

# JUDGMENT WRITING AND LEGAL SCHOLARSHIP: THE PATH FORWARD

## I. INTRODUCTION

In the plethora of legal writing available, judgments rendered by courts as well as articles written by law professors and students occupy a crucial position. However, the writing in both these branches of legal scholarship is riddled with certain flaws which have the deleterious effect of lowering the overall quality of legal scholarship. We intend to shed light on these systemic defects. Addressing the defects would be beneficial for litigants, lawyers, judges, law students, law professors, organizations and the general public. In Part II, we discuss legal judgment writing by judges as a subset of legal scholarship, and underline the importance of making judgments precise, reasoned and comprehensive. In Part III we scrutinise legal pedagogy in law schools, and the reasons behind the lack of meaningful engagement with empirical exploration in the works of law professors and students in the course of their research. In Part IV we draw some conclusions.

## II. LEGAL JUDGMENT WRITING BY JUDGES

A large, but under-recognized, part of legal writing is not only found in treatises and articles but also in judgments. As is well known, judgments are one of the primary ‘sources’ of law. The Code of Civil Procedure, 1908 (‘CPC’) refers to the term ‘decree’ and defines it as a “formal expression of an adjudication” which “conclusively determines the rights of the parties”.<sup>1</sup> The word ‘judgment’ is also specifically defined under the CPC to mean the “statement given by the judge on the grounds of a decree or order”.<sup>2</sup> Order XX Rule 4(2) of the CPC goes on to prescribe what a judgment should contain – “a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision”. Though these terms are defined specifically, through this note reference to a ‘judgment’ will encompass a broader reference to formal orders given by judges who preside over Courts as well as officers who preside over Tribunals and other quasi-judicial bodies.

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<sup>1</sup> The Code of Civil Procedure, 1908, § 2(2).

<sup>2</sup> The Code of Civil Procedure, 1908, § 2(9).

These definitions enable us to understand the content and objective that a judgment seeks to achieve. From these definitions it becomes evident that a judgment is a formal legal prescription that determines the rights of parties to an adjudication on the basis of certain legal reasons. In addition to the statutory definition of a judgment or decree, the principles of natural justice also mandate that judicial officers give reasons for their decisions ‘in writing’.<sup>3</sup> Articulatedly put by Chief Justice Mukherji, “Reason, therefore, is the soul and spirit of a good judgment”.<sup>4</sup>

Reasoned judgments form the essence of the right to equality, and Indian law emphasizes the importance of ‘reasoned orders’ that are in writing for a variety of reasons.<sup>5</sup> Reasoned orders benefit not only litigants but also the decision makers and the judicial system itself. On a broader plane, well reasoned and articulated judgments form the basis of good administration.<sup>6</sup> More specifically, for litigants, reasoned orders act as safeguards to arbitrariness on part of the decision maker.<sup>7</sup> Additionally, well articulated orders improve the very quality of decision making as they ensure clarity in reasons, objectivity and impartiality of the decision.<sup>8</sup> In contrast, the absence of reasons may impede the rights of a litigant, one significant right being the right of appeal. A litigant will be unable to effectively exercise his right of appeal unless he knows the basis upon which the original decision rested.<sup>9</sup> Related to this, the task of superior courts is made easier if the lower court/tribunal stated the reasons for its decision in writing.<sup>10</sup> Reasoned decisions therefore further the well known principle that “justice should not only be done but should also be seen to be done.”<sup>11</sup>

Though there is mandate for reasoned orders, the manner of writing orders/judgments affects the way these reasons are conveyed to the litigants, the courts and to the public. Most Indian judgments are famous for their length, complexity and lack of structure. Even arguably the most famous case with respect to constitutional law – *Kesavananda Bharati v. State of Kerala*,<sup>12</sup> ran into 2160 paragraphs and approximately 641 pages (AIR) causing Upendra

<sup>3</sup> Breen v. Amalgamated Engg. Union, (1971) 2 QB 175 : (1971) 2 WLR 742 : (1971) 1 All ER 1148 (CA) (per Lord Denning J).

<sup>4</sup> As cited in Justice T.S.Sivagnanam, *The Salient Features of the Art of Writing Orders and Judgments* (Lecture delivered at the Tamil Nadu State Judicial Academy, April, 2010).

<sup>5</sup> Govt. Branch Press v. D.B. Belliappa, (1979) 1 SCC 477.

<sup>6</sup> M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW VOL. 1 470 (M.P. Jain, 6<sup>th</sup> ed., 2007).

<sup>7</sup> Breen v. Amalgamated Engg. Union, (1971) 2 QB 175 : (1971) 2 WLR 742 : (1971) 1 All ER 1148 (CA).

<sup>8</sup> Alexander Machinery (Dudley) Ltd. v. Crabtree, 1974 ICR 120 (NIRC).

<sup>9</sup> Jagannath v. Union of India, AIR 1967 Del 121.

<sup>10</sup> M.P. JAIN & S.N. JAIN, *supra* note 6, 471.

<sup>11</sup> See R v. Sussex, [1924] 1 KB 256; State of West Bengal v. Krishna Shaw, 1991 Supp (1) SCC 414.

<sup>12</sup> AIR 1973 SC 1461.

Baxi to comment that this judgment has created an “illiterate bar”.<sup>13</sup> These traits make it difficult for the readers of a judgment to discern the reasons and the logic of the law. Justice Michael Kirby in his article “On the Writing of Judgments” delineates four categories of individuals as the ‘primary readers’ of judgments – the litigants, the legal profession, other judges and the decision maker himself.<sup>14</sup> As pointed out earlier, litigants require an explanation for the decision not only for the purposes of appeal but also to uphold the integrity of law. Judgments are also closely read by members of the legal profession to understand the development of law through precedents. Judges who sit in appeal, reversal and review are also readers of lower court judgments as well as precedents. Many judgments are also read by Non Governmental Organizations, companies etc. who do not strictly form part of the legal profession. Given that the readers of judgments are so diverse, it becomes imperative that judgments are written in such a way that they are understood by all.

Certain basic features of a well articulated judgment are clarity, brevity and simplicity. As ideally envisioned, judgments should begin with the facts, followed by the law and then a conclusion based on a reasoned application of the law to the facts. However, within this broad structure, judges have the liberty to allude to literature, humour and illustrations, in order to provide strength to their reasons and make the judgments interesting.<sup>15</sup> In doing so, however, there is a danger of judgments going completely off track which manifests in unnecessarily lengthy and complicated legal scholarship.

Recently, Australian cases have started using important tools which make judgments more readable and more easily understood, without compromising on creativity. For example, judgments use ‘opening words’ that provide a sentence or two on the issue at hand.<sup>16</sup> This immediately directs the attention of the reader to the relevant issues and provides clarity at the outset. Use of sub headings is another significant tool that helps structure the judgment as it highlights different points and again increases clarity.<sup>17</sup> Another significant change in the style of judgment writing in Australian cases is the gradual abandonment of Latin terms and phrases.<sup>18</sup> Complex legal and Latin terms create ambiguity to readers who are not well versed with such terms. The practice of abandoning such terms is progressive and makes the judgment comprehensible to all. More remarkable developments in judgment writing include the usage of gender neutral language, inclusion of footnotes and provision of a schedule of cases.<sup>19</sup> All these components not only make judgments more readable but also

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<sup>13</sup> See Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 SCC (Jour) 45.

<sup>14</sup> Justice Michael Kirby, *On the Writing of Judgments*, 64 ALJ 691 (1990).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

ensure that judgments actually fulfil their objectives towards litigants, lawyers, judges and the country as a whole.

India, being a common law jurisdiction, can learn from the positive developments in judgment writing in Australia. In late 2014, the judges of the Supreme Court came together to accept a neglected, but serious problem of lengthy judgments that cause confusion to litigants as well as to the law itself.<sup>20</sup> As reported, “*Lean, to-the-point judgments delivered in quick time*”, is an informal message judges are circulating amongst themselves.<sup>21</sup> As reported, the Indian Supreme Court has itself given nearly forty thousand judgments that run into millions of pages, since 1950.<sup>22</sup> With so many judgments rendered, judges are realizing that a lot of the law has already been crystallized and many cases can be disposed by succinct, clear and well structured judgments. Writing brief judgments, without compromising on reasons, will also speed up the process of justice delivery. Though the focus has been on length of judgments, considerations such as structuring of judgments, gender neutral language, schedule of cases, footnotes etc. will go a long way in bringing clarity to the law itself.

A telling example of a simple, clear and short judgement is that of *Ryland v. Fletcher*,<sup>23</sup> a landmark decision by the House of Lords that laid down important principles of tort law. Some notable Indian cases have also followed suit. For example, the recent Supreme Court decision in *Shreya Singhal v. Union of India*,<sup>24</sup> though lengthy, is well structured, well reasoned and divided into comprehensive sub headings. The 1952 Supreme Court case of *State of West Bengal v. Anwar Ali Sarkar*,<sup>25</sup> has also been recognized as a classic example of a judgment that reasons, explains and lays out complex legal issues in a simple, clear and understandable fashion. However, in contrast, the landmark judgment of the Supreme Court in *Novartis A.G. v. Union of India*,<sup>26</sup> which impacts access to medicines and health, though reasoned well, lacked a cohesive structure, making the 112 page long judgment difficult to read and understand.

A lecture delivered at the Tamil Nadu State Judicial Academy, highlights important aspects of good judgment writing as it urges judges to *edit*

<sup>20</sup> The Times of India, *Supreme Court judges bat for succinct judgments*, November 3, 2014, available at <http://timesofindia.indiatimes.com/india/Supreme-Court-judges-bat-for-succinct-judgments/articleshow/45017501.cms> (Last visited on April 4, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> [1868] UKHL 1.

<sup>24</sup> (2013) 12 SCC 73.

<sup>25</sup> 1952 SCR 284; See Suhrith Parthasarathy, *Critical Judgment: How vague prose can muddle the rulings of our highest courts*, CARAVAN, April 1, 2015, available at <http://www.caravan-magazine.in/perspectives/critical-judgment-courts-vague-prose?page=0,1> (Last visited on April 29, 2015).

<sup>26</sup> (2013) 6 SCC 1.

their judgments.<sup>27</sup> Editing enables judges to recheck not only the substantive aspects of their judgment, but also gives them an opportunity to fine tune their work by eliminating repetitions, pruning lengthy quotations of law, removing Latin and legal jargon, using shorter sentences and paragraphs and structuring judgments more cohesively. Given that judgments are a primary source of law and form an integral part of legal scholarship, it becomes imperative that judges pay more attention to the way their decisions are articulated and structured. Briefer, well rounded and cohesive judgments will ensure logical evolution of the law as well as further the integrity of the legal system as a whole.

### III. LEGAL PEDAGOGY IN LAW SCHOOLS AND LEGAL SCHOLARSHIP

Empirical exploration has been relegated to the hindsight of legal scholars, with the bulk of legal study spanning doctrinal works. Legal questions that necessitate empirical exploration are profuse and varied.<sup>28</sup> Empirical study and research has a wealth of insight to offer to law and policy making, by “revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens”.<sup>29</sup> ‘Empirical methods’ refer to “all techniques for systematically gathering, describing, and critically analyzing data”.<sup>30</sup> We primarily refer to studies which “involve the application of statistical techniques of inference to large bodies of data in an effort to detect important regularities (or irregularities) that have not previously been identified or verified”.<sup>31</sup> Empirical exploration is based on observation, testing hypotheses and is an incremental process.<sup>32</sup>

Science seeks to test a particular hypothesis on the touchstone of objective data, leaving open the possibility of the said hypothesis being either confirmed or refuted.<sup>33</sup> In contrast, legal argumentation often works backwards by collating evidence and advancing arguments to support a pre-ordained con-

<sup>27</sup> See Justice T.S.Sivagnanam, *The Salient Features of the Art of Writing Orders and Judgments* (Lecture delivered at Tamil Nadu State Judicial Academy, April, 2010).

<sup>28</sup> ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 21 (2009); See also, Oliver Wendell Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS 187 (1921); Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

<sup>29</sup> See THE NUFFIELD FOUNDATION, *Law in the Real World: Improving our Understanding of How Law Works*, November 2006, available at <http://www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf> (Last visited on April 5, 2015); See also, Paddy Hillyard, *Law's Empire: Socio-Legal Empirical Research in the Twenty First Century*, 34 JOURNAL OF LAW AND SOCIETY 2 (2007).

<sup>30</sup> ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 7 (2009).

<sup>31</sup> Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 JOURNAL OF LEGAL EDUCATION 3 (1989).

<sup>32</sup> LAWLESS, ROBBENOLT & ULEN, *supra* note 30, 10-15.

<sup>33</sup> *Id.*, 10.

clusion.<sup>34</sup> While the goal of the former is to obtain an accurate picture of the world, the latter centres on winning an argument.<sup>35</sup> For a profession that endorses and rewards skills of persuasion, rhetoric and dexterous oratory have sometimes been given precedence over sound logic and rationality of thought.

Lack of engagement with an empirical study of legal issues has had several adverse fallouts. *First*, legal pedagogy in classrooms has laid an inordinate emphasis on doctrinal study. *Second*, legal academic writing has shunned inventive thought and originality of ideas, by using available doctrinal scholarship to buttress arguments advanced.

The mandate of law schools has been, by accident or by design, to produce skilled doctrinal lawyers.<sup>36</sup> As most law schools are aimed at producing lawyers who can meet industry expectations, the curriculum formulated at the undergraduate level is constrained.<sup>37</sup> The ‘marketisation’ of higher education, which often leads to the commodification of knowledge, stems from the motivation to operate financially sustainable educational enterprises which are capable of providing specialized vocational training to students.<sup>38</sup> Thus, the incentive structure of law schools and the legal profession are heavily weighed against the promotion of empirical exploration. Law schools are directed towards realizing a diverse range of goals, and adding empirical research to the list would not be an easy task.<sup>39</sup>

Legal scholarship is aimed at clarifying truths about the world which lack precise answers.<sup>40</sup> Thus, it is odd that the culture of traditional legal scholarship has laid an inordinate focus on debating doctrinal and normative questions of law. Empirical research, which uncovers “facts about how individuals and institutions within our legal culture actually behave”, has been sidelined.<sup>41</sup> The efforts of several legal scholars have been directed “more to-

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, 11.

<sup>36</sup> Paddy Hillyard, *Law’s Empire: Socio-Legal Empirical Research in the Twenty First Century*, 34 JOURNAL OF LAW AND SOCIETY 2 (2007).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Schuck, *supra* note 31.

<sup>41</sup> *Id.* (It is relevant to note that Professor Schuck’s admission stands true of this note too: “In this brief essay, I cite little hard evidence to support it. I rely instead upon my casual review of the law journals and books that cross my desk day after day, and my (admittedly fragmentary) knowledge of the projects in which legal scholars are generally engaged. Paradoxically, my use of this casual, unsystematic methodology tends to validate my premise in two ways. *First*, I reify my own critique, thereby exemplifying the very avoidance of empiricism that I lament. *Second*, my unwillingness to discuss the question except on an impressionistic basis also serves to underscore a remarkable and revealing situation: to my knowledge, no law professor has ever empirically investigated the extent to which legal scholars actually conduct empirical research”).

wards influencing legal reasoning and rather less toward influencing and shaping policy and practice".<sup>42</sup> Traditional legal scholarship has been characterized by close textual analysis coupled with excessive reliance on journal articles and legal textbooks.<sup>43</sup> This creates a self-replicating loop with little original contribution, as all inferences and analyses are based on an existing body of scholarship or legal material. Trained in locating the *ratio decidendi* in complex judicial decisions, law students and legal scholars find it difficult to comprehend how empirical exploration will aid them in their study.<sup>44</sup> Taught to think within the insulated confines of precedents and statutes, the law student characterizes the chasm separating the legal academy from the practice of law and operation of public policy.<sup>45</sup>

Professor Peter Schuck has extended this observation to the lack of inclination displayed by law professors within law schools in attempting empirical exploration. He has identified various causes behind such academic scepticism, namely inconvenience, lack of control over the process of gathering data, uncertainty of outcomes, lack of resources to engage in empirical research, the time consuming nature of the work and inadequate training etc.<sup>46</sup> To remedy this, he has suggested that law schools should encourage empirical exploration by hiring junior faculty members who display a predisposition towards empirical research.<sup>47</sup>

It is crucial to note here that we do not deny or understate the utility of skilled and interpretive doctrinal or normative work. Theoretical legal scholarship has often been instrumental in challenging accepted notions and altering legal doctrine and institutions.<sup>48</sup> Doctrinal works such as Charles Reiche's theory of 'new property' and Catharine MacKinnon's theory on sexual harassment in the workplace have generated rich debate and made significant contribution to legal scholarship.<sup>49</sup> However, in this note we seek to draw attention to the anomaly that *almost* the entire body of legal scholarship in existence is theoretical in nature. The focus on gathering of new facts and an attempt to

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<sup>42</sup> THE NUFFIELD FOUNDATION, *supra* note 29, 31.

<sup>43</sup> LAWLESS, ROBBENOLT & ULEN, *supra* note 30, 10.

<sup>44</sup> THE NUFFIELD FOUNDATION, *supra* note 29.

<sup>45</sup> Hillyard, *supra* note 36.

<sup>46</sup> *Id.*; See also, Julius G. Getman, *Contributions of Empirical Data to Legal Research*, 35 Journal of Legal Education 489 (1985) (He notes that:

"Part of the problem is that so little empirical work is done in law that we have not learned how to deal well with what there is. *First*, the amount of time one needs to invest to do such research is enormous compared to the amount of time one invests in writing traditional law review articles. *Second*, finding appropriate issues to investigate is difficult. Third, there is the possibility of failure. One of the great things about what most law professors do is that it is absolutely safe").

<sup>47</sup> Hillyard, *supra* note 36.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

arrive at an original idea - is marginal.<sup>50</sup> Such an imbalance hinders legitimate intellectual dialogue. Notable exceptions do, however, exist.<sup>51</sup>

The solutions to these impediments may be creative and varied. A detailed study conducted by Lee Epstein and Gary King into how a suitable infrastructure for empirical research can be built in law schools, has recommended that the curriculum should offer at least one course on empirical research, which would cover quantitative and qualitative approaches to research design.<sup>52</sup> In this regard, guidance can be taken from the analogous course curricula of certain graduate level social science courses. The utility of being exposed to such methods lies not only in improving the quality of legal scholarship within and outside law schools, it will also provide law students with the necessary skills to evaluate such research- for clients, their law firm partners, or judges.<sup>53</sup>

In recognition of the significant role played by student edited law journals in the legal fraternity, some scholars have suggested the creation of a 'public archive' for the systematic documentation of empirical data which may have been used by authors in the course of their writing.<sup>54</sup> The public archive would contain the empirical data used by the author to draw the conclusions made in his article, complete details of the methodology adopted and the calculations made, as well as all necessary information required by another to replicate the results.<sup>55</sup> Such a practice would have several advantages. It would enable the reader to verify the conclusions drawn by the author, and encourage empirical research by other scholars who can draw on the work of the author. For instance, if a particular author is relying on a survey he has conducted, the

<sup>50</sup> *Id.*

<sup>51</sup> See generally ALFRED FLETCHER CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMAN AND CHILDREN IN AMERICA* (1985); DAVID L. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979); David M. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72 (1983); Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 *STAN. L. REV.* 773 (1981); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297 (1981); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623 (1986); STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* (1988) (as cited in Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 *JOURNAL OF LEGAL EDUCATION* 3 (1989)); See also, Marc Galanter, *The Day After the Litigation Explosion*, 46 *MD. L. REV.* 3 (1986); Marc Galanter, *The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days*, *WIS. L. REV.* 921 (1988).

<sup>52</sup> Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 *JOURNAL OF LEGAL EDUCATION* 3 (2003).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Law Review should collect and document the details of the individual survey responses made by the participants, excluding only such information as is required to protect the identity of the participants.<sup>56</sup>

#### IV. CONCLUSION

The purpose of legal scholarship being to facilitate meaningful intellectual dialogue, it is essential to identify systemic impediments to the same. In this note, we have analysed two branches of legal scholarship, namely judgment writing by judges and papers written by law professors and law students. Ill-structured and prolonged judgments spanning hundreds of pages not only obscure the law for litigants, they make the process of navigating through the law tedious. Thus, it is suggested that judges devote special effort in writing judgments that are clear, precise, concise and comprehensive. This will be advantageous for litigants, lawyers, organizations, the general public as well as the judicial system.

With regard to legal scholarship within law schools, almost the entire corpus of work produced has been devoted to the analysis of doctrinal and normative questions of law, relying solely on existing literature. Attempts to engage in empirical exploration, the endeavour to find new facts, have been few and far in between. Empirical research methods hold vast potential to offer insights into the operation of law and policy, and the behaviour of actors within the system. Thus, it is essential for law schools, law professors and law students to travel beyond textual analysis and engage in empirical exploration.

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<sup>56</sup> Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 JOURNAL OF LEGAL EDUCATION 3 (2003).