

*Session 10.0*

*Evaluating Judicial Performance*

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- 1 This is such an important topic that it deserves a conference all by itself. I would like to start with a request, that I have made to several thousand judges who have come to the National Judicial Academy in India – we have a very large number of people and judges, so that is not a particularly impressive figure. I would like to ask each of you to write on a piece of paper – and if you do it I will collect it from you later, at the end of the session here – what do you think is the difference between a good judge and a great judge?
- 2 In other words, in one sentence, one idea, the one quality that distinguishes a good judge from a great judge. I would be very curious to see what answer will come from this very mixed international group, because I have got a fairly clear answer from several thousand Indian judges, and I will not share it with you now so that it should not influence your thinking. Perhaps if I have a chance I will share it later. I am a professor so I am entitled to use this time for some little research work. I would be very grateful if you can put just one idea. I would be grateful if you can pass that on to me and I will then share that with you. If I can get one or two minutes or a few seconds at some point I will share that with you if I can.
- 3 Now, I would like first of all to compliment the wonderful program. I have gone through this 360 Degree Program as a manager at the World Bank, where they have this program, and that is an exactly identical program, not in the context of judges but in the context of managers, and I have found it to be actually a very helpful program, and I am very delighted that it is being extended to the judiciary. I will carry this message back to India. I think it would be a very valuable contribution.
- 4 Internationally, there is an increasing number of frameworks for evaluating judicial performance. I think the initial feeling that judicial performance should not be evaluated because it is inconsistent with judicial independence is giving way to a cautious approach to using judicial evaluation, largely self-evaluation by judges, as a constructive means, as the Chief Justice put it, of improving judicial performance. It is also starting to become, very importantly, an instrument of judicial accountability. There, it starts to move beyond this warm and fuzzy, sort of, ‘helpful intervention’ to becoming more and more of an instrument of accountability, where there is public participation and there has to be consequences to poor performance, like for every other public official.
- 5 Recently, in July 2008, the European Commission for Efficiency of Justice put together what I thought was an excellent framework, that sets out some 115 measurable parameters for evaluating judicial performance in five main areas. This is not just the performance of judges but the performance of the entire court system, the judge as well as the entire system. That is another controversial issue: do you measure only the judge, or do you measure the court itself, and if there is a bench of judges how do you tease out the responsibilities of the individual judge from the other judges, and what about the role of the jury, and so on. I am not entering into those issues, but the five main areas identified by the CEPEJ criteria are: strategy and policy

of the courts, human resources and status of the judiciary, means of justice, including finance and ICT, the operations process – all activities from preparation of cases to the conducting of hearings and decision-making and execution by the judge; so much of this will actually fall within that category of operations process – and access to justice and public trust and confidence. I think that provides, really, an excellent overall framework for the evaluation of judges. For those of you who are interested, there is not only a description of these principles but also a detailed framework that can be applied for evaluation. It is undoubtedly a valuable contribution.

- 6 We also have a number of excellent frameworks for evaluation judicial performance developed in the United States, in a number of jurisdictions and a number of courts. I think perhaps the US is a leading jurisdiction in terms of judicial accountability with a very large number, over 80% of the judges at the state level being elected. Therefore, the US has a very strong tradition of evaluating judicial performance. There are a number of such frameworks. In particular there is, for example, the Trial Court Performance Standards, developed by the National Centre for State Courts and the Bureau of Justice with assistance from the Department of Justice, which also focuses on five areas: access to justice, expedition and timeliness, equality, fairness and integrity, independence and accountability, and public trust and confidence.
- 7 On my part I think these more comprehensive frameworks, that look not only at the performance of the judges but at the performance of the entire institution are preferable to frameworks that look only at the performance of the judge in the court, or at the processes that the judge manages. While these frameworks evaluate the performance of courts as institutions, there is an excellent framework for evaluating the performance of individual judges, and that is found in the UN-sponsored Bangalore Principles of Judicial Conduct. As you know, there are six values that are set out in the Bangalore Principles of Judicial Conduct: independence, impartiality, integrity, propriety, equality, competence and diligence. This is a judge-focused framework.
- 8 My intention today, in the remaining time available to me, is not to dwell further on these and other available frameworks for evaluating judicial performance, either at the level of the judge or the court. I would like instead to focus on one single point, which is my central submission, which is that these frameworks are deficient and not adequate for countries such as our country, my country, countries which are struggling with the challenge of justice-oriented social transformation and social change.
- 9 Let me explain what I mean. In 1912, in a very important article written in the *Central Review*, entitled *Social Justice and Legal Justice*, Roscoe Pound argued that the most significant feature of the transition that was taking place in the United States at the social level in the aftermath of the Civil War, and the change that was taking place in the judicial system, was, and I quote, “a change in our attitude towards the fundamental question, ‘what is justice?’ For what do courts and law exist, and what do we expect of them?” Pound argued that responding to social change, the concept of justice has advanced through various stages. The first stage with justice was equated with dispute settlement. The second stage with justice was equated with maintenance of harmony and order. In the third stage, justice was equated with individual freedom. He argued that a fourth stage had developed in society, but had not yet been reflected in the courts, and that was what he called ‘social justice’. That is, justice including ensuring that the needs of people are satisfied, not only that they

have freedom. Now, Pound blamed courts and academicians for allowing this gap between the social concept of justice and the legal concept of justice to exist, which disparity impeded the effectiveness of courts.

- 10 My main point here is not to discuss Pound's views of justice but to point out that when society is going through a struggle for justice, ideas of justice change. It is very important to monitor not only the processes of courts – whether the judge is being polite and efficient and listening and so on, and there is timeliness, and efficiency, and effectiveness, but also to monitor the substantive idea of justice that is being delivered by courts. If not, the gap between what Pound calls 'legal justice' and 'social justice' will start to emerge, and no matter how efficient courts are they will not serve their social role and their social function. And, for countries such as ours, such as mine, India, where we are engaged primarily in a struggle for social justice, it is at the end of the day very important to monitor whether courts are actually, in substantive terms, delivering the right concept of justice or not. And, if not, no matter how efficient they are they are socially not only useless but they may actually be counterproductive.
- 11 Now, keeping this in mind, we at the National Judicial Academy have developed a different framework for looking at the evaluation of the performance of courts, which is anchored in the unique nature of our constitution. We have very specific provisions in our constitution that actually make the constitution an instrument of social change. The [Indian] constitution has been described as an instrument of social revolution. Therefore, picking up a cue from this, in 1982 the Supreme Court of India actually declared, expressly in a judgment, that the role of the judiciary is to be an arm of social revolution.
- 12 We believe that this is a central issue that should be monitored in evaluating the effectiveness of the judiciary. Is the judiciary actually delivering this mandate of facilitating the kind of social change that is central for the success of the constitution and the future of the country? From this perspective we have developed a six-point framework for evaluating the performance of courts and judges. The six points include evaluating first the role of courts and the role of judges. This can be applied at the level of individual judge or at the level of court. The first point is evaluating the role of courts. There we look at whether the courts are actually, in terms of the substance of their decisions, delivering the unique definition and concept of justice that is defined in the constitution, which is actually very similar in letter and spirit to international-law concepts of use/cogence, and international-law ideas of human rights.
- 13 We applied this by developing what we have called a 'rights protection index'. We look at whether or not in the decisions of courts, and to what extent, courts, and the decisions of judges, are actually protecting rights. If they protect rights then we say that they have high effectiveness and if not we say there is low effectiveness, because we believe that this is the instrument through which courts actually advance the course of substantive justice. From this perspective, the second factor we monitor is organisational effectiveness in discharging this role. Is the organisation effectively configured to achieve this role? The third factor we look at is, do judges and lawyers have the necessary qualities and attitudes and knowledge and skills – we call it QASK – to deliver this role of advancing social justice? The fourth question we ask is, is judicial method adequate to ensure that this role is being effectively fulfilled? The fifth criterion that we ask about is, are the management techniques of courts effective

to ensure that this role is being achieved? The sixth question we ask is, is there access to justice on the part of those who need protection of their rights? There we find, for example, after our analysis that in fact such access is lacking in India. The main role of the courts seems to be to prosecute poor people for petty crime, rather than protect their rights, and so with this feedback we are trying to transform the role of the courts towards greater protection of rights, in order to advance the course of social justice.

- 14 So, we have developed this six-point framework, and building on that we have expanded that into a sixty-point social-justice-oriented evaluation framework for the judiciary. We believe that this is particularly relevant to countries such as ours, developing countries, non-OECD countries, which at this point of time are engaged in a struggle for social justice and social transformation, which is missing from the frameworks that have been developed in the context of countries that may have had such struggles in the past, may be coming on to such struggles in the future, but are not centrally concerned with such struggles at this point of time.
- 15 I will conclude by just saying that, because it is such a vast topic I decided to focus on this one central issue: how will the evaluation frameworks for the judiciary help to advance the course of social justice?