upon to work as core faculty and vice versa. Through this, a unique synergy is built.

Over-reliance on the extended pool, however, has its own problems. Once a faculty member is transferred out of Kathmandu they are either not available, or it becomes too costly to continue their participation as a resource person. Due to their busy court schedule, judges are sometimes not available for training. Besides quality control issues, a great challenge of working with extended faculty is the hierarchical environment of the Nepali judiciary. In view of this, recruitment plans for trainers and staff are critical for addressing faculty development challenges.

The involvement of other sectors such as the law schools, the Bar, and research institutes would lessen the load currently being shouldered by judges. However, if the NJA decides to continue with the current framework of core and extended faculty, it needs to develop a strategy for replacing the core faculty at least every two to three years. For this, a clear approach and succession strategy for attracting talent needs to be put in place.

3.2.4 Training Materials and Publications

The preparation and publication of training material is a necessary component of judicial education. Currently, the NJA has been able to prepare training and reading materials and trainers' manuals only in some areas. There is an urgent need to produce materials in electronic form to meet the needs of current participants as well as for running distance education programmes. In the absence of human, physical, and financial resources not much has been done in this regard.

3.2.5 Nomination of Participants

Currently, participants in NJA programmes are nominated by their respective organizations.²⁷ These organizations do not have human resource development plans, nor does the NJA have any say in deciding who should be trained. Further, there is no direct communication between the participants and the NJA. This creates several complications in meeting the individual needs of the participants, designing supplementary or advanced programmes, or maintaining the calendar of activities.

3.2.6 Monitoring and Evaluation of the Impact

A serious constraint in measuring the success of the NJA is the absence of effective monitoring mechanisms for the programme, faculty, and participants. During the initial phase pre-session discussions with the resource persons, end of the session, and end of the training evaluations were rigorously undertaken. More recently, however, pre-session discussions have virtually been discontinued and there is some laxity in evaluating resource persons. The NJA also tried to conduct post-training-objective tests, but it was unable to continue with these. During the training, especially where judges are asked to write judgments and orders, their work is peer reviewed. Subsequently, the resource person, who as a rule is competent to hear appeals, gives their feedback. The NJA, therefore, is yet to develop a systematic approach to the medium-term evaluation of its participants to identify links between its training activities and participant performance.

Only very recently has the NJA begun to collect, document, and, where desirable, publish the decisions handed down by District

Court judges.²⁸ Since a significant investment in terms of judicial education is made to this group, the NJA has tried to devise a novel strategy to evaluate their work. The objective of documenting and publishing these judgments is to assess the impact of the NJA's programmes, encourage creative thinking, and promote quality judgment writing among the judges. It also creates peer group pressure for recognition and brings information on the actual work of the courts into the public domain and within the reach of law students, researchers, and other critics. Since this exercise has only recently commenced, its value cannot yet be confirmed.

3.2.7 Behavioural Change, Ethics, and Integrity Issues

Bringing about behavioural change and keeping the target community alert on ethics and integrity issues is one of the objectives of judicial education. Unless judges understand the nature of judicial process and their respective functions are clear about the values of independence, impartiality, integrity, propriety, equality, competence, and diligence and they embrace them in the discharge of their duties, enhancement of public trust will be a daunting challenge. As mentioned in section 2.3.3 above, the NJA has already introduced the topic to the target community by organizing ToT and training on ethics and integrity and has also prepared a trainers' manual and reading material on the subject. In addition, in December 2007 it invited P.N. Bhagwati to speak to district judges and orient them on 'What it means to be a Judge'. The discourse was video-recorded and is shown to judges in subsequent programmes. It is believed that discourse by eminent judges like Bhagwati and other jurists on these issues will have a positive influence on judges, which will help them to think and behave like judges.

To usher in a behavioural change, a uniform ethical framework of the judiciary and justice sector institutions is critical—this is where judicial education institutions can play a very meaningful role. The NJA attaches importance to attitudinal change, but achieving tangible results in this area requires a coordinated effort with the SCN, Judicial Council, Judicial Service Commission, and the judges and other employees.

3.2.8 Stakeholder Engagement and Donor Support

The NJA currently operates from the capital city, Kathmandu. It does not have a direct linkage with district level institutions where much needs to be done. Direct engagement with these stakeholders is essential for enhancing the capacity of the justice sector. This is important as the *NJA Act* mandates the institution to work with the wider community involved in imparting justice.

The NJA also does not have a systematic plan for donor engagement in its activities. After the end of the ADB support, the NJA did not have any donor assistance for over a year. Then gradually donor support recommenced. The NJA has not however yet found any donor willing to invest in infrastructure and faculty development; the two areas critical for the sustainability of the institution. In a post-conflict context, donors play a crucial role in helping judicial education institutions develop—provided that their support is carefully targeted to implement plans and programmes developed to meet local needs. Given that judicial reform is a priority of the donor community, it is imperative to develop plans and strategies for soliciting more donor support without it being pulled into different directions by donor driven priorities. It is important, therefore, for the NJA and its donors to ensure support for strategic objectives and plans of the NJA.

3.3 KEY QUESTIONS AND KNOW-HOW

Judicial education in Nepal is a very recent experiment where many lessons are yet to be learnt. It is, however, an interesting case study on the subject. The Nepali legal and judicial system is at a unique confluence where common law norms are blended with local legal tradition and where international and domestic legal systems closely interact. The country was affected by conflict for more than a decade during which the judiciary was badly damaged. Now, with peace dawning in the country, the judiciary is trying to wake up to a reform agenda. The NJA is a key agency of change created to develop and implement this reform agenda. The Nepali experiment on judicial education is guided by local concerns, however, and some considerations will be of interest to reformers and judicial educators in the Asia Pacific region.

All judiciaries, especially those in developing societies, are facing enormous internal and external challenges. Many old values and norms of justice need to be recast with new meaning. Justice cannot be seen simply in the formal sense of helping the society to maintain the status quo. It must empower the marginalized to enable them to realize their rights and become an equal partner in the benefits of national development. An expansive concept of justice, therefore, must be understood, so that a just conduct in society is promoted; and a humane and peaceful order decrying discrimination and exploitation of any kind is established based on the highest respect for human rights. Only in this will good governance be promoted, national development be facilitated, and healthy economic development be possible. This should be the quest of justice.

Such a quest brings within its sweep what was traditionally left to the distributive realm of justice. The judiciary in Nepal, like many other countries in South Asia, is uniquely situated to embrace this wider meaning of justice and develop a judicial culture that delivers accessible and effective justice. Judicial education institutions should, therefore, work towards expanding the notion of justice, nurturing its inherent values, and bridging the gap between courts and the society.

Judicial education institutions should identify challenges facing the judiciary and devise steps to address them. By imparting necessary and desirable knowledge and skills to all levels of the judiciary, existing training needs will be met. In addition, a conducive environment for bringing about desirable reforms is also developed. This is true for all legal systems, and even more so in an evolving system as found in Nepal.

While there is a need to continuously improve the quality of justice service delivery and make justice more accessible to the people, judicial education institutions should also act as reform vehicles and contribute to the policy reform in the justice sector. By bringing to the fore issues of ethics, integrity, and accountability, judicial education can help judges and court staff work in a more responsive manner and thereby win public trust and confidence. In this way, judicial education institutions can be considered as key agents of change.

In many developed countries there are multiple institutions undertaking continuous education, each catering to the needs of one pillar of the justice sector. This is a luxury for many developing countries. Bringing the pillars of justice under one institutional framework for continuing education saves scarce resources. Furthermore, it orients the actors in the sector to work together in a coordinated manner to fulfil the duties imposed on them by the constitution and laws, thereby, achieving the overarching objective of quality and accessible justice. Caution should, however, be exercised. Bringing diverse communities under one education platform can also create problems. If educational interests and priorities are too diverse, the focus and impact of judicial education initiatives may be diluted. Sectoral interests may also work at cross purposes.

A key question in determining the quality of judicial education is monitoring and evaluation. Without these, judicial education institutions cannot measure training impact on the performance of their participants. In the absence of evaluation, there is the possibility that judges and others undertaking judicial education do so as a formality or an excuse to spending time away from their court. It is true that participants in judicial education, especially the judges, detest being subjected to evaluation. However, objective assessment becomes critical when education is linked to career development and also with judicial administration, as is the case in Nepal.²⁹ Identification of linkages between training and improvement in institutional and individual performance is a must. A few tools are available for monitoring the quality of continuing education, and its contribution to judicial learning and ultimately improved performance. The most commonly used methods in adult learning environments for evaluating judicial education, include: pre-and-post training objective tests; peer group reviews; observation of participation; and the study of judgments and orders. Nepal has been using several of these techniques; however, the NJA is yet to develop concrete monitoring and evaluation methods which work in the short, intermediate, and long-terms. Educators and reformers are yet to collaborate in developing appropriate methodologies and tools for monitoring the impact of educational inputs as an integral part of an educational institution's development.

Often judicial educational institutions identify training needs by conducting training needs survey and analysis. The TNA takes note of both institutional and individual capacity enhancement needs, as well as societal needs relating to accessible and effective justice. As the TNAs broadly categorize participants in terms of their duties (for example, Appellate Court Justice, district court judge, government attorney, etc.) it only gives a broad idea of how judicial education programmes should be designed and implemented. When developing a programme, educators need to go further than the broad TNA. They also need to identify both individual needs, and the needs of a wider spectrum of society including justice sector consumers.

The challenges faced by the justice system in a particular country may assist in identifying actors who can provide effective leadership in service delivery, and reform of the system. Such challenges should guide policy makers when developing the institutional framework for judicial education. In this way, relevant actors are brought into a common forum, and can provide the necessary inputs to incorporate judicial education as an integral activity of an overall legal and judicial reform strategy.

Effective and rigorous research must be an element of judicial education. Research is required for the identification of training needs, to assess the impact of judicial education, and for maintaining or improving the quality of judicial education programmes. In countries where systematic research is yet to be institutionalized, judicial education institutions are ideally suited to conduct research in matters pertaining to law and justice. These institutions receive continuous feedback on the workings and shortcomings of the law through their ongoing interaction with justice sector practitioners. Through this, they can develop effective research activities to positively influence reform initiatives for the improvement of the justice system as a whole.

Institutional capacity building is a serious challenge not only in the case of infant judicial education institutions like Nepal, but in many countries in the developing world. The prevalent view in many common law jurisdictions is that the peer group model makes it necessary for such institutions to be led by a judge. But even here the involvement of law professors is not despised. In many

academies law professors have played important roles.³⁰ Rather than who leads the organization a more important question for judicial academies is the development of an institution's capacity to plan, design, effectively implement programmes of judicial education, and arrange resources and strive for sustainability. Training institutions should build their training faculty in a balanced way to include a range of expertise—not just through judges alone. Increased dialogue with courts and other stakeholders to identify the capacity enhancement needs of their human resources, as well as with donors to solicit support for activities remains critical. Institutions should be representative of their constituency, and they need to reflect this in their capacity-building, and faculty-development plans.

Judicial education institutions should be primarily guided by local domestic needs and planned in a country specific context. However, as systemic specificities are vanishing and the legal systems are influenced by growing internationalization—of human rights values, and emergent international norms of trade, commerce, and services—insulation and compartmentalization of domestic legal systems is slowly becoming a matter of the past.

There are many areas where judicial academies can share and benefit from each other's experiences. For instance, institutions may benefit from regional collaboration and the exchange of training materials in areas such as judicial procedures and process, case management, mediation and judicial skills, use of judicial tools, information on case law, judicial education methods, and information dissemination systems. Every country can learn from comparative, regional, and global initiatives while developing policy, approaches, strategies, and methodologies for judicial education based on the local context. Synergistic relationships based on experience can be developed with an increasingly globalized world supplementing national efforts through the cross fertilization of ideas.

Finally, in order to promote reform, judicial education needs to be supported by visionary leadership. Unless the judicial leadership is clear about the reform goals, puts its weight behind these reforms, and uses judicial education institution's programmes to actively improve court management and dispensation of justice, judicial education becomes a lonely walk. The Nepali judiciary, through the

design of its strategic plan seems to be moving towards introducing reforms. However, much ground is yet to be covered before it is in a position to win public trust and confidence. The NJA, and judicial education institutions in other countries, can at best be a pro-active partner and facilitator in this reform process.

NOTES

1. Nepal was affected by Maoist insurgency from 1996–2006 during which over 14,000 people were killed and thousands of others disappeared or were displaced. Normal function of the judiciary was very much affected. Many courts were bombed and arsoned. In many districts, court personnel were stopped from performing their normal duties. Maoists also constituted their own parallel kangaroo courts and dispensed justice and annulled verdicts given by formal courts.
2. A.M. Bhattarai,, and K. Upreti, 'Institutional Framework for Legal and Judicial Training in South Asia' (2006), *Law and Development Working Paper Series 2*, World Bank, p. 7.
3. The Project was handled by a Project Implementation Team (PIT) led by the Registrar of the Supreme Court with representation from the other sector. The NJA virtually had no say in the project. Therefore, what went on between the PIT or the government and the ADB was not communicated to the NJA. What was seen at the NJA was that the project was first scaled down and then withdrawn in August 2006.
4. Established in 1982 as a department of the Ministry of Law and Justice, the JSTC conducted some programmes for the judges prior to 1990. But after promulgation of the 1990 Constitution, the judges had stopped going to the JSTC.
5. The absence of proper law is also felt by the Judiciary and in several cases it has issued directives to the government to frame law on many of these subjects. For instance, *Meera Dhungana v. Ministry of Law*, decision dated 4 September 2002 (marital rape); *Sarmila Parajuli and Others v. Cabinet Secretariat and Others*, N.K.P. 2061, 1312; (sexual harassment) synopsis available in NJA (2006), *Gender Justice: Collection of Resource Materials* (Nepali text), pp. 3 and 27; *Rajendra Dhakal and Others v. Nepal Government* (disappearance) decision dated 1 June 2007, English text available in 1 NJA L.J. pp. 301, 335–6 (2007).
6. A.M. Bhattarai, 'The Judicial System of Nepal: An Overview in Fifty Years of the Supreme Court of Nepal' (May 2005), *Golden Jubilee Publication of the Supreme Court of Nepal*, pp. 13–31.

7. A similar challenge is faced in Cambodia as well, see section 2.2, page 224.
8. Gender inequality is high in the country. In terms of gender related development index (GDI), Nepal ranks 134th. *Kathmandu Post*, 29 November 2007.
9. Comprising 4.6 million or 20 per cent of the population, Dalits (the so called untouchables) and 80 per cent of Nepal's ultra poor, have been systematically discriminated against and exploited on the basis of caste. Sixteenth Periodic Report of Nepal on Committee on the Elimination of all Forms of Racial Discrimination (CERD), 75, CERD/C/452/Add. 2, 30 July 2005.
10. Minorities, colloquially called *Janajatis*, are said to comprise 37 per cent of the population.
11. This is generally in line with the models of judicial academies in South Asia. Federal Judicial Academy Act of Pakistan, 1997; also the institutional structure of Judicial Administration Training Institute (JATI), 1995 at <<http://www.minlaw.gov.bd/jati>> (19 August 2008).
12. Other members of the Governing Board were: The Minister of Law and Justice, Attorney General, two Senior Justices of the Supreme Court, one retired justice of the Supreme Court, Chairman of the Bar, Vice Chairman of the National Planning Commission, one judge each from Appeal and district Courts, Dean at the Faculty of Law, one law professor, and three other lawyers representing the indigenous community, *Dalits*, and women. The Executive Director is to work as member-secretary of the board.
13. The other members of the Executive Committee are: Law Secretary, Secretary to the Judicial Council, the most Senior Deputy Attorney General, Registrar of the Supreme Court and Secretary of the Nepal Bar.
14. Strategic Plan of the Nepali Judiciary (2004), p. 30; Strategic Plan of the NJA (2006), p. 4. The human resource in the judiciary is likely to increase in the years to come. Besides the above stated number—both Attorney General's office and the Law Ministry have a couple of hundred junior support staff.
15. The two pillars excluded from the sweep of the NJA are the police and the jail and correction authorities. But as the NJA is required to make justice prompt, easy, and accessible, it can very much link these sectors in its activities. For the function and duties of the NJA, see the Strategic Plan of the NJA 2006.

16. The idea behind organizing content based ToT is to strengthen the grip of the trainers on subject matter.
17. The subjects mentioned here vary in terms duration, from one to multiple sessions. For instance, 'Ethics Integrity and Accountability' takes at least 7 sessions (that is, 10 hours 30 min), while 'Understanding Leadership' takes two sessions (that is, 3 hours.) Source: Based on NJA Annual Reports (2004–7).
18. S 5 NJA Act 2006.
19. There are 4.6 million Dalits, the so called untouchables in Nepal constituting around 20 per cent of the country's population. But their use of the court service for securing justice was almost nil. In the Annual Report of the Supreme Court or the Office of the Attorney General cases filed by Dalits are almost non-existent. In a recent study conducted by LANCAU, a Dalit rights organization, there are only thirty-six cases filed by persons belonging to the Dalit community challenging various types of discrimination—LANCAU, 'Study Report on Untouchability Filed in Court' (draft 2007).
20. At the NJA, the judge faculty leads the design and execution of the programme for judges, the government attorney does the same in the programme for attorneys. For this purpose, a senior joint attorney along with an officer has been deputed by the AG's office to the NJA. Similarly, MoLJPA gets involved in the execution of programmes for government legal officers.
21. NJA has traced many good judgments on juvenile and gender justice written by District Court judges who had participated in the programme on juvenile justice. It has now begun collecting judgments written by District Court judges for systematic recording and publication. Besides, initiatives are now being taken for preparation of a calendar system in the courts. Source: Mid-term Review of the SCN Strategic Plan (2008).
22. The research report on the Status of Supreme Court Directives, Collection of Case Law on Gender Justice and more recently the NJA Law Journal have gotten very popular reception in the market.
23. For 2007–8 the annual budget of the NJA was Rs 12,000,000 (equivalent to USD 190,476, USD 1.00 = NRs 63.00).
24. NJA Strategic Plan (2063/64–2067/68), 4.
25. S 5 NJA Act 2006.
26. The number of these staff is around 4000.
27. The Supreme Court nominates the judges and court officers, the Attorney General's Office, the MOLJPA, and the Bar Association nominates the participants from their offices.

28. District courts are courts of first instance in Nepal. As is the case in other countries decisions of the trial courts are not generally published.
29. *S 5 NJA Act 2006.*
30. For instance the first Director of the Federal Judicial Academy of India was a retired law professor who is now succeeded by another law professor. NJA, India also has created two posts for professors. In the case of NJA Nepal, not only a sitting or retired judge but any person who has the qualifications to be a judge can be the executive director.

Annexure One

Glossary

adat law	Customary Islamic law
angka	A collective
barangay	The Philippine's smallest political unit of government
bottom-up	The approach to judicial reform focusing on 'users' as opposed to an institution-centric approach
Dalits	Nepal's so called 'untouchable castes'
demand-side	Users/clients of of justice/judicial systems
Janajatis	Colloquial for Nepal's minorities
kastom	The local Vanuatu spelling for custom, which denotes traditional culture.
kot blong waetman	'For white-men only'
locus standi	Legal standing of a person to petition a court
minutasi	Judgment, or better known as finalization of cases
Muluki Ain	The National Code of Nepal
munsif	Courts of civil jurisdiction in some Indian states
Naya Muluk	'New Nepal'
ningas cogon	A type of wild grass that ignites easily but burns out fast
Operasi Kikis	Loosely translated as 'Operation Eradication'
Pradhan Nyayalaya	Supreme Court of Nepal
Sandiganbayan	Anti-Graft Court
Shari'a	Islamic law
stare decisis	The common law doctrine of binding precedent
suo motu	When courts initiate cases on their own account
supply-side	Operational or institutional elements of justice/judicial systems
top-down	Traditional approach to judicial reform, that is, an institution-centric approach
utang na loob	Debt of gratitude

Annexure Two

Country Context Background

A2-1.0 CAMBODIA

A2-1.1 COUNTRY CONTEXT

HISTORICAL OVERVIEW OF THE CAMBODIAN LEGAL SYSTEM—The Cambodian legal system has evolved over time through a series of contributions from various legislative sources, as well as social and political changes. Prior to the period of the French protectorate, Cambodia was ruled by Kings who applied customary and religious rules as the legal basis for governing the country. During the French protectorate (1863–1954), French authority had imported some legal rules to implement in Cambodia. From that time onward, the Cambodian legal system was largely influenced by the French legal system. Even after the French protectorate ended, the Cambodian legal system remained unchanged. The Cambodian civil code, criminal code, commercial code, and court system were modelled on French codes and judicial systems.

The influence of the civil law system (the French legal system) in Cambodia was interrupted when the Khmer Rouge took control over the country from 1975 to 1979, at which time both legal and judicial systems were abolished. The Khmer Rouge transformed the country into collectivism. No court was operating. The head of an *angka* (a collective) could decide to execute anyone who behaved or acted against their intents.

After the collapse of Khmer Rouge in 1979, Cambodia was governed by a socialist government (1979–91) where the legal system was inspired by the concepts of both the Soviet socialist system and the Vietnamese socialist system. During this period, the Cambodian government established provincial/municipal courts in 1982 and the Supreme Court in 1987. There was no proper separation of powers. The administration of justice was mainly ensured by the Ministry of Justice.

In 1991, four political factions in Cambodia entered into the Paris Peace Agreement with the participation of the international community and consequently, the United Nations decided to send its missions to Cambodia to organize, for the first time, a democratic election. From 1991–3, Cambodia

was governed by a Supreme National Council (SNC) which was composed of representatives of four political factions with the supervision of the United Nations Transitional Authority in Cambodia (UNTAC). UNTAC and SNC passed laws and regulations for implementation during the transitional period, notably the provisions relating to the judiciary, criminal law, and procedure applicable during the transitional period adopted in 1992, and law on criminal procedure adopted in 1993. Nevertheless, this legislation were not sufficient to ensure the operation and functioning of courts in civil and criminal matters so the Cambodian courts have adopted a practice which is a mixture between socialist legal concepts, the remaining French civil law concepts, and newly adopted regulations.

CURRENT STATE OF JUDICIAL REFORM—In 1993, a liberal democratic constitution was adopted and democratic government was formed as a result of free and fair elections. The constitution enshrined basic concepts of separation of powers, rule of law, independence of the judiciary, and protection of human rights. It is the first time that Cambodia has been able to reintroduce the concept of independence of the judiciary after about two decades of civil war.

The Royal Government of Cambodia (RGC) established a council for judicial reform in 2001 and finally adopted a comprehensive action plan for implementing legal and judicial reform in June 2003. The reform action plan has set out some principal objectives, such as the improvement of the protection of individual rights and freedoms, to modernize the legislative framework, to provide better access to legal and judicial information, to enhance quality of legal processes and relative services, to strengthen judicial services, to introduce alternative dispute resolution methods, and to strengthen legal and judicial sector institutions to fulfil their mandates.

To prepare and implement its reform action plan, the RGC had established the Royal School for Judges and Prosecutors (RSJP) in 2002 and passed numerous pieces of legislation to ensure the function of judicial institutions. In 2007, a comprehensive code of civil procedure and code of criminal procedure were adopted. The adoption of these two codes contributes greatly to improve functioning of the court and to ensure better access to justice.

A2-1.2 JUDICIARY AND THE COURTS

CONSTITUTIONAL COUNCIL—The Constitutional Council consists of nine members with a nine-year mandate. Three members are appointed by the King, three members by the National Assembly, and the remaining three members by the Supreme Council of Magistracy. One third of the members

are replaced every three years. The Constitutional Council has the duty to safeguard respect for the Constitution, and to interpret the Constitution and the laws passed by the parliament. The Constitutional Council also has the right to examine and decide on contested cases involving the election of parliamentary members.

MINISTRY OF JUSTICE—Pursuant to Articles 109 and 111 of the Constitution, judicial power is an independent power, it is not granted to the legislative or executive branches. From these provisions, it is very clear that the Ministry of Justice should not exercise any form of jurisdiction over the exercise of judicial power and over the filing and conduct of public prosecutions.

The Ministry of Justice has no power to interfere with the judgment of the judges, although it has a role in assisting in the administration of justice. All court clerks are appointed by Ministry of Justice. The Ministry can also perform inspections on the regularity of the performance of judicial officers including the judges and prosecutors.

SUPREME COUNCIL OF MAGISTRACY (SCM)—The King is the guarantor of the independence of the Judiciary and presides over the SCM. The SCM makes proposals to the King for appointing judges and prosecutors or taking any disciplinary action against them or removing the judges and prosecutors. The SCM is composed of the President of the Supreme Court, the General Prosecutor of the Supreme Court, the President of the Appellate Court, the General Prosecutors of the Appellate Court, the Minister of Justice, and judges and representatives of provincial and municipal courts.

COURTS—Cambodia has 22 provincial and municipal courts/courts of first instance, one appeal court, and one Supreme Court located in the Capital. The court of first instance has jurisdiction over all types of law suits including administrative disputes.

The courts of first instance, the appeal court, and the Supreme Court are composed of sitting judges and prosecutors or general prosecutors. The sitting judges and prosecutors are supported by court clerks who do secretarial work for the judges and prosecutors during the court proceedings or for the administration of the court houses.

The appeal court hears all types of appeal. It re-examines both the law and the facts of the cases. The Supreme Court only examines the application of laws by lower courts on the first appeal. However, if there is a second appeal to the Supreme Court on the appeal court decision, the Supreme Court would re-examine both the application of the laws and the facts of the case.

In 2003, the RGC entered into an agreement with the United Nations to establish the Extraordinary Chamber within the Courts of Cambodia (ECCC). This court is a hybrid court in which both Cambodian judges and foreign judges work together in the prosecution, investigation, and rendering of decisions. There is also a system of co-counsel, which requires Cambodian lawyers and foreign lawyers to work together in the defence of their clients. The court office is administered by both Cambodian staff and foreign staff. The ECCC has jurisdiction over crimes committed by senior leaders of the Khmer Rouge during the period 1975–9. It applies mainly Cambodian laws but where Cambodian laws do not exist or where there is uncertainty or inconsistency between Cambodian laws and international laws, international laws or international precedents would be sought for implementation or providing a basis for interpretation.

A2-2.0 INDIA

A2-2.1 COUNTRY CONTEXT

The Republic of India is the world's second most populous country, at 1.03 billion according to the 2001 census, and the seventh largest by geographical area, at 3.29 million sq. kilometres. It is a pluralistic, multilingual, and multi-ethnic country. Although Hindi is designated the official language, English is widely spoken and used in administration and enjoys the status of a subsidiary official language. Additionally, the Constitution of India recognizes 22 other languages.

India is a federal republic of 28 states and seven union territories. Each state or union territory is divided into basic units of government and administration called districts, which number approximately 600 in total. The districts are further divided into *tehsils* and eventually into villages. India is the world's largest parliamentary democracy and has universal suffrage, with the minimum age of voting being 18 years. It is a founder member of the United Nations and many other international organizations.

Though India is considered to be the second fastest growing large economy, it still suffers from high levels of poverty and illiteracy. Its gross domestic product (GDP) per capita is estimated to be USD 4,182 as at 2007, taking into account purchasing power parity. The official position is that 27.5 per cent of the population lived below the poverty line in 2004–5. Its adult and youth literacy rates are estimated to be 61.3 per cent and 73.3 per cent, respectively.

India has a long colonial history under western states, commencing with the Portuguese in 1510, and including the Dutch, French, and British, over different parts, at various points in time. However, by the nineteenth century,

most of modern India was brought under British dominion, barring small pockets under French and Portuguese rule. It regained independence on 15 August 1947 and was declared a republic on 26 January 1950.

Constitutionally, India is declared a secular state and includes most of the religious denominations present in the world. In composition, Hindus comprise 80 per cent of the population and Muslims comprise 13 per cent. Right through its partition on religious lines, to form a Muslim Pakistan and secular (albeit Hindu majority) India, it continues to witness tensions between followers of these two faiths. Such tensions extend into the political and administrative systems and also affect access to justice.

Additionally, though all citizens are declared equal under the constitution, social disparities continue. Positive action and beneficial legislative measures have been adopted to empower socially weak classes (castes and tribes) of people. However, these and other financially and/or educationally weak classes of people present serious challenges to access to justice programmes.

Traditionally, most of India has been a male-dominated society. A number of measures have been introduced to enhance and implement opportunities for women, in the political process, education, and the economy. However, problems persist, in recognizing and enforcing rights of women, especially in traditionally-prejudiced rural areas. This presents serious challenges to access to justice for women.

A2-2.2 JUDICIARY AND THE COURTS

In view of its colonial history and ethnic composition, the legal system in India is a mixture of predominantly English common law and customary law.

The *Constitution of India*, the world's longest, provides for three distinct branches of governance, namely, the legislature, executive, and an independent judiciary. The Supreme Court is the apex court in the country. The High Court stands at the head of the constituent state's judicial administration. Each state is divided into judicial districts presided over by a district and sessions court. These are followed by courts of civil jurisdiction, known in different states as *munsifs*, sub-judges, civil judges, and the like. Similarly, the criminal judiciary comprises a chief judicial magistrate and judicial magistrates of first and second class.

The Supreme Court has original, appellate, and advisory jurisdiction. The Constitution gives an extensive original jurisdiction to the Supreme Court to enforce the fundamental rights' provisions of the Constitution. It also has the power to declare the law and to strike down union or state laws which contravene the Constitution, and is the ultimate interpreter of

the Constitution. The appellate jurisdiction of the Supreme Court can be invoked by a certificate of the High Court concerned or by special leave granted by the Supreme Court in respect of any judgment, decree, or final order of a High Court in cases both civil and criminal, involving substantial questions of law as to the interpretation of the constitution. The President may consult the Supreme Court on any question of fact or law of public importance. The Supreme Court of India comprises of the Chief Justice and not more than 25 other judges appointed by the President. Judges hold office till sixty-five years of age.

There are 18 High Courts in the country, three having jurisdiction over more than one state. The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. Each High Court has powers of superintendence over all courts within its jurisdiction. High Court judges retire at the age of 62. The jurisdiction as well as the laws administered by a High Court can be altered both by the union and state legislatures. Certain High Courts, like those at Bombay, Calcutta, and Madras, have original and appellate jurisdictions. Under its original jurisdiction suits, where the subject matter is valued at Rs 25,000 or more, can be filed directly in the High Court. Most High Courts have only appellate jurisdiction.

Finally, mention must be made of the fact that India has both a national Human Rights Commission as well as several State Human Rights Commissions mandated to receive complaints of human rights violations as well as to undertake activities (such as human rights education) that have a distinct impact on access to justice. Also, largely due to judicial activism on the issue of legal aid¹ in 1987, India enacted the *Legal Services Authorities Act* which has created a network of legal services institutions at the state, district, and *taluk* levels. These institutions complement the work of Bar Associations and NGOs in providing legal advice and assistance to the indigent in India.

A2-3.0 INDONESIA

A2-3.1 COUNTRY CONTEXT

DEMOGRAPHICS—Indonesia is the biggest archipelago country in the world with 17,508 islands. The country has a total population of 220 million people. The majority of the citizens are Moslem, comprising 85.2 per cent of the total population, which makes Indonesia the nation with the biggest Moslem population in the world. Other significant religious demographics are Protestant (8.9 per cent), Catholic (3 per cent), Hindu (3 per cent), Buddhist (0.8 per cent), and others (0.3 per cent). The citizens can generally be divided into two main races, the Malayan (*melayu*) who

reside in the western part of Indonesia, and the Papuan in the eastern part. There are also minority citizens who have migrated from China, India, and the Arab countries, who have been migrating to Indonesia since the eighth century AD.

Most of the population resides only in several major islands: Java, Sumatera, Kalimantan (Borneo), and Sulawesi (*celebes*), with the highest economic concentration on the island of Java. The Indonesian language (*Bahasa Indonesia*) is the national language with some 250 local languages spoken by citizens in various locations.

LEGAL SYSTEM—The Indonesian legal system is a complex combination of three different legal systems. First, the customary law (*adat law*) inherited from native Indonesian kingdoms and tribes which dates to before the colonialization period; second, the legal system and institutions installed by the Dutch colonial administration developed during the colonial period until the end of World War II; and lastly the national legal system which has been developed by the Republic post-independence on the basis of Indonesian precepts of law and justice.

These three legal systems coexist till today, for example, the commercial code from the colonial era is still applicable as a source of law, while sections of this code have been replaced by newer laws such as the Company Law, the Capital Market Law, and the Anti Monopoly Law. While customary law was never formally legislated, the judiciary honours the principles of customary law and consistently applies customary law as the basis for consideration in their judicial decision-making process.

Modern Indonesian legislation comes in a number of forms. According to the Law Number 10, Year 2004, on the Procedure of Legislative Drafting, the types and hierarchy of Indonesian law can be outlined as follows: the Constitution; Law/Government Regulation in Lieu of Law; Government Regulation; Presidential Regulation; and Local Regulation. In addition to these regulation classes, state agencies are allowed to issue a publicly binding regulation in order to implement norms delegated from the above-mentioned regulations.

A2-3.2 JUDICIARY AND THE COURTS

GENERAL—After the third amendment of the Constitution in 2001, the structure of judicial power has undergone significant change. Before the amendment, the Supreme Court was the sole state institution in the judicial branch. Following the amendment Indonesia now has three institutions under the judicial branch, which are the Supreme Court, the Constitutional Court, and the Judicial Commission.

The Supreme Court remains the apex of judicial power over its existing four court jurisdictions, which are the court of general jurisdiction, the religious court, the state administrative court, and the military court, in addition to its tax court jurisdiction. The court of general jurisdiction has jurisdiction over general civil disputes and criminal cases. The court of general jurisdiction comes with several specialized courts, with even more specific jurisdiction, such as the commercial court, with jurisdiction over bankruptcy² and Intellectual Property Right cases;³ the Human Rights Court, with jurisdiction over violation of human rights;⁴ the Anti Corruption Court, with jurisdiction over corruption cases indicted by the Anti Corruption Commission;⁵ the Fisheries Court,⁶ with jurisdiction over illegal fishing; and the Industrial Relations Court,⁷ with jurisdiction over disputes among employees with their employer.

The Religious Court has jurisdiction over family disputes of Moslem citizens. In addition to ordinary religious courts, in the province of Nanggroe Aceh Darussalam, the religious court is named as *Mahkamah Syariah*, with wider jurisdiction covering also criminal offences under Moslem law. The State Administrative Courts have jurisdiction on the dispute over decisions of state administrative officials, while the Military Courts have jurisdiction over criminal offences committed by army personnel.

Currently the Indonesian judiciary consists of a total of 706 Courts of First instance in addition to the Tax Court (including all four court jurisdictions), 67 appellate courts, with 6,509 judges (5,844 judges of first instance and 665 appellate judges) and supported by a total of 21,953 court staff. From this figure, almost 80 per cent of the court population is either part of the court of general jurisdiction or the Religious Court.

The Indonesian court system adheres to a three-tier litigation system, which consists of first instance, appellate, and *cassation*. Each jurisdiction has its own court structure, separate from the others. Practically all types of cases are lodged in the court of first instance (District Court), with relevant subject matters within each territorial jurisdiction. For the general court and religious courts, the District Court is located in each district/municipality, while for other jurisdictions, the jurisdictional authority of the court of first instance may cover a wider geographical area. An appeal to a decision of the court of first instance is allowed to the relevant appellate court located at the provincial level. Cassation is heard by one Supreme Court located in the capital city. It is possible to ask for a special review to the Supreme Court with regards to the already final and binding court decision in cases of new evidence, or where an inappropriate implementation of the law is present.

Some specific legislation, particularly in relation to commercial disputes, such as bankruptcy, intellectual property rights, appeal to the decision of

the Business Competition Supervisory Commission, and appeal to the decision of Consumer Protection Body, allows appeals to be made directly from the court of first instance to the Supreme Court's cassation level, and skip the appellate court in a bid to reduce litigation time. Some laws also allow a small amount of litigation to be submitted directly to the Supreme Court, that is, a judicial review of regulation under the law, and disputes on the confiscation of foreign vessels.

The position of a judge is a career position, and judges are recruited very early, right after graduation from law school, to be educated and developed internally, their career advanced through years of promotion and transfer processes. Up to 2001, judges at the Supreme Court were purely career judges. Non-career judges were only recruited after the amendment of the Constitution which allowed non-career judges to sit on the Bench of the Supreme Court. Further, after the establishment of the Judicial Commission in 2004, the selection process now also involves the Judicial Commission as the institution responsible for recruiting and nominating judicial candidates to the parliament.

The other part of judicial branch is the Constitutional Court. It was established with special jurisdiction to examine in first and final instance the following cases:

- Constitutional review of laws against the Constitution
- Disputes among state institutions with authority delegated from the Constitution
- Dissolution of a political party
- Disputes on the result of general election
- Parliament's opinion that the President and/or Vice President is suspected of violating the law in the form of treason, corruption, bribery, and other serious crimes, and can no longer meet the requirement for President and/or Vice President as per the provisos of the Constitution.⁸

The Constitutional Court is not a superior court to the Supreme Court and has no correlation with the Supreme Court. Each has its own separate jurisdiction, and each manages their own cases, organization, and financial aspects separately.⁹

THE SUPREME COURT OF THE REPUBLIC OF INDONESIA—The Supreme Court is the highest Court of Appeal for the court of general jurisdiction, the religious court, the state administrative court, the Military Court, and lastly, the Tax court. In general, the Supreme Court has two main functions: judicial and non-judicial. It is important to put into context the recent

judicial reorganization in the Indonesian judicial system. A constitutional amendment has effected significant changes of the judicial structure. Previously, court administration and management support, including budget and infrastructure, were provided by the executive. The new structure has effectively put management of all aspects of the courts in Indonesia under the Supreme Court.¹⁰

In relation to its judicial function, the Supreme Court has two main functions, which are to adjudicate cassation requests, and to adjudicate special review applications for the already final and binding decision.¹¹ Furthermore, the court also has authority to adjudicate disputes on authority, and to adjudicate disputes over the confiscation of foreign vessels by Indonesian warships. The Supreme Court is authorized to conduct judicial review of regulations under the law, and is also responsible for providing opinions to the President in relation to the provision of pardons.¹²

In implementing its cassation function, the Supreme Court examines case as an appellate court.¹³ The Supreme Court only reviews facts in limited type of cases.¹⁴

In its non-judicial function, the Supreme Court has several functions, namely:

- 1) Rule-making Function—This allows the Supreme Court to establish rules of practice and procedures and matters relating to public notaries, attorneys, the internal discipline of the courts, and other matters relating to the administration of judicial affairs.¹⁵
- 2) Administrative Function—In order to manage the organization, administration, and financial matters of the judiciaries.¹⁶
- 3) Supervisory Function—The Supreme Court supervises legal processes throughout the country and exercises control over the activities of judges, ensuring that the administration of justice is properly conducted by the lower courts.
- 4) Advisory Function—This allows the Supreme Court to provide opinions and/or advice on matters of law to other state organs or administrative agencies whenever required.¹⁷

The law stipulates that the Supreme Court shall consist of a maximum 60 justices, including 11 leaders.¹⁸ By convention, the maximum number of seats filled was 51 justices. In general, the Supreme Court organization is composed of two main elements, the Registry and the Secretariat. The Registry is responsible to handle case administration received by the Supreme Court, while the Secretary is responsible for the management of administration, organization, and finance of the court, including all courts under its jurisdiction.

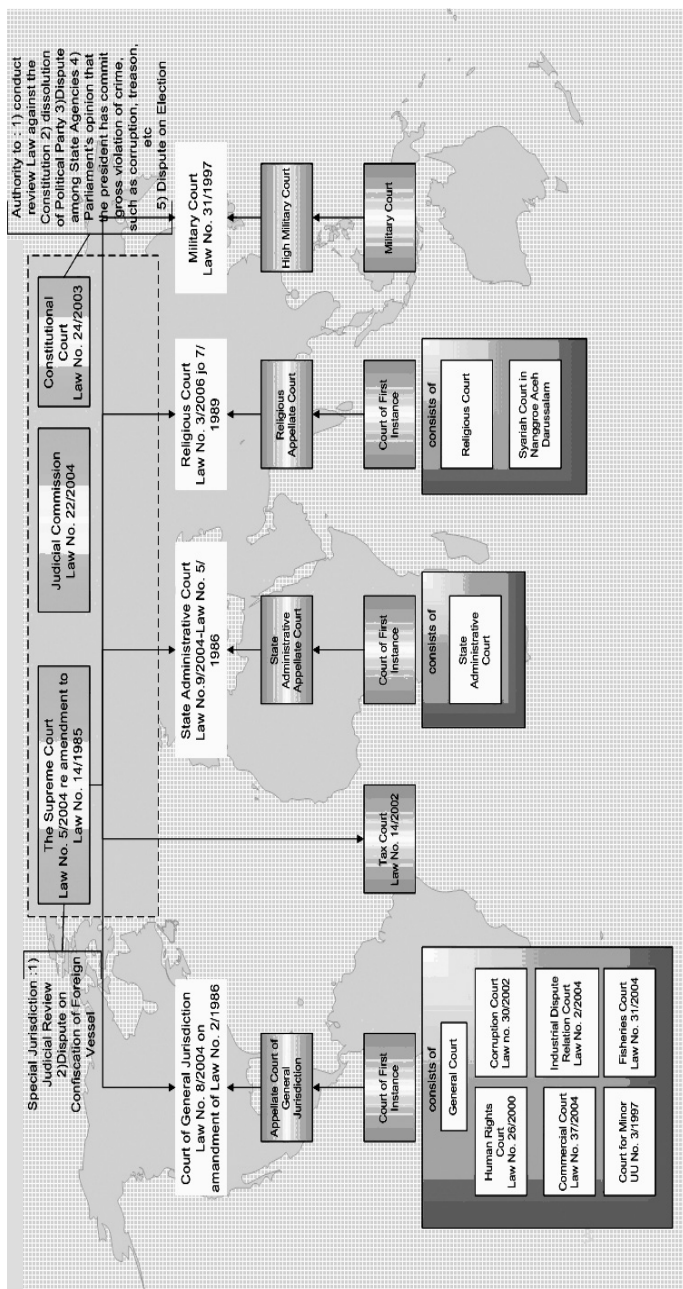


Figure 1: Indonesian Judicial System After the Third Amendment of the Constitution

Source: Judicial Reform Team Office, The Supreme Court of the Republic of Indonesia.

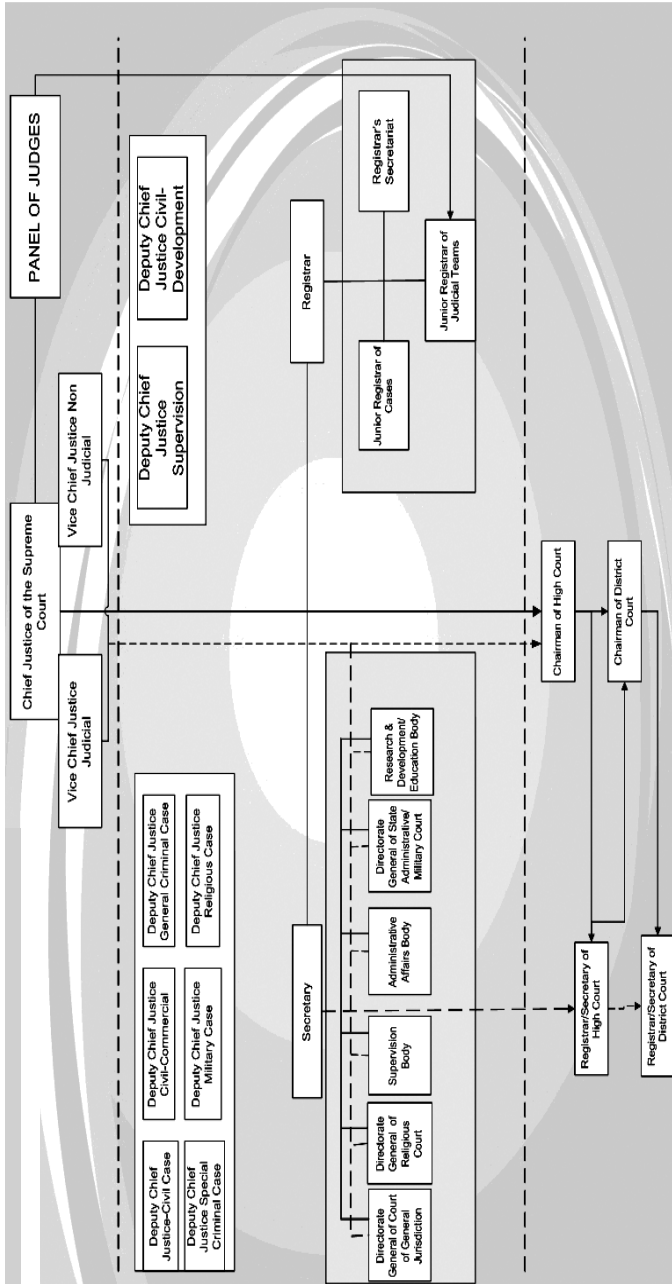


Figure 2: The Structure of the Supreme Court of the Republic of Indonesia
 Source: Judicial Reform Team Office, The Supreme Court of the Republic of Indonesia.

The Supreme Court handles cases in panels consisting of at least three justices.¹⁹ In certain cases, panels can consist of more than three justices, for example, in corruption cases prosecuted under Law Number 30 Year 2002 on Anti Corruption Commission,²⁰ disputes on the election of local leaders, human rights cases, or other cases considered important by the Supreme Court.

The panels are traditionally established under a judicial team. Each leader of the Supreme Court is head of a judicial team. The Chief Justice of the Supreme Court distributes cases to the panel which are then distributed further by the Chairman of the panel to the panels under each team.

A2-4.0 NEPAL

A2-4.1 COUNTRY CONTEXT

Nepal is a small landlocked country in the Himalayas sandwiched between India and China. In the south, east, and west, Nepal is bordered by India and in the north by China. Today, Nepal is spread over five regions and 75 districts for administrative purposes, inhabited by 25.8 million people comprising some 100 ethnic groups. In the Human Development Report Nepal now ranks 142 out of the 177 countries, and in the human poverty index 84th among 108 developing countries. The general life expectancy is 62.2 years and 17.4 per cent of people do not survive past age 40.²¹

Nepal was unified into one Kingdom some 238 years back at the initiatives of the Kings of Gorkha, one of the small princely states in the middle mountains, who through a series of military expeditions weaved more than fifty small principalities into one country. It was a time when the British Empire was making massive inroads into the Indian subcontinent. Britain effectively checked the Gorkhali drive for unification in the Himalayas through a protracted war between 1814 and 1816. In this war Nepal not only lost a huge area in the west, east, and south, it was also squeezed to its present size under the Treaty of Sagauli in 1816. While the treaty permanently ended antagonism between the two expanding forces, it opened up new relations between them as well. Britain gained a trusted ally in Nepal and the latter retained its independence throughout the former's rule in the Indian subcontinent when hundreds of Indian *Maharajas* (Kings) had succumbed to British military might.²²

During the most part of the nineteenth century and the first half of the twentieth century Nepal remained isolated from the external world. The country began to open up only after the overthrow of the feudal *Rana Rule* (1846–1950) through the First People's Movement in 1950. It tried to install democratic rule within the country with a constitutional

monarchy, multiparty democracy, and an independent system of justice. The King, however, usurped the power and installed direct rule in 1960 after overthrowing a popularly elected government and banning all political parties. The Second People's Movement in 1989–90 brought back democracy by compelling the King to accept his earlier agreed position of constitutional monarch, but this attempt was discredited by the failure of governments to promptly deliver the goods to the people, as well as the growing Maoist insurgency in the country. For a short interregnum Nepal again saw the direct rule of the King in 2005–6.

After the signing of the Comprehensive Peace Agreement (CPA) with the Maoist rebels in November 2006, Nepal entered a period of transition. Following the election of the 'Constituent Assembly' in April 2008, Nepal was declared a federal republic, and the 238-year-old monarchy was abolished. The Constituent Assembly functions as the legislature-parliament under an Interim Constitution. Further to the CPA, the United Nations Mission in Nepal is providing support to: implement the mandates of arms and army management; monitor the election of the Constituent Assembly and the human rights situation; and assist the government in implementing the CPA. At present, Nepal is a unitary state, but a major political consensus has been reached to make the country a federal one.²³ A series of agreements have been signed with forces crying for federalism and the Interim Constitution has been amended accordingly.

A2-4.2 JUDICIARY AND THE COURTS

The Nepali judiciary today stands on the constitutional foundations laid down by the 1990 Constitution which is mostly replicated in the Interim Constitution. The judicial power of the state is exercised by the courts, tribunals, and other judicial institutions of the country as per the Constitution, laws and, 'recognized principles of justice'.²⁴ The expression 'recognized principles of justice' keeps the potency of internalizing values developed in international and comparative settings for evolving a competent system of justice in Nepal. Besides, the *Nepal Treaty Act* also accords a prestigious position to human rights norms which could be used to give further force to the rights recognized by the Constitution and the laws.

The legal and judicial traditions of Nepal owe much to Hindu religious texts such as *Shrutis* and *Smritis*, and *Vyabdhara*. Religion and justice were blended in one and supposedly protected and administered by the Kings and his courtiers who applied the scripture-based law even though minorities following other religions historically lived side by side with the Hindus. The first codified law of Nepal, the *Muluki Ain* (the national code)

which is still a major law on civil and criminal matters, promulgated in 1854 during the early phase of the *Rana Rule*, bore strong imprints of the Hindu tradition.²⁵ This law was amended several times to give it a secular and equalitarian tone and tenor. Besides, there are a host of other laws that govern civil, criminal, family, social, and economic matters.

The attempts to establish an independent judiciary fructified in 1950 following the overthrow of the *Rana* oligarchy. Attempts were made to establish a democratic government that respected the separation of power. The movement of 1950 also began to transport external values into the Nepali legal system, primarily resulting in the gradual internationalization of the common law due to Nepal's cultural and educational proximity with India. So much so that the first Chief Justice of the post 1950 *Pradhan Nyayalaya* (Supreme Court) was an expatriate Nepali practising law in India.²⁶ The Supreme Court began to establish and entrench the rule of law by issuing prerogative writs reviewing legislation and playing the role of the guardian of the Constitution.²⁷ And since that time the system of justice has grown consistently and continuously, despite political upheavals in the succeeding several decades that experimented with several constitutions.²⁸ It should however, by no means be understood that the judiciary is free from challenges.

Today the judiciary consists of a three-tiered system comprising the Supreme Court, sixteen appellate courts and 75 district courts in a hierarchical order. Besides, there are at least eight other tribunals and special courts to hear specific cases. The constitution of Benches hearing specific cases is a growing practice in the country. While there are juvenile Benches in district courts, the government, on the advice of the Supreme Court, envisages establishing commercial Benches in the appellate courts to hear commercial disputes.²⁹

The Chief Justice is appointed by the President on the recommendation of the Constitutional Council while all other judges are appointed by the Chief Justice on the recommendation of the Judicial Council and following a confirmation hearing at the legislature-parliament.³⁰

The Supreme Court is the final Court of Appeal. All the courts and judicial institutions except the Constituent Assembly Court are subject to it. It has the final authority to interpret the Constitution and the laws in force.³¹ The precedents established by the Supreme Court are as good as the law.³² The court is vested with extraordinary powers to issue prerogative writs. It exercises the power of judicial review and also entertains public interest petitions.³³

Below the Supreme Court are the appellate courts geographically dispersed in different regions of Nepal. As the name suggests, they are basically appellate courts which hear appeals against the decisions of the

district courts and quasi-judicial institutions such as the chief district officer, land revenue officer, forest officer, warden of the wildlife parks and reserves etc. The appellate courts also issue writs such as habeas corpus, mandamus, and injunctions.³⁴ The district courts are general jurisdiction courts hearing civil, criminal, and family matters. The quasi-judicial bodies, in a number of cases are the trial courts; however, they do not directly fall under the control and supervision of the judiciary.

Currently, there are 256 judges, 314 officers, and around 3,000 para-legal staff associated with the judiciary, around 238 government attorneys and around 10,000 practising lawyers in Nepal. All the judges are law graduates with practical experience either in the Bar or the justice sector for a number of years but competence is affected by the poor quality of legal education.

In a nutshell, the Nepali justice system has evolved over time, learning more from its own experience than blindly following any model of justice. Today it is based on a strong constitutional foundation. The Constitution enshrines a very bold and comprehensive framework of rights. By virtue of Nepal's commitment to human rights, the justice system has a rights focus. The courts are independent from the executive. They also enjoy functional autonomy. Because of its constitutional position and the role it is expected to play the judiciary is now a central institution for processing constitutional, legal, and social disputes, and ensuring abidance to the rule of law and human rights.

The fact that an amicable settlement of disputes through court referred mediation is a newly prioritized agenda of the justice system, all the courts now have internalized mediation as one of the mainstream strategies of dispute settlement. The medium of court business is Nepali. However, the effectiveness of the justice system is impeded by a very narrow canvas of law, procedural wrangles, and low investment in the judiciary. Periodic review of the legal framework is yet to become a prioritized agenda of the legislature or the Law Commission.

A2-5.0 PHILIPPINES

A2-5.1 COUNTRY CONTEXT³⁵

DEMOGRAPHICS—The Philippines is an archipelago of over 7,100 islands with a land area of 115,600 square metres. It has a population of 85 million. Ninety-five per cent of the population is made up of various ethno-linguistic groups descended from migrants who arrived in successive waves to the archipelago from Taiwan and mixed with other sporadic migrations from southern China.³⁶ Some 87 major dialects are spoken all over the islands. English and Filipino are the official languages, with English as the

language of instruction in the courts and higher education. Christianity is the main religion in the archipelago, with Roman Catholicism making up the majority. A small but significant minority profess Islam, particularly in the southern Philippines.

LEGAL SYSTEM—The Philippine legal system is aptly described as a blend of customary usage, Roman (civil law) and Anglo-American (common law) systems. Civil law governs the areas of family relations, property, succession, contract, and criminal law, while statutes and principles of common law origin are evident in the areas of constitutional law, procedure, corporation law, negotiable instruments, taxation, insurance, labour relations, banking, and currency. In some parts of the islands in the south, Islamic law is observed. This particular legal system is the result of the immigration of Muslim Malays in the fourteenth century and the subsequent colonization of the islands by Spain and the United States.

The main sources of Philippine law are the Constitution, statutes, treaties and conventions, and judicial decisions. The Constitution is the fundamental law of the land and as such, it is the authority of the highest order against which no other authority can prevail. Every official action, to be valid, must conform to the Constitution. On the other hand, statutes are intended to supply the details that the constitution, because of its nature, does not provide. The statutes of the Philippines are numerous and varied in their contents. They provide rules and regulations that govern the conduct of the people in the face of ever-changing conditions.

Having the same force of authority as legislative enactments are the treaties that the Philippines execute with other states. As a member of the family of nations, the Philippines is signatory to and has concluded numerous treaties and conventions.

Philippine law is also derived from cases decided by the courts, pursuant to the New Civil Code, which provides that 'judicial decisions applying to or interpreting the laws or the constitution shall form a part of the legal system of the Philippines'.³⁷ Following the three-tier system of courts, decisions of the SCP (Supreme Court of the Philippines) establish jurisprudence and are binding on all other courts.³⁸ The decisions assume the same authority as the statutes to which they apply or interpret. Until authoritatively abandoned, these decisions necessarily become, to the extent that they are applicable, the criteria which must control the acts not only of those called upon to abide thereby but also of those duty-bound to enforce obedience thereto.³⁹

To a certain extent, customary law forms part of the Filipino legal heritage because the 1987 Constitution provides that '...the State shall

recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.⁴⁰ This was true even as early as 1899 under the old Civil Code, which provided that '...where no statute is exactly applicable to the point in controversy, the custom of the place shall be applied, and in the absence thereof, the general principles of law.'⁴¹ Although this provision was discarded in the new Civil Code which took effect in 1950, judges, in the exercise of sound discretion, still apply the customs of the place or, in its default, the general principles of law in the absence of any statute governing the point in controversy. Otherwise the provision of the same Code which requires a judge to decide every case even where there is no applicable statute would prove to be a veritable enigma.⁴² The Civil Code also provides that '...customs which are contrary to law, public order or public policy shall not be countenanced...,' and '...a custom must be proved as a fact according to the rules of evidence.'⁴³ Thus, Philippine law takes cognizance of customs which may be considered as supplementary sources of the law.

A2-5.2 JUDICIARY AND THE COURTS

The Constitution of the Philippines ordains that judicial power be vested in one SCP and such lower courts as may be established by law.⁴⁴ The *Judiciary Reorganization Act* of 1980,⁴⁵ which took effect on 18 January 1983 organized a three-tier justice system and defined the organization, jurisdictions, establishment and staffing of judges of the CA, RTCs, MeTC, MTCs and Municipal Circuit Trial courts. In 1994, Republic Act No. 7691 amended BP 129 and expanded the jurisdictions and organization of the lower courts. Republic Act No. 7902 (1994) expanded the jurisdiction of the CA, while Republic Act 8246 (1996) created additional divisions in the CA and increased the number of justices from 51 to 69. Three divisions now seat in Cebu and another three divisions in Cagayan de Oro.

At the apex is the SCP, a collegiate court composed of one Chief Justice and fourteen Associate Justices. The SCP is the final arbiter of any and all judicial issues. When so deciding, the court may sit *en banc* or in divisions of three, five, or seven members. Below the SCP is another collegiate court, the CA. Composed of one Presiding Justice and 68 Associate Justices (Rep. Act No. 8246), the CA is vested with jurisdiction over appeals from the decisions of the RTCs and certain quasi-judicial agencies, boards, or commissions. The trial courts comprise the third-tier of the Philippine justice system. The trial courts are geographically organized into Municipal, Metropolitan, and RTCs.⁴⁶

A Municipal Trial Courts (MTC) is established in municipalities all over the country. MTCs that have jurisdiction over more than one municipality

are called Municipal Circuit Trial Courts (MCTC).⁴⁷ In the towns and cities in the Metropolitan Manila area, MTCs are called Metropolitan Trial Courts (MeTC). In cities outside Metropolitan Manila, courts in the Metropolitan areas are called Municipal Trial Courts in Cities (MTCC). RTCs were established among the 13 regions in the Philippines consisting of Regions I to XII and the National Capital Region (NCR). There are as many RTCs in each region as the law mandates.⁴⁸

In addition, Shari'a courts were established in provinces in Mindanao where the Muslim Code on Personal Laws is enforced. Shari'a courts have the same level as the trial courts. Shari'a District courts are the counterpart of RTCs, while the Shari'a Circuit courts are the equivalent of MCTCs. Presently, there are five Shari'a District courts and 51 Shari'a Circuit courts.⁴⁹

There are also special courts presided over by justices. These are the Court of Tax Appeals (CTA) composed of a presiding judge and five Associate Justices,⁵⁰ and the *Sandiganbayan* composed of a Presiding Justice and fourteen Associate Justices.⁵¹ The CTA is vested with the exclusive appellate jurisdiction over appeals from the decisions of the Commissioner of Internal Revenue and the Commissioner of Customs on certain specific issues, while the *Sandiganbayan* has exclusive jurisdiction over violations of the *Anti-Graft and Corrupt Practices Act* [Republic Act No. 3019], the *Unexplained Wealth Act* [Republic Act No. 1379] and other crimes or felonies committed by public officials and employees in relation to their office, including those employees in government-owned or controlled corporations.⁵²

A2-6.0 SRI LANKA

A2-6.1 COUNTRY CONTEXT

The Democratic Socialist Republic of Sri Lanka, formerly known as Ceylon, is a tropical island nation in the Indian Ocean, about 31 miles from the southern coast of India, with Colombo as its capital city. Its population is about 17.73 million according to the 2001 census. Sinhalese and Tamil are its official languages with English being spoken by about 10 per cent of the population, particularly in Colombo. It has an area of about 65,600 sq km, divided into nine provinces. It has been a member of the United Nations since 14 December 1955. Its GDP per capita is estimated to be USD 4,600 as of 2005, taking into account purchasing power parity, and its literacy rate is 92 per cent, with almost 99 per cent of children entering first grade. It has a republican form of government, with universal suffrage, the minimum age of voting being 18 years.

It has a long colonial history, first being under Portuguese influence in the coastal areas since the early sixteenth century, but the Portuguese were

replaced by the Dutch in the mid-seventeenth century. The British, in turn, ejected the Dutch in the late eighteenth century and finally brought the whole island under British rule in 1815 (after defeating the king of Kandy, the last of the native rulers) creating the Crown Colony of Ceylon. Sri Lanka regained independence on 4 February 1948 as the Commonwealth of Ceylon. It was thereafter declared a republic on 22 May 1972 and renamed as the *Free Sovereign and Independent Republic of Sri Lanka*. It was subsequently renamed the *Democratic Socialist Republic of Sri Lanka* in 1978.

Ethnically, the Sinhalese people comprise approximately 81.9 per cent and ethnic Tamils compromise about 9.4 per cent of the total population. The Moors, which is an ethnic group, traces its lineage to Arab traders and immigrants from the Middle-East, and comprises about 8 per cent of the total population. Also, there are other smaller ethnic groups, such as the Burghers, who are of mixed European descent and the Malays, from south-east Asia.

The ethnic Tamils have been categorized into two groups, the first being those whose ancestors migrated from India in ancient times and who are called the 'Sri Lankan Tamils' comprise about 4.3 per cent of the total population. The second group comprises Tamils brought from India by the British colonists to work as indentured labourers on estate plantations and who stayed on after independence. The latter comprise about 5.1 per cent of the total population. However, the 2001 census doesn't include Tamils in rebel held areas, outside government control.

Tensions have been simmering between the ethnic Sinhalese and Tamils since independence and by the mid-1970s calls arose for an independent Tamil state, called Tamil Eelam, in northern and eastern Sri Lanka, which had a predominantly Tamil population. In 1977, the Tamil United Liberation Front, espousing separatism, won all the seats in Tamil areas. On the other hand, the Liberation Tigers of Tamil Eelam (LTTE) chose violent means in this quest and over 65,000 people have been killed since fighting erupted in 1983, which has taken a toll on the human rights and economic situation in the country. Additionally, the tsunami that hit the south east Asian region on 26 December 2004 killed over 32,000 people and displaced 443,000 in Sri Lanka.

A2-6.2 JUDICIARY AND THE COURTS

In view of its colonial history and ethnic composition, the legal system in Sri Lanka is a mixture of English common law, Roman-Dutch, Sinhalese, Muslim, and customary law.

The judicial system in Sri Lanka comprises of the supreme court, court of appeal, provincial high courts, district courts, magistrate's court, and primary courts, in that order of hierarchy.

Appointment of all judges of the Supreme Court and Court of Appeal is by the President,⁵³ following approval by the Constitutional Council upon a recommendation made to the Council by the President.⁵⁴ Judges hold office during good behaviour and cannot be removed except by an order of the President made after an address of parliament, supported by a majority of the members of parliament, has been presented to the President for removal on the ground of proved misbehaviour or incapacity.⁵⁵ It is the highest and final superior court of record and is empowered to exercise: jurisdiction in respect of constitutional matters;⁵⁶ jurisdiction for the protection of fundamental rights;⁵⁷ final appellate jurisdiction;⁵⁸ consultative jurisdiction;⁵⁹ jurisdiction in petitions relating to election of President, relating to the validity of a referendum and appeals from Orders/judgments of the court of appeal in other election petitions;⁶⁰ jurisdiction in respect of any breach of the privileges of parliament;⁶¹ and jurisdiction in respect of other matters which the parliament may by law vest or ordain.

The Court of Appeal consists of the President of the court and not less than six and not more than eleven other judges.⁶² Provisions on appointment and removal of judges are the same as applicable to the Supreme Court. It is empowered to exercise jurisdiction in: appeals from the High Court in the exercise of its appellate or original jurisdiction,⁶³ as well as appeals from any court of first instance and any tribunal or other institution; sole and exclusive cognizance by way of appeal, revision, and restitution, power and authority to inspect and examine records of any court of first instance;⁶⁴ jurisdiction to grant and issue writs according to law, writs of certiorari, prohibition, procedendo, mandamus, and quo warranto;⁶⁵ jurisdiction to grant and issue writs of habeas corpus;⁶⁶ jurisdiction to grant injunction;⁶⁷ and jurisdiction to try election petitions in respect of the election of members of parliament.⁶⁸

Judges are appointed by the President on the recommendation of the Judicial Service Commission made after consultation with the Attorney General. Judges are removable by the President and are subject to disciplinary control by the President on the recommendation of the Judicial Service Commission.⁶⁹ The High Court has original as well as appellate (and revisionary) jurisdiction.

District courts are established under the *Judicature Act*, No. 2 of 1978 for each of the 54 judicial districts. Every district court is a court of record and is vested with unlimited original jurisdiction in all civil, revenue, trust, insolvency, and testamentary matters other than such matters as are assigned to any other court by law. Appeals from judgments, decrees, and orders of the district court lie to the Court of Appeal. All judges of the district courts

are appointed by the Judicial Service Commission which is also vested with the power of dismissal and disciplinary control of the judges.

Magistrate's courts are established under the *Judicature Act*, No. 2 of 1978 for each of the 74 judicial divisions. Every Magistrate's court is vested with original criminal jurisdiction (other than in respect of offences upon indictment in the High Court), and is ordinarily empowered to impose sentences up to a fine of Rs 1,500 and/or two years rigorous/simple imprisonment unless power is vested in the Magistrate's court to impose higher penalties by special provision. Appeals from convictions, sentences, or orders of Magistrate's courts within a province lie to the High Court of the province. All magistrates are appointed by the Judicial Service Commission which is also vested with the power of dismissal and disciplinary control of the judges.

Primary courts are established under the *Judicature Act*, No. 2 of 1978. There are seven primary courts functioning in Anamaduwa, Angunukolapelessa, Kandy, Mallakam, Pilessa, Wellawaya, and Wennappuwa. In the other divisions, the Magistrate's courts exercise the jurisdiction of the primary courts. A primary court is vested with the following jurisdiction to entertain: suits where the debt, damage, demand, or claim does not exceed Rs 1,500; suits for enforcement of bye-laws of local authorities and matters relating to recovery of revenue of such authorities; exclusive criminal jurisdiction in respect of offences prescribed by the Minister by Regulation; and offences in violation of provisions of any Act or subsidiary legislation in respect of which jurisdiction is vested. A revision of an order made by a primary court could be made to the High Court of the Province. All judges of the primary court are appointed by the Judicial Service Commission which is also vested with the power of dismissal and disciplinary control of the judges.

Sri Lanka does have a National Human Rights Commission whose limited mandate has raised controversy in Sri Lanka and abroad.

A2-7.0 VANUATU

A2-7.1 COUNTRY CONTEXT

Vanuatu,⁷⁰ formerly known as the New Hebrides, is a collection of over 80 islands located in the south-western Pacific. There are 12 main islands although the population is dispersed widely, and during the last national census, in 1999, 65 islands in the country were inhabited.⁷¹ It has a population of approximately 210,000 people. About 99 per cent of the population is indigenous ni-Vanuatu. Vanuatu has two urban areas, Port Vila, the capital, located on Efate and Luganville to the north, located on Espiritu Santo. It is estimated that 80 per cent of the population lives in rural areas.

Vanuatu has an unusual colonial history, having been colonized jointly by France and England in an arrangement known as the Condominium.⁷² On gaining independence in 1980 Vanuatu adopted or inherited various features from both colonial powers, in particular a dual education system, one French and one English. In addition to these two languages, a pidgin language, Bislama, is widely spoken. The linguistic divide between Francophone and Anglophone speakers tends to create social and political divides. This is further complicated by the large number of indigenous cultures. While the indigenous population is broadly Melanesian, over 100 linguistically distinct cultures exist in Vanuatu.

Kinship ties remain strong and custom provides the basis for social ordering, particularly outside of the urban areas. The importance of custom is reflected in the legal system. While the legal system operates as a common law system complete with an adversarial court system, the rules applied within the legal system are a combination of locally made legislation and judicial law, adopted English law, adopted French law, and indigenous customary law.¹⁷ Further, all land in Vanuatu is owned by customary landowners, although land can be leased in order to allow for 'modern' land dealings.¹⁸

Vanuatu is on the United Nations list of least developed countries.⁷³ Since Independence Vanuatu has experienced erratic growth of GDP. One of the reasons for this is that agriculture, which is one of the mainstays of Vanuatu's economy, is vulnerable to natural disasters such as cyclones and droughts. Changes in international prices for Vanuatu's exports, most notably the declining price for copra, have also affected GDP. Political instability has also resulted in mismanagement and hindered growth.⁷⁴

This weak economic performance is mirrored in Vanuatu's weak human development performance. In terms of human development in 2007 Vanuatu was in the bottom third of medium development countries on the United Nations human development index, with a rank of 120. While increasing life expectancy rates indicate that health care is improving, access to health care, water, and sanitation are issues, particularly in rural areas. Functional literacy is estimated to be 30 per cent for women and 37 per cent for men.

A2-7.2 JUDICIARY AND THE COURTS

The Constitution is the supreme law of Vanuatu. On independence, Vanuatu adopted British and French laws as the basis of the legal system, and also stated that customary law is part of the law.⁷⁵ Locally made legislation has largely superseded legislation and local case law supplements English principles of common law and equity.

Vanuatu operates an adversarial court system. The main courts are the magistrates court, supreme court, and court of appeal. These are

supplemented by the Island courts. Customary land tribunals, with no right of appeal to the western-style courts, also exist.⁷⁶

The magistrates court has jurisdiction in most civil matters where the amount claimed or the subject matter in dispute does not exceed VUV 1,000,000. This amount is increased to VUV 2,000,000 in landlord and tenant cases. The magistrates court also has jurisdiction over some family matters and can hear uncontested petitions for divorce or nullity of marriage and claims for maintenance not exceeding VUV 1,200,000. It has criminal jurisdiction over any offence for which the maximum penalty does not exceed two years imprisonment, and can also hear appeals from the islands courts.

The Supreme Court has unlimited jurisdiction in all criminal and civil matters, except for disputes involving customary ownership of land, and hears appeals from the magistrates court.

The Court of Appeal has jurisdiction over appeals from the Supreme Court. A panel of three or five judges constitutes the Court of Appeal. Judges are a combination of those from the Supreme Court and judges from overseas, with judges from New Zealand, Fiji, Solomon Islands, and Australia being used in recent years. It usually sits twice a year.

The appointment of judges in these three courts is done by the Judicial Services Commission in accordance with the *Judicial Services and Courts Act 2000*. This Act also empowers the Commission to remove judges for a variety of reasons, including misconduct. Court personnel are also governed by this Act.

Island courts are semi-formal courts that were established in accordance with the constitutional requirements that 'parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.'⁷⁷ Justices in the island courts are lay people. They must be knowledgeable in custom, and at least one of them must be a custom chief from within the territorial jurisdiction of the court. Disputes are heard by three justices sitting together. The jurisdiction of each court is determined by its particular warrant, although no island court can deal with civil claims (other than land claims) of more than vuv 50,000, or impose criminal sanctions of more than a vuv 24,000 fine or six months imprisonment.

The courts are not bound by formal rules of evidence and lawyers are not allowed to participate in island court hearings. Appeals against decisions of an island court can be made to the magistrates court.

The ownership of land in Vanuatu is determined by custom, and the Constitution requires that 'the government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the

ownership of custom land.⁷⁸ Until 2001, customary land disputes were heard by the Island courts, with appeals going to the Supreme Court. In 2001, the *Customary Land Tribunal Act* (CLTA) established a system of tribunals for dealing with disputes relating to customary landownership. Whilst the Supreme Court supervises customary land tribunals there is no right of appeal to the Supreme Court against decisions of land tribunals. The CLTA system uses chiefs as adjudicators.

In practice, the legal system as established by the state only has a noticeable presence in the urban areas and main 'outer island' centres. Supreme Courts are found only in the urban areas of Port Vila and Luganville. Magistrates courts are located in Port Vila, Luganville, Lakatoro (Malekula), and Isangel (Tanna). Island courts are found at all of the centres that have magistrate's courts, and also at Saratamata (Ambae—also known as Aoba), Pentecost, and Sola (Vanua Lava).⁷⁹ Customary land tribunals have been established in some parts of the country.

NOTES

1. S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004), New Delhi: Lexis-Nexis Butterworths, pp. 175–225.
2. Law Number 37 2004 on Bankruptcy and Suspension of Payment.
3. Law Number 14 2001 on Patent, Law Number 15 2001 on Trademarks, Law Number 31 2001 on Industrial Design, and Law Number 32 2001 on Integrated Circuit Design.
4. Law Number 26 2000 on Human Rights Court.
5. Law Number 30 2002 on Anti Corruption Commission.
6. Law Number 31 2004 on Fisheries Court.
7. Law Number 2 2004 on Industrial Relation Dispute.
8. Law Number 24 2003 on Constitutional Court.
9. Art 13 (1) and (2) Law Number 4 2004 on Judicial Power.
10. Except for Tax Court which is still managed by the Ministry of Finance.
11. Art 28 (1) Law Number 14 1985 on the Supreme Court.
12. Art 35 Law Number 14 1985 on the Supreme Court.
13. As a consequence, the Supreme Court rarely conducts hearings and summons litigants.
14. See previous section on types of cases as to which court may hold hearing and summon litigants.
15. Art 79 Law Number 14 1985 on the Supreme Court.
16. Art 13 (1) Law Number 4 2004 on Judiciary Power.
17. Art 37 Law Number 14 1985 on the Supreme Court.
18. Art 4 (3) Law Number 5 2004 on the Amendment to the Law Number 14 1985 on the Supreme Court.

19. Art 40 (1) Law Number 14 1985 on the Supreme Court.
20. Art 60 (2) Law Number 30 2002 on Anti Corruption Commission.
21. UNDP *Human Development Report* (2007/2008).
22. The recruitment of Gorkha soldiers began after the Indian Mutiny of 1857 during which Gorkha soldiers, siding with the British, crushed the mutiny. For this assistance the British also obliged Nepal by returning a small portion of lost territory in Western Nepal which is even today euphemistically called *Nayamuluk* or '*New Nepal*'.
23. Art 138 Nepal Interim Constitution 2007.
24. Art 100 Nepal Interim Constitution 2007. The expression is of immense importance as it empowers the judiciary to internalize values recognized in international and comparative settings.
25. This is more visible in family law and other property related laws such as the trust law, financial transaction, and some criminal laws such as incest, bestiality, or killing of cows, etc.
26. At least eight Chief Justices succeeding him were law graduates from India.
27. A.M. Bhattarai, *The Judicial System of Nepal: An Overview in Fifty Years of the Supreme Court of Nepal* (May 2005), Golden Jubilee Publication of the Supreme Court, 13–17.
28. Nepal issued the first Constitution in 1948 during the last leg of Rana rule. An interim Government Act, a constitutional text in nature, was issued in 1950, and in 1958 a new Constitution was issued just to be withdrawn in 1960 and replaced in 1962. The 1990 Constitution lasted for 17 years and now Nepal has a new Interim Constitution issued in 2007.
29. At the moment the commercial Benches will hear cases under the *Companies Act* 2006, *Secured Transaction Act* 2006, *Insolvency Act* 2006, and the *Competition Act* 2006, but the NJA is engaged in conducting multi-sectoral discussion to explore the possibility of increasing the jurisdiction of these Benches both in the short and the long-term.
30. Arts 103, 109, and 155 *Nepal Interim Constitution* 2007.
31. Art 102 *Nepal Interim Constitution* 2007.
32. Art 102 *Nepal Interim Constitution* 2007.
33. Art 107 *Nepal Interim Constitution* 2007. This provision was also there in Art 88 *Nepal Constitution* 1990.
34. S 8 *Judicial Administration Act of Nepal*.
35. M.S. Feliciano, 'Legal Systems in ASEAN, Philippines' (2006) *Asian Law Organization*. Chapter 1-1, <<http://www.aseanlawassociation.org/legal-phil.html>> (20 October 2007).
36. Demographics of the Philippines, available in <http://en.wikipedia.org/wiki/Demographics_of_the_Philippines>
37. Feliciano, above n. 35, Chapter 2-1, citing Art 8 Republic Act No. 386 1950, NCC. <<http://www.aseanlawassociation.org/legal-phil.html>> (20 October 2007).

38. Ibid., citing *Miranda v. Imperial*, 77 Phil 1066 (1947).
39. Ibid., citing *Caltex (Phil) Inc v. Palomar*, GR No 19650, 29 September 1966, 18 SCRA 247, 257 (1966).
40. Ibid., citing Art XIV S 17.
41. Ibid., citing 6 Art 6 (2).
42. M.J. Gamboa, *An Introduction to Philippine Law* (7th ed., 1969), 14–15; Art 9 New Civil Code: ‘...no judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws...’
43. Arts 11 and 12 *Republic Act No. 386 1950*, New Civil Code.
44. S 1 Art VIII *Constitution of the Republic of the Philippines 1987*.
45. *Batas Pambansa Bilang*, 129.
46. R.C. Pangalangan, ‘The Philippine Judicial System’ (IDE-JETRO, March 2001), *IDE Asian Law Series No. 5, Judicial System and Reforms in Asian Countries (Philippines)*, 6.
47. S 25 *Batas Pambansa Bilang 129 1980*.
48. S 13 *Batas Pambansa Bilang 129 1980*, For territorial area of a branch, ss 17 and 18 *Batas Pambansa Bilang 129 1980*.
49. Available in <<http://www.chanrobles.com/courtsinthephilippines.htm>>.
50. S 2 *Republic Act No. 1125 1954*, as amended by *Republic Act No. 9282 2004*.
51. *Republic Act No. 8249*.
52. M.S. Feliciano, above n. 35, Chapter 2, 16, 17. <<http://www.aseanlawassociation.org/legal-phil.html>> (20 October 2007).
53. Art 107 *Sri Lankan Constitution*.
54. Art 41C *Sri Lankan Constitution*.
55. Art 107 (2) *Sri Lankan Constitution*.
56. Arts 120 to 125 *Sri Lankan Constitution*.
57. Art 126 *Sri Lankan Constitution*.
58. Arts 127 and 128 *Sri Lankan Constitution*.
59. Art 129 *Sri Lankan Constitution*.
60. Art 130 *Sri Lankan Constitution*.
61. Art 132 *Sri Lankan Constitution*.
62. Art 137 *Sri Lankan Constitution*.
63. Art 139 *Sri Lankan Constitution*.
64. Art 145 *Sri Lankan Constitution*.
65. Art 140 *Sri Lankan Constitution*.
66. Art 141 *Sri Lankan Constitution*.
67. Art 143 *Sri Lankan Constitution*.
68. Art 144 *Sri Lankan Constitution*.
69. Art 111 *Sri Lankan Constitution*.
70. For general information on Vanuatu see: E. Melvin, and C.R. Ember, (eds), ‘Vanuatu’ in *Countries and their Cultures Volume 4* (2001) Lamont Lindstrom, 2391.

71. Vanuatu National Statistics Office, *The 1999 Vanuatu National Population and Housing Census Main Report* (2000), 16.
72. The Condominium was established by the Anglo-French New Hebrides Convention 1906.
73. United Nations Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States* <<http://www.un.org/special-rep/ohrlls/ldc/list.htm>> (6 July 2006).
74. For an overview of Vanuatu's national economy see: S. Athy and F. van der Walle (eds), *20 Years of Central Banking in Vanuatu*: C. Ala and P. Arubilake, 'Chapter 1: Domestic Economy' (2000) 12. Also D. Cowen, A. Wolfson, and J.M. Ni, *International Monetary Fund Vanuatu Country Report* (2002) available online at <<http://www.imf.org/external/pubs/cat/longres.cfm?sk=16224>> (27 July 2006).
75. Art 95 *Constitution of the Republic of Vanuatu*.
76. For more information see: J. Corrin-Care, T. Newton, and D. Paterson, *Introduction to South Pacific Law* (1999) Cavendish, London, 323–8.
77. Art 52 *Constitution of the Republic of Vanuatu*.
78. Art 78 (2) *Constitution of the Republic of Vanuatu*.
79. Phone conversation with Veronique Teitoka, Port Vila Supreme Court, 17 July 2006.

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