

Gender and Judging in India

Ann Stewart⁴⁴⁴

Abstract:

The paper provides the background for a project which traces the longer term impact on a cohort of judges in India of a major collaborative Indo British project on gender and law training in the 1990s. This group of 43 District and Sessions judges (31 men; 12 women), drawn from all over India, were selected by their respective High Courts. Subsequently a significant number have been elevated to their High Courts (the final appellate body in each state). The paper places the judges within the background of the original project and the present institutional contexts in which they now function. It considers, through the lens of gender justice, two related debates: how to measure the effectiveness of international development projects involving judicial reform and the impact of women within the judiciary. It provides preliminary observations on interviews conducted with judges.

Rezumat:

Lucrarea oferă baza pentru un proiect care urmărește impactul pe termen lung pe o cohorta de judecători în India al unei colaborări majore pentru un proiect indo-britanic privind tipologiile și procesul de formare în justiție în anii 1990. Acest grup de 43 de judecători de district și sesiuni (31 bărbați; 12 femei), proveniți din toată India, au fost selectați de către instanțele lor superioare. Ulterior, un număr semnificativ au promovat la instanțele superioare (ultima instanță de recurs în fiecare stat). Lucrarea plasează judecătorii la începutul proiectului și apoi în prezentul context instituțional în care funcționează. Aceasta are în vedere, prin prisma tipologiilor în justiție, două dezbateri legate de: cum se măsoară eficacitatea proiectelor de dezvoltare internațională care implică reforma sistemului judiciar și impactul femeilor în cadrul sistemului judiciar. Aceasta oferă și observații preliminare asupra interviurilor luate judecătorilor.

Keywords: gender justice, judicial selection, diversity and intersectionality, agency.

Introduction

This paper arises from a gender and law education project for Indian judicial officers which took place between 1996 and 2002. The focal point for the project was 43 senior but 'subordinate' judges: 31 men and 12 women. In the nature of these development projects both stages of the project (the main project phase between 1996 and 2000 and the subsequent 'rolling out' phase between 2000 and 2002) were evaluated on

completion and passed into history.

'How will you know whether you have made a difference?' I was asked this question by the funder's social development advisor at the



⁴⁴⁴ E-mail contact profesional: a.stewart@warwick.ac.uk

start of the project. It was a good question then and it has remained so ever since. Seeking an answer provides part of the motivation for the present research. The argument made here is that the project was innovative even though set within prevailing development policy paradigms at the time and reflection upon it after a substantial period of time has lapsed can provide some insights into the nature of such activities and contribute not only to two linked but differing debates: the first relating to the role of women in the judiciary, the second to the role of developmental judicial reform and rule of law projects but also more specifically to the search for appropriate and effective methodologies for the evaluation of judicial performance relating to social justice.

In 2010 the author who was the UK director of the project decided to return to the experience and to undertake in depth interviews with members of the original group to seek their reflections, years later and in a different institutional context, on the training and their assessment of the longer term impact, if any, of the project. The initiative was therefore not part of the original project and undertaken as a purely academic research project. The judges are now senior members of the judiciary in India, many sitting in their respective High Courts (the final appellate body in each State). Detailed analysis of these interviews (27 to date) has yet to take place so this paper can only provide the background context and first impressions from the fieldwork. It raises questions rather than answers.

The original project

Because it provides the rationale for the present research it is necessary to

The Indian constitution ensures that all citizens are equal before the law– formal equality. However social and economic forces make citizens unequal in practice. Thus while men and women are legally equal in court if seen as abstract legal persons, as social beings they are unequal.

describe the original project in some detail.

The Supreme Court in *Judges Association vs. Union of India* (1991) Suppl. 11 SCR 230 issued a direction to set up an all India Institute for the training of higher officers of the judiciary, including district judges, and a state level institute for training the 'subordinate' judiciary within each state or union territory. The institutional development of this decision has taken some time. Although nominally in existence in the Supreme Court, the National Judicial Academy (NJA) appointed its first director and moved to its palatial new facilities in Bhopal in 2002. Thereafter it started to build up its programmes. A very few High Courts had operational training academies in the 1990s but more have since been established so that now training facilities exist, to differing degrees, in the 18 High Courts.

In August 1995, the Department of Women and Child Development of the Government of India convened a seminar to discuss whether the legal system dealt fairly with women. The chief guest was the Chief Justice of India but the seminar was also attended by very senior stakeholders in all aspects of the legal system in India including several legally

⁴⁴⁵ Professor Menon of the National Law School of India, and subsequently first Director of the NJA, and the author attended the meeting. We were

asked to draw up a training programme to meet the identified issues.

focused women's organizations. Those attending the seminar acknowledged that the anxiety about the way in which the legal system dealt with gender issues.

The Indo British Gender and Law education for the Judiciary project was one product of this seminar⁴⁴⁵. Its principle objectives were to facilitate discussion of gender issues by using both national and international research and experience; to develop suitable training materials which would be used initially to train a core of key judicial staff and be modified thereafter for incorporation into the common curriculum for judicial officers being developed by the National Judicial Academy; to develop training skills of key judicial staff to facilitate the institutionalisation of the issues within the judicial system; to promote best practice through access to national and international experience and example and to encourage the development of organisational change; and to promote collaboration between the relevant institutions in the United Kingdom and India.

The project was funded through the UK's Department for International Development in conjunction with the Indian Government. It therefore was a development project, involving collaboration formally between the NJA, Warwick Law School and the British Council which acted as management agents. However the NJA at that time was an office in the Supreme Court in Delhi so in reality the project partners were the Chief Justice of India and the Registrar General plus one administrative officer. Nonetheless such high level of support ensured collaboration throughout the judicial system.

Structure of the project

Selection and composition of participants

The target group was district and sessions judges, the most senior trial level

judges undertaking both criminal and civil matters who also can be posted in High Court registries or assigned to government service as law secretaries or, in large states, to the legal services commission.

In the states with formal judicial training arrangements, they can be also posted to direct these activities. Judges move every three years and may undertake a range of these activities over their professional career. There are a number of grades, the most senior of which is principle judge, who will have responsibility for a whole district. India has a mixed entry process for judges: a career route whereby judicial officers start as magistrates and work their way up; and a direct entry from the bar which is possible at a number of defined stages. Opportunities for elevation to the High Court for the career judiciary are limited because there is a quota (usually 25%) and a 'cut off' age of (usually) 58. Seniority is generally the basis for promotion.

The selection process involved the NJA inviting specific High Courts to choose two participants to attend in any particular year. Small states could only send one. Over the four year period of the project all High Courts sent participants. Participants generally were drawn from the more senior ranks and, significantly, from the career judiciary. The Chief Justice at the time of initiation of the project came from this stream. As academic project director I was keen to encourage the High Courts to consider the gender composition of the group while stressing the need to identify potential participants with an interest in both gender and training issues if at all possible. However I was not involved in the selection process. Twelve participants were women (28%), roughly commensurate with the proportion of women within this level of the judiciary at the time.

Project activities

The project involved both intense and sustained levels of activity and participation. It built up over the initial four years and involved some participants in activities for a further two years. Thus for some this amounted to 6 years of association with the project.

Each participant's key involvement took place in their first year. There were three key elements: a three day briefing held in India; a 6 week intensive programme in the UK; and a follow up seminar in India. The Indian briefing was organised under the auspices of the NJA and addressed by Supreme and High Court judges, to cement the legitimacy for this unusual project. Judges were introduced through briefings by specialists to the context of gender equality in India with a clear emphasis on the implications for judicial practice and briefed on obligations under CEDAW. They had sessions with women's organizations, working in the area of gender and law. The judges were introduced to more general gender issues by skilled gender trainers who have devised and implemented such training for the Indian Administrative Service.

These briefings brought together the judges from the various states for the first time. For many it was their first professional activity outside their own state. After the first year, the briefing provided an opportunity for the participants in the previous year to meet the next group. This interaction built confidence in the programme as a whole - previous participants were able to reassure newcomers that the programme was conducted professionally and presented no threat to their integrity or independence; and provided an opportunity to share information, materials from previous years and professional experience. This collective knowledge accumulated over the years and provided increasing

depth to the programme. The most challenging sessions were always those involving women's organisations. We worked hard to find ways to minimise any negative impact. As UK director of training I attended the briefing and participated fully in the design of the sessions but took very little part in the substantive discussions. Thereafter, the participants returned to their states to prepare for their departure for the UK which occurred 2 months later.

The second element was the intensive study programme conducted at Warwick Law School in the UK. It involved a number of elements designed to develop different skills although the approach throughout was collegiate and highly participatory. The emphasis was on the process of judging not on influencing individual judgements (Malleon 1999: 172). The first element was to increase their awareness of gender issues. While they were exposed to international and comparative material to identify catalysts for change; the steps needed both to bring about awareness of change and also its implementation. We analysed the time scales involved and the complexity. Participants were encouraged to see the ways in which various jurisdictions had made imaginative use of the CEDAW convention and in particular the ways in which it had been used by the judiciary to create a legal culture in which substantive rather than formal equality is implemented.

The educational challenges involved in training judges are substantial (Stewart 2001) and this programme had to not only tackle this issue but also go the further step of enabling our participants to gain sufficient skills to train others. This second element of the programme was conducted by an experienced adult education trainer with academic expertise in the field of gender and development within India. We adopted a highly participatory method: the

judges learned how to train others by themselves learning through these methods. The participants found these methods very difficult because they came from academic contexts where teachers instruct and are not questioned so substantive knowledge is generally received passively. They pass from this education system into the court system which reinforces this approach as they become providers of unquestioned answers via their judgements. So they openly doubted whether they were learning anything worthwhile. We considered that our methods based on self learning proved very successful for the majority eventually – a significant number of participants became very enthusiastic supporters of these methods over the years of the project.

The third element in the UK programme involved the development of training materials because there was no specifically designed gender curriculum. We aimed therefore to provide sets of materials which could be adopted institutionally by the NJA and by state level training bodies but also by the trained judges for their own training activities. Each participant was given responsibility to devise and prepare a training session on a relevant but specific topic using participatory methods while the final activity undertaken in the UK was the conduct by each participant of this training session. Each session was evaluated by the group, the trainers and in most years by a representative of the NJA (including two Chief Justices of India who come specifically to join us for these sessions). The evaluations are given to the participant. Each year's materials were then collated and produced as 'ready to use' training manual at the end of the six week session.

We also provided each participant with a week long placement with a relevant organisation or court. These placements

proved very successful, allowing the judges to obtain first hand experience of aspects of the administration of justice in England. They reported back in ways which demonstrated that observing another system stimulated considerable insight into their own, provoking them to think about what exactly they were trying to achieve in India and how they were doing it. We regard this as an important but often misunderstood aspect of internationally based training.

The third element in this year involved follow up activities in India. Each judge prepared a 'plan of action' which involved a realistic assessment of what they might do to put their training into practice. We subsequently held a seminar in India to assess the progress of all participants. At these sessions they had an opportunity of sharing with each other and with the NJA representatives the extent to which they have been able to implement their training now that they had returned to their hugely burdensome judicial postings.

Most of the judges were involved in a final stage involving collective implementation via regional 'pilot' one day seminars attended by 35-50 fellow district and sessions judges from local and neighbouring states. They tested their materials and training capabilities.

At the end of the four years the British Council obtained funding from the UK British Foreign and Commonwealth Office to conduct 'roll out' seminars across India. Over the course of the next 2 years 3000 judges attended 3 day workshops conducted by the most capable trainer judges using the collective materials.

Returning to the big question: evaluation

How successful was the project in meeting its objectives?

Few gender training projects have this level of financial support and backing from the judiciary. We had the support of 5

Chief Justices of India over the life time of the project, most of whom took a personal interest and devoted time to it. However despite this crucial judicial support it was conducted at a time when there was still only a rudimentary institutional framework at individual High Court level and no such framework at national level. The project was developed and implemented while the NJA was being built.

It embodied many of the limitations associated with judicial reform projects undertaken in a development context. This issue will be explored below but two points can be made here. First the project formulation did not involve much consideration of the relationship between objectives and evaluation. The act of faith was that the activities described above would equip this group to contribute to the development of gender justice within the judiciary in India – that there would be positive outcomes as well as outputs. Secondly the project was in many ways incomplete. We prepared a bid for a further 'implementation' phase to institutionalise this investment in human capital within the newly functional NJA and the developing state judicial training academies and to encourage and support collaboration within the group itself. Based on the highly positive way in which the project had been received by all stakeholders, we were optimistic that funding would be forthcoming but as with the fate of so many such development projects, the UK funder's priorities changed and we were not granted this crucial next phase.

So the big question on impact was made more difficult both because of limitations in evaluation methods and timescales for implementation. In relation to the wider training outputs we pointed to the 43 judges who were in possession of basic training skills, the majority of whom could be used as a judicial training

resource throughout India. Over 20 participants took part as trainer/facilitators at regional seminars and received formal assessments from participants: all were considered more than adequate and many assessed as good or excellent. We highlighted three published volumes of training materials which had been tested at the regional seminars and judged to be useful or very useful by the overwhelming majority of participants (some 250 judges). We documented the institutional responses (activities undertaken with a gender focus; use of materials and participants in such activities) within the 18 High Courts and produced a rough and ready rating for each. We had no way of measuring any resulting outcomes for those using the courts.

The judge in the courtroom

Were we able to say that the training had started to tackle the initial general cause of anxiety: the lack of gender justice in the courtroom? How did we evaluate the impact of training on the day to day activities of the participants? We relied solely on detailed qualitative material (self reflection, sample judgements, examples of individually instigated training activities, meetings held and talks given, reported changes in practice etc), provided by the participants themselves and whereas the responses to wider impact questions were triangulated through other means, the behavioural change responses were not. However within these obvious limitations, the evaluations conducted at the end of the initial 4 year programme provided very positive results.

The project's 'client centred' learning method was highly participative and self directive in order to encourage the judges to seek the practical ways in which they could implement their training in whatever their day to day court work involved. This worked. To give some examples, participants identified the need to take a more

proactive role in the proceedings to ensure fairness between the parties rather than simply respond to the material presented by the lawyers. They also were more aware of the impact of the use of discretion, in particular that it could be used to ensure such fairness wherever appropriate. On this key aspect of attitudinal change, the participants' own evaluation provided strong evidence of success. The following quote reflects the sentiments expressed in the majority of the detailed self-evaluations:

The value of the training can hardly be over emphasized. My perception of gender issues today is quite different from what it was before the training. It has undergone a sea change.

They considered that they could identify inequalities being faced by women which they now recognised they had ignored as 'mere routine behaviour' before. This new understanding translated into actions such as trying to compensate for procedural delays and 'adopting procedures and methods which enable women, children and infirm persons to come forward and give evidence to their satisfaction'. They took a fresh approach to the appreciation of evidence recognising that the way in which the evidence is given can have a crucial bearing on the weight given to it. They reported that they were less concerned with 'minor omissions and contradictions' in witnesses' evidence in rape cases. They suggested that they are able to understand how difficult it is to give evidence in such cases. 'I realise that before the training I was stereotyping the witness expecting her to respond as I would. Now I appreciate evidence from the victim's position.' They were much more vigilant in ensuring that cross examination of victims was 'restricted and to the point'. They are more aware of the gender context and take care to avoid stereotyping.

Generally the self-evaluations provided evidence of a variety of ways in which the judges have implemented changes at key stages of the court process.

Judges reported that they had made greater efforts to provide a more conducive environment in the courtroom, not an easy task in these overcrowded, often seemingly very harsh, places. In practice this meant not only treating staff, witnesses, litigants and their lawyers in such a way that reflects sensitivity to gender issues but also encourages the various parties to follow the judge's example. It led them to tackle 'latent prejudices as well as inhibitions', and 'understanding their wants, needs and expectations of me'. The outcome was noted: 'There is a more congenial family atmosphere with subordinates'.

The benefit of hindsight

The evaluation took place at the end of a four year project. The last batch of participants had been back in their posts for roughly 6 months while the first batch had been working for over 3 years post training. How exactly was this group to fulfil the expectations generated by the substantial investment in them as individuals but also as 'representatives' of their High Courts and as possible catalysts for change?

They were all at that time senior but subordinate mainly career stream judicial officers working under immense pressure due to huge numbers of pending cases. Due to the lack of a project specific second phase which would have focused on developing an appropriate institutional framework through which the gender curriculum and training could be utilised, responsibility for any continuing 'success' seemed to rest with this tiny group. What institutional recognition, support and facilitation would they receive? What level of individual agency could be expected

of them in the particular institutional context of their respective states and importantly for how long?

As an academic who specialises in issues relating gender, law and development I was and remain particularly interested in attitudinal change and its impact on judicial performance. Did the gender of the judges make a difference? Would women exercise more agency than men? Would there be different institutional responses based upon gender? Would the effects of the training 'wear off' over time given dominant societal norms relating to gender relations or are there changes within society more generally and within the judicial sector more specifically which provide reinforcement?

Locating the issues

(1) The development framework: Judicial Reform and Rule of Law projects

There has been 'rule of law revival' within overseas development assistance in recent years resulting in a huge growth in legal and judicial reform programmes. 'These reforms are widely seen as being foundational to all governance and economic development strategies because they consolidate state capacity to provide public order, safety and security; build the legal framework to secure the investment environment; strengthen judicial independence and the rule of law; and promote human rights, access to justice and (it is hoped) alleviates poverty' (Armytage 2006).

Partly because the primary focus has been on post conflict, transitional and 'failing' states, the emphasis has shifted from project based interventions such as the one under discussion here to large scale sectoral programmes, funded through general financial support to governments wherever appropriate, aimed at comprehensive reforms of legal and judicial systems.

Judicial reform has become big business involving billions of dollars, large numbers of donors in hundreds of programmes (Trubek 2006; APJRF 2009: 5). Now such programme specifications require gender issues to be integrated across the sector albeit delivered through specific projects.

Yet confidence in the efficacy of this programmes is not strong partly because there are few reliable and universally recognised indicators of whether they work and because such indicators as there are tend to indicate that substantive improvements in justice are very elusive (see contributions to APJRF 2009; Armytage 2006). Those working in the field are increasingly recognising the need to invest resources in developing methodologies which will facilitate 'evidence based' policy development and performance monitoring and refining their approaches in the light of what has not worked.

There is a rich seam of critical analyses from a range of perspectives of this global development approach to justice (Carothers 1998, 2006; Faundez et al 2000). Some reflect on the fate of earlier modernist law and development movements (Trubek and Galanter 1974; Trubek 2006). Others, often those with interests in gender justice point to the continuing concentration on legal centralism and formal legal institutions even though some account is now taken of post colonial pluralism (Gopal 1996; Tamanaha 1995; Rittich 2004-5; Stewart 2002). The ideological assumptions which underpin this form of globalisation are seen as undermining alternative forms of popular or local justice (Santos & Gavarito 2005; An Naim 1999; Golub 2003) and forms of Western imperialism (Carothers 2006). The more recent incorporation of human rights and democracy can also be seen as a form of imperialism (Rajagopal 2007-8; Merry 2006) although Sen's work

on development as freedom (1999) and justice (2009) would seek to rehabilitate aspects of development discourse by focusing on 'unfreedoms' such as poverty, absence of economic opportunities and neglect of public facilities and the role of the state to enable individual capabilities. 'Access to justice' and 'justice for the poor approaches', dubbed the Third Moment, which seek to combine Sen's freedom approach with more pluralistic less top down institution centric approaches are emerging (Trubek and Santos 2006; APJRF 2009).

Judicial reform in India

These developments support an assessment of the distributive dimension to judicial reform (Kennedy 2006), which had been ruled out under earlier neo liberal forms of rule of law ideology (North 1990). While India may be emerging as a world power, with one of the fastest growing major economy, over 25% of its population lives below the poverty line, giving rise to an understandable interest in issues of distribution and justice. The vision for judicial reform which has emerged within the NJA under its present director seeks to develop an approach which is internally devised and administered and grants a minor role to external donors. Gopal (2009) argues that India has developed a strong postcolonial legal and judicial system which is renowned for its capacity to innovate. It can develop the conceptual 'tools' with which to tackle the many challenges it faces.

'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 ... 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.' (Gopal 2009: 46).

He argues therefore that gender justice is realized when women actually experience human conduct towards them that conforms to standards of equality prescribed by law not merely when a court renders a decision upholding equality for women. The goal of the judiciary is to secure human conduct consistent with acceptable normative standards defined as those required by international treaties and generally accepted principles of international law. However the normative content of 'just conduct' can vary according to social and legal systems but will be defined for the state in India by the constitution (56). '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 (61). Where norms conflict courts will be required 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 (61). Such an approach enhances public confidence in the judiciary and strengthens support for judicial independence (Gopal 2009: 46 - 47).

Success here is clearly to be measured through 'home grown' justice outcomes. Judges are expected to exercise, within what is presumed to be a supportive institutional context, a positive proactive role in which they set aside any 'non conforming' social values they may hold and judge through the application of the just conduct values reflected in the constitution and prevailing international legal norms. Such an approach presumes considerable levels of individual agency and boldness which could otherwise be described as independence.

The development collaboration paradigm used for the original project is

clearly no longer acceptable to contemporary Indian circumstances. Nonetheless arguably there are similarities in objectives: as the present author wrote at the time of the original evaluation:

One objective is to provide an atmosphere and environment within the court that is as conducive as possible to obtaining substantive rather than formal justice. Substantive justice involves a consideration of the context of the case and an emphasis on achieving a just outcome. The Indian constitution ensures that all citizens are equal before the law – formal equality. However social and economic forces make citizens unequal in practice. Thus while men and women are legally equal in court if seen as abstract legal persons, as social beings they are unequal. To achieve substantive justice these historical differences which are structural to any society and often discriminatory must be a matter of consideration for the judges. (Stewart 2000)

The NJA does not conduct gender specific training for senior judicial officers. Each state judicial academy (under the auspices of their particular High Court) has its own programme for training focusing on entry level officers and some continuing education sessions. Interaction between the NJA and these state bodies is increasing and the latter are encouraged to reflect the wider vision in their activities. Specific gender training is not undertaken for entry level training but individual sessions can be included and significant issues such as implementation of the new domestic violence legislation are covered.

However can the legacy of the project shed any light on the way in which this approach to judging might develop and in particular how to go about the business of measuring any movement towards justice outcomes through judicial education?

(2) Women in the judiciary

The project was not concerned directly with the position of women in the judiciary or in increasing the numbers of women in post. However our wish to have a reasonable number of women participants raises the issues of justification: why would gender equality within the judiciary be an 'unqualified good' (Malleon 2003: 1)? Is it because more women on the bench improves the quality of justice by bringing 'something different to the adjudication process' or because their 'absence undermines the democratic legitimacy' of 'public decision making institutions' (Malleon 2003: 1-2)? Varying opinions on these matters reflect different schools of thought within feminism and beyond (see Wilson 1990; Schultz and Shaw 2003; Malleon 2003; Feenan 2008). However we found that the presence of a minimum of two women in each group of 10 (13 in the last batch) had a very positive impact on the conduct of the programme although it is important to note the influence also of other intersectional issues (religion; caste; class). On the whole they recognised the issues more swiftly than their male colleagues and were happier with the adoption of new methods of thinking and behaving. 'They were willing to share their experiences. As others have found, male judges hearing for the first time the difficulties that their female colleagues have experienced in their professional lives were amazed and then concerned' (Stewart 2000)

In the main they were highly motivated and demonstrated considerable agency. However as noted at the time many of these factors could be put down to the fact that to be in a position to be selected the women had in the main identified themselves as different. They seemed to be 'outsiders': having attained their position by breaking into a new group, they did not desire to conform once they

have arrived (Allen and Wall, 1987; Martin, 1990).

All activities formally associated with the project ceased in 2002. However informal contact between a number of the participants, mainly but not exclusively with the women, and the author has continued. A number of the participants exercised a high level of continuing commitment to implementing the project objectives. For instance three women participants from one state took it upon themselves to organise (with the permission of their High Court and in the state judicial academy) gender training sessions for every subordinate judge in this very large state. This was undertaken in their very limited 'spare' time. A male judge in another state undertook a similar exercise with all court and legal services personnel in his district. Other female participants have shared key judgments with the author which they consider to be innovative in pursuit of gender justice. There are many more examples of such activities undertaken with often limited institutional support.

Then and now:

The big question, did the project make a difference (to whom, in what ways), continues to inform the author's interest. Not many gender based training projects involving the judiciary are so intensive; involve so much international collaboration; enable participants to sustain some form of involvement over 4 to 6 years; or involve the particular emphasis on attitudinal and behavioural change. However the project was not granted the crucial institutional development phase. Nonetheless the project had very high level support from within the judiciary and each participant was selected by and 'represented' their High Court. Has there been any continuing recognition of the investment in these participants?

A high profile 'home grown' judicial reformatory institutional framework has

emerged in the last few year within the NJA under the auspices of the Supreme Court and supported by the senior judiciary more generally. State level academies (directed by High Courts) are developing rapidly to provide comprehensive training programmes. Is there any memory or recognition of the earlier initiative in these developments?

Because of the nature of the project the burden of implementation has fallen heavily on the individuals which raises the question of the relationship between the individual agency and institutional response. The 'commissioning' Chief Justice of India was emphatic that he wanted the project to produce 'bold' judges aware of the 'ground realities'. This vision in updated form remains.

However the institutional framework and culture of the judiciary is deeply hierarchical, highly conservative and rigid in its practices. Probity and conformity are core values. Progression is through seniority with merit playing little part. Another key motivation behind the recent research has been to consider the subsequent trajectories of the judges; to reflect on factors such as gender that may or may not have affected their progress; and to see whether their gender made more of a difference to the implementation of the broad objectives of the project over time.

Where are they now?

Of the original 43 judges, 7 out of the original 12 women are or have been High Court judges (one has just retired). Of the 7, two hold high rankings and are potential candidates for Chief Justice of a State or possibly appointment to the Supreme Court (given the absence of any woman at the moment). 19 of the 31 men are or have been High Court judges, 4 hold high rankings and are potential candidates for Chief Justice of a State. Of the rest, most are serving principal or district judges; some of whom hold specific postings such

as registrars to the High Court, directors of training or within specialist courts.

Interviews

I have conducted 27 interviews with judges drawn from 11 states spread throughout India: 9 women and 18 men. 6 of the women were High Court judges (one had just retired; another 7th was awaiting a decision on her elevation at the time of interview); 14 men were or had been High Court judges. The retired High Court judges were still undertaking judicial work within specialist agencies.

The interviews which were recorded involved semi structured questions undertaken by the author. It was made clear to them that the purpose of the interviews was purely academic and not any form of formal evaluation. The elapse of time and their now senior positions was explicitly recognised in order to encourage frank and open responses. There were 4 main areas of questioning. The first focused on their career paths since the time of the training. Where had they gone, what had they done and did they think that they had opportunities to use their training? They were not expected to provide a comprehensive list of their activities but questions were structured in such a way as to gain insight into their own understanding of the capacity to exercise agency within the particular institutional contexts in which they have found themselves. The second focused on their own perception of why they were selected to participate and their response (did they know about 'gender' etc) to prompt them to reflect on their own 'qualifying' characteristics and to reveal if possible some insights into their backgrounds. They were asked whether they considered that their selection had had any impact on career progression. The third group of questions focused on the impact of the training. Did they think that the training had had a lasting impact?

Did their increasingly senior position have any effect? They were prompted to give examples where ever possible from within the court room and in any wider activities they undertook. Finally there were a group of question relating to their assessment of whether such forms of training were still necessary and appropriate in the present institutional context and in the light of recent legislative reforms relating to gender issues. They were asked to reflect on the NJA and state judicial academy training.

Early impressions:

The data has yet to be analysed so these remarks are based upon general impressions from the interviews and other sources. All the respondents pointed to the significant and lasting impact that the project had had on them. This was not confined to their understanding of gender issues but was generalised into a confidence to pursue their judicial responsibilities proactively – to make what they perceived to be unpopular judgments or to instigate administrative changes – the boldness sought by the Chief Justice and underpinning the NJA vision. Many pointed to the experience of the project as a highlight in their professional lives. Many have exercised considerable agency with limited institutional support. The overall context in which they all operate is overwhelming levels of pending cases. The major imperative is to get through as many cases as possible as quickly as possible. All the interviewees stress these workloads and the performance indicators that they must meet in relation to them. Some suggest that they have had little time do much in relation to implementing the project objectives others that they can do so despite this load.

A number of factors which impact on their progression and their agency in implementing their training became very

clear. Gender was a significant but by no means only factor. In general the women evidenced far more sustained interest in the training. When discussing matters of violence against women particularly in the context of new provisions relating to domestic violence (which only come before these judges on appeal), most still reflect prevailing attitudes: that maintenance of the family takes priority unless the violence is extreme; that the laws can be abused by women (and their families). Female interviewees tended to have far more nuanced understandings of what constituted abuse of the law and some were willing to place women's interests before those of the family while recognising the very limited practical alternatives available to women.

The investment in these judges has not gone unrecognised institutionally although the extent of the activity which flows from this varies considerably. Their involvement in the project features prominently in the public profiles on High Court websites. Their High Court colleagues, including the Chief Justices are still well aware of their involvement and know which district and session judges have taken part. They are called upon to undertake training both within their states and some within the NJA. They have not received any formal recognition in terms of their career development.

Two profiles:

Judge A (Hindu) is a district and session judge in her fifties in a large state. She was selected to attend the final year of the programme. She joined the judiciary after a very brief period of practice at the lowest level and has moved through the ranks on the basis of seniority. At the time of selection she said she was the most junior judge of the 43 (which was correct). When asked why she thought she had been selected she was clear that it was

because she had impressed her superiors through the quality of her work (the quantity and quality of each subordinate judge's work is reviewed routinely). She mentioned one high court judge, later to become a state chief justice, who recognised her worth and supported her. The judge features in a number of interviewee accounts as offering support and encouragement for such initiatives. She had also been chosen to attend one of the regional seminars conducted by trainers from an earlier year and had been enthusiastic about this. She said she had also been recognised for her approach to gender issues. She was very receptive to the training, demonstrating an ability to translate her new knowledge and approach into solid legal reasoning. The training session she conducted at the end of the project in the presence of a Supreme Court judge later to be Chief Justice was on a topic challenged many received norms while encouraging the trainees to move towards implementable outcomes. The future CJI was very impressed and took her recommendations away to give to the Law Commission.

On return she was posted to the family court. Such a posting is not sought after by most judges and usually seen as a sideways move. Family courts are seen as particularly stressful, involving messy personal relationships but little scope for the exercise of judicial skills. Judge A recognised and shared this perception as far as her career progression was concerned but at the same time recognised the scope it gave her to implement the gender training that she had acquired and she speculates that that was one of the reasons she was posted there (along with the fact that it allowed her to hold a posting near her family). She set out to improve the quality of gender justice within the court and she was recognised for this by the local family

lawyers and by her superiors. At the same time for her own interest she undertook a doctorate in the area of child abuse. Such cases were starting to appear before her as a judge and at that time there was almost no recognition or expertise on how to deal with these cases in the courts so she sought to remedy this. Her work was recognised by her High Court. She has since held other postings in district and sessions courts (judges hold posts for 3 years normally). She described her approach to judging and pointed to a number of areas where she has made judgments which reflected progressive interpretation of the laws including in one area which now forms the basis for a Supreme Court judgment.

Judge A joined the other two female judges (Judge X and Y) from her state in conducting at their own initiative the training mentioned earlier. Judge X had been involved in the first year of the project, Judge Y the third. So they made contact through the project and have become friends. They also provide professional support for each other. However Judge X has been in the High Court for some time, Judge Y was appointed one year ago. Judge Y joined the judicial service as a district judge (after some years at the Bar). Both Judges X and Y come from distinguished legal backgrounds. As a result she ranks above Judge A although she has fewer years of judicial service. The rules relating to the appointment of career judiciary to the High Court have changed in this particular state to the clear disadvantage of those in Judge A's position. She is very unhappy about this development which means that she is very unlikely to reach sufficient seniority before she reaches the cut off age of 58 for appointment to the High Court (this informal rule allows for sufficient service before the retirement age of 62). She considers that merit should play a greater factor but is also

very clear that she obtains great satisfaction from her work and the public service she can give.

Judge A has recently been posted as joint director of the newly built state judicial training academy. Her experience on the project, as well as her excellent record as a judge, was a key reason for her appointment. She sees it as recognition of her merit. She greatly enjoys being at the academy and uses the methods and skills learned on the project and subsequently. She is very positively regarded by those who are undertaking the training. From other sources it is clear that she is seen by members of the High Court as the type of judge who will move training in the general direction set out above.

Judge A does not come from a legal background and says that if she had understood the system she would have practised for longer and joined as a district judge. She maintains contact with some other members of the group and watches the progress of the group particularly those who have not been elevated with interest.

Judge B (Muslim) is in the High Court of a small state. He is now the second most senior judge and therefore eligible for appointment as Chief Justice of another state soon. He does not come from a legal background and did not want a legal career but family financial circumstances propelled him into one. He joined the judicial service after some years in practice because he says he was more interested in public service, making a difference and the pursuit of justice than in advocacy. He was a relatively senior (although young) district and sessions judge when selected. When asked why he thought he was chosen for the project, he is not sure why he was chosen other than his superiors had noted his good judicial performance. He knew little about 'gender issues' and was wary and

sceptical about the project. He recalls his reactions in early stages of the project activities. He said he was the 'joker', not too keen on treating it seriously. He was nicknamed the baby of the group by other members particularly the women, which he enjoyed. However he gradually became quieter, more thoughtful and recognising that he was there to work, set about doing the tasks. He confirms that he retained a degree of detachment. However his evaluation after 6 months was extraordinary. He wrote with considerable passion about his transformation. He said that he now saw the world differently. What he had taken for granted was no longer so. He described in detail the impact that the project training had had on him and how he was now applying these perceptions in his judicial work. He received little or no institutional support to implement his training. Training facilities were rudimentary in his state but he offered his services to participants in other states and sought out opportunities to discuss matters with fellow judges and legal professionals. He took part as a trainer in the implementation stage of the project. He reaffirms these points in the interview but points to the limited institutional opportunities available within his state.

He returned to his postings as a district and sessions judge. When asked whether involvement in the project had assisted his career progression, he is emphatic (as all the other interviewees were) that this was not so. There had been no recognition which he clearly thought correct (confirmed by all other interviewees) indeed some responses from colleagues had been negative and he implied obstructive. This did not worry him. His elevation to the High Court has enabled him to apply his knowledge through his judgments. He describes himself as a scholar. He relishes the opportunity to develop the law through his judgments and provides examples where he has

paved the way for new interpretations of areas with particular interest to women such as maintenance provisions and the position of second wives. He identifies areas of the law which need change to improve the position of women.

One of his responsibilities presently is to oversee the judicial training academy in the state. He does not suggest that he plays a particularly proactive role. He oversees the programme and offers suggestions to the district judge in charge but does not become overly involved.

He maintains contact with a few of the other members of the group.

Conclusion

While the interview data will hopefully provide valuable insights into the role of judicial education on gender and its impact over time and also shed some light on the difference that gender makes in these sorts of programmes, it is clear that there is a need for more clarity on the contribution such activities can make to 'justice outcomes'. This will involve the development of far more rigorous evaluation methodologies which seek to capture the impact on those for whom these activities are undertaken and their contribution to building confidence and legitimacy in the judicial and legal system among citizens.

Allen, David and Wall, Diane (1987) 'The behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?' in *The Justice System Journal* 12 (2) 232-245.

An' Naim Abdullahi (ed) 1999 *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa*.

APJRF (Asia Pacific Judicial Reform Forum) 2009 *Searching for Success in Judicial Reform* New Delhi: Oxford University Press.

Armytage, Livingston 2006 'Monitoring Performance of Legal and Judicial Reform in International Development Assistance- Early Lessons

from Port Moresby and Phnom Penh' International Bar Association Chicago Showcase *Governance and Social Development Resource Centre*.

Carothers, Thomas 1998 'The Rule of Law Revival' *Foreign Affairs* 95-106.

Carothers, Thomas 2006 *Promoting the Rule of Law Abroad: In Search of Knowledge* Washington DC: Carnegie.

Faundez Julio, Footer Mary & Norton Joseph (eds) 2000 *Governance, Development and Globalization* London: Blackstone Press,

Feenan, Dermot 2008 'Women Judges: Gendering Judging, Justifying Diversity' *Journal of Law and Society* 35 (4) 490-519.

Golub Steven 2003 *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* Washington DC: Carnegie Endowment.

Gopal Mohan 1996 'Law and Development: Toward a Pluralist Vision' *90 American Society of International Law Proceedings* 231.

Gopal, Mohan 2009 'Development and Implementation of Reform Initiatives to Ensure Effective Judiciaries' in *Searching for Success in Judicial Reform* New Delhi: Oxford University Press pp 45-78.

Kennedy David 2006 'The Rule of Law, Political Choices, and Development Common Sense' in David Trubek and Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* Cambridge: Cambridge University Press 95-173

Malleson, Kate (1999) *The New Judiciary: The effects of expansion and activism*. Aldershot: Ashgate/Dartmouth.

Malleson Kate 2003 'Justifying Gender Equality on the Bench: Why Difference Won't Do' *Feminist Legal Studies* 11 1-24.

Martin, Elaine (1990) 'Men and Women on the bench: vive la difference?' in *Judicature* 73 (4) 204-208.

Merry Sally Engel 2006 *Human Rights*

and Gender Violence: Translating International Law into Law Justice.

North Douglas 1990 *Institutions, Institutional Change and Economic Performance* Cambridge: Cambridge University Press.

Rajagopal Balakrishnan 2007-8 'Invoking the Rule of Law in Post Conflict Rebuilding: A Critical Examination' 49 *William and Mary Law Review* 1347.

Rittich Kerry 2004-5 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' 26 *Michigan Journal of International Law* 199-243.

Santos, Boaventura De Sousa & Rodriguez-Garavito, César A. 2005 *Law and Globalisation from Below: Towards a Cosmopolitan Legality* Cambridge: Cambridge University Press.

Sen Amartya 1999 *Development as Freedom* New York: Random House

Sen Amartya 2009 *The Idea of Justice* London: Penguin Books.

Schultz, Ulrike & Shaw, G. (eds) 2003 *Women in the World's Legal Professions*.

Stewart Ann 2000 'Implementing Gender Justice through the Judiciary: A Case Study of Judicial Training in India' in *Governance, Development and Globalization* eds. Julio Faundez, Mary Footer, Joseph Norton, London: Blackstone Press, pp. 85-104.

Stewart, Ann 2001 'Judicial Attitudes to Gender Justice in India: The Contribution of Judicial Training', (2001) *Law, Social Justice and Global Development* <http://elj.warwick.ac.uk/global/issue/2001-1/stewart.html>

Stewart, Ann 2002 'Juridifying Gender Justice: From Global Rights to Local Justice' in *Law and Development: Facing Complexity in the 21st Century* eds John Hatchard and Amanda Perry-Kessaris London: Cavendish pp 36-56.

Tamanaha Brian 1995 'The Lessons of Law and Development Studies' 89 *American Journal of International Law* 470.

Trubeck David 2006 'The Rule of Law in Development Assistance' in David Trubek and Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* Cambridge: Cambridge University Press pp 74 – 90.

Trubek David and Galanter Mark 1994 'Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' *Wisconsin Law Review* 1062.

Trubek David & Santos, A. 2006 *The New Law and Economic Development: A*

Critical Appraisal Cambridge: Cambridge University Press.

Wilson, Bertha 1990 'Will Women Judges Really Make a Difference?' *Osgoode Hall Law Journal* 28 507

Nota redacției: Articolul a fost publicat inițial în Warwick School of Law Research Paper No. 2010/11, Revista Forumul Judecătorilor privind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.