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## EDUCATING JUDGES ABOUT ENVIRONMENTAL LAW

*John Pendergrass\**

The Environmental Law Institute (ELI) began its Judicial Education Program in 1990 in response to a challenge to ELI by Chief Judge James L. Oakes, of the United States Court of Appeals for the Second Circuit, to close a gap in judges' knowledge by educating them about environmental law. This challenge was reiterated in August 2002, when Supreme Court judges from more than fifty countries met at the "Global Judges Symposium on Sustainable Development and the Role of Law" in Johannesburg, South Africa. The judges concluded that "the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law."<sup>1</sup> The judges also stated that there was an "urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of

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1. JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT, Global Judges Symposium, Aug. 18-20, 2002, Report, Vol. 1 at 14 (UNEP 2002), available at <http://www.unep.org.dpd/symposium/Principles.html>.

implementation, development and enforcement of environmental law.”<sup>2</sup>

### **National Context**

In two decades of working with judges and advocates to design programs to inform judges around the world about environmental and natural resource issues, ELI has learned a number of lessons. Foremost among these is that there is no single best method of educating judges, but that it is essential to make the program directly relevant to their duty to decide cases based on the law of their jurisdiction. Judges and judicial institutions in different jurisdictions undoubtedly share certain characteristics, including expertise in the judicial process, but vary substantially in their authority, the law they apply, and their preferred methodology for learning about new areas of the law. Thus, ELI has found that the national context is critical to the success of any educational effort. This includes but is not limited to the type of legal system, judicial system, existing educational programs for the judiciary, ethical norms for judges, accepted educational methods in the country, and the cultural context. Consequently, ELI custom-designs education programs for judges specifically for a particular nation’s judiciary, or in some federal countries, for sub-national jurisdictions. Regional or multi-national educational programs can be valuable where the programs cover subjects about which the judiciaries of those nations have a shared basis of understanding. Within these limits, there are general principles that can be applied to guide development of appropriate judicial education programs in a national context.

### **Institutionalization of Educational Programs**

ELI has also found that judicial education on environmental and natural resources issues is most effective when it is part of a general system of education for judges. Many jurisdictions have established institutions dedicated to educating judges, which typically are the locus of programs to educate judges about environmental and natural resources law. In many countries judges are required to complete a post-law school course of study in order to be eligible to become a judge. Environmental and natural resource law can be added to the

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2. *Id.*

curriculum of such a course of study as any other specialized area of the law might be included. Continuing education of existing judges is the most common context in which environmental and natural resource issues are presented to judges. ELI has assisted several jurisdictions with an existing continuing judicial education system to add environmental and natural resources law to the system so that programs on these subjects are offered on a regular basis. This enables all judges in a jurisdiction, including those that join the judiciary in the future, to be educated about these issues. These subjects are complex and cannot be adequately covered in a single short course, so the most effective educational programs will include basic and advanced courses.

Courses are not the only method by which judges can learn about environmental issues, particularly after they have been introduced to the subject and develop an appreciation for the importance of the subject. Motivated judges will conduct further research on their own, but others can be encouraged to further their education by making it easier to obtain additional information. ELI therefore provides judges with written materials, audio-visual materials, and other learning aids that they can refer to on their own. Internet-based materials may be an effective method of providing information to many judges, but are not reliable as the sole method unless all judges have easy internet access and are fully capable of using the internet as a learning tool.

### **Research for Custom Designing a Course**

In ELI's experience it is essential to interview judges and practicing attorneys about the important environmental and natural resource issues in their jurisdictions in order to design a course that provides the judges information that will be most useful to them in deciding cases. In this context, the knowledge of practicing advocates is particularly important because they know which issues are creating disputes and controversies before they reach the courts. Judges may only be aware of the types of cases and issues that have been, or are in the process of being, litigated, but attorneys may be able to predict the issues that will be brought to the courts in the near to medium term. This allows a course agenda to be tailored to cover the topics that will be most important to judges. In addition to substantive topics, such interviews have sometimes revealed the need to focus on procedural

and trial practice issues that are important in environmental cases but that judges may not deal with on a regular basis. Such procedural issues include standing, admission and consideration of technical and scientific evidence, expert opinion evidence, and remedies such as restoration of environmental harm.

## **Custom-Designed Course**

### Teaching Methods

Judges are like others in that they learn from a variety of instructional methods and sources of information. One method that is effective in reinforcing learning is to have participants engage in practical exercises that require them to use and analyze information received during a course. ELI has had some positive experience with such practical exercises and other methods that require participants to analyze new concepts and information. ELI therefore investigates the feasibility of including such exercises as part of every course agenda but recognizes that strong local considerations may override the advantages of these methods. For example, some judges consider it unethical to give their opinion on any hypothetical situation. In such situations it may be necessary to discuss legal concepts and laws in an abstract sense without a factual context.

Since judges in different jurisdictions have different expectations of how information should be provided to them and of appropriate methods by which they may be assisted in learning about new topics, ELI has found it to be essential to spend considerable time investigating preferred methodologies in the particular jurisdiction. ELI has found it useful to interview judges, particularly those that head judicial education institutions in the jurisdiction, about what methods are effective in their jurisdiction.

### Faculty Selection

Choice of faculty is a key element to success of any educational program. The first qualification for faculty is, of course, that they be expert in the subject matter. Thus the core of the faculty generally has knowledge and experience in the law of the jurisdiction. These may include law professors, prosecutors, attorneys for non-governmental organizations, and attorneys in private practice. Judges typically are very attentive to presentations by judges, particularly those from higher courts, so it is advantageous to find judges who have expertise

in one or more topics of the course.

ELI has found that judges often have specific ideas regarding who would be appropriate to act as faculty in a course for judges. In a number of jurisdictions, judges have indicated that it would be unethical or otherwise undesirable for advocates who might appear before them to act as faculty. In some cases this was interpreted to exclude any practicing attorney, while in others attorneys who did not actively appear before the court were acceptable. A similar division of opinion exists with respect to prosecutors. Particularly in civil law jurisdictions where there is little or no distinction between judges and prosecutors they are preferred faculty, while in other jurisdictions they are disapproved along with other attorneys who appear before the court. These restrictions can make it difficult to use attorneys who are expert in the law of the jurisdiction, which is critical to achieving the goal of providing instruction about the local law. In these situations the judges often consider academics to be the preferred faculty. Academics often are experts in the substantive law of the jurisdiction, but may be less expert in the evidentiary issues. In other instances judges have accepted advocates, and in a few have even preferred them due to their practical experience.

#### Importance of the Environment

A common concern often shared by government environmental officials, prosecutors, private enterprises, representatives of non-governmental organizations (NGOs), and the public is that judges do not appreciate the importance of environmental and natural resource cases. It may therefore be useful to have a component that describes the environmental and natural resource context of the country or jurisdiction. This may include the particular resources of the country and their current status, such as the quality of air and water, biodiversity, commercially valuable resources, and globally significant natural resources, if any. It may also be useful to include information about the economic value of the environment and natural resources to the country.

#### Law of the Jurisdiction

The educational program should be designed for the judges of the jurisdiction. Thus, the program should account for the powers that judges in the jurisdiction have and the roles they may have in the legal

system. In some civil law systems, this may include investigative functions that would not be appropriate or available to judges in common law systems. ELI has also discovered that it is often preferable to design courses specifically for judges of a particular level in recognition of the fact that trial judges face a different set of issues than do appellate judges. A course for trial judges might focus more on procedural issues such as standing, admissibility of scientific evidence, handling of expert witnesses, and appropriate remedies, while a course for appellate judges might cover those issues more summarily and focus more on constitutional issues.

In order to be of maximum value to judges who must decide cases, an educational program needs to be grounded in the law of the jurisdiction. Thus the statutes and jurisprudence of the jurisdiction should form the basis of a course, particularly if it is a basic or introductory course. On the other hand, environmental and natural resource law has developed rapidly over a relatively short period since the 1960s and many countries have adopted legal concepts from leading countries, often irrespective of whether they come from similar legal systems. These include the polluter pays principle, precautionary principle, environmental impact assessment, public trust, intergenerational equity, ambient environmental quality standards, and emissions standards. There is, therefore, much that can be learned from the laws of leading countries, and comparative law can be useful in teaching about environmental and natural resources law, but the basis of education on substantive law should remain in the laws in effect in the jurisdiction.

The substantive law education should include any specific constitutional provisions on environment and natural resources, constitutional foundations for environmental and natural resource law, international treaties that the country has ratified, specific environmental and natural resource laws, and jurisprudence in the country regarding all of the above. The substantive subject matter may be quite extensive depending on the jurisdiction, including laws covering such topics as: overall framework for environmental protection; environmental crimes and sanctions; water, air, and land pollution; health protection, including water supply quality standards; surface and groundwater use; mining, fishing, timber, and other natural resource sectors; biodiversity; conservation of natural resources; protected areas; land use planning and control;

environmental impact assessment; and threatened and endangered species.

### Procedure

Environmental and natural resource cases can be procedurally complex, so program and course designers should consider including components on the particular procedural aspects of such cases that may be unusual or more complex than other types of cases. For example, plaintiffs in environmental and natural resource cases often seek to represent the public or other diffuse interests, which presents unusual issues of standing or who may have access to courts. Such cases have even resulted in changes to rules of who may be allowed to bring a case. Similarly, such plaintiffs may present unusual issues with respect to case management, including timing, surety or bond requirements, and preliminary relief.

Evidence is a particularly important issue in environmental and natural resource cases as it is typically highly technical and presents issues such as chain of custody and qualification of experts. Components covering such issues should therefore be considered, based on the types of cases that are brought in the jurisdiction. For example, qualification of scientific experts and acceptance of laboratory analyses of samples may be important where pollution cases are common, whereas valuation of timber or other resources may be important where illegal logging or fishing cases are common.

### Remedies

Remedies are a critical element of environmental and natural resource cases. Many such cases require judges to consider remedies that are unusual, even if authorized by national law. Judges may need training in appropriate sanctions under penal laws as well as civil remedies. Environmental and natural resource cases often involve conduct that could cause irreversible harm to the environment if allowed to continue while the full process of adjudication is followed, raising the question whether interim remedies that preserve the status quo are available. Environmental and natural resource cases also frequently present questions of whether and how damage to the environment can be repaired, which may require judges to use procedural tools that are unusual. Even more complex issues arise concerning who and how to compensate for past harm to natural

resources or the environment. This is an area where experience from other jurisdictions may be useful, particularly those with similar legal and judicial systems.

### **Monitoring and Evaluation/ Measures of Success**

Educational and capacity-building programs are intended to accomplish certain goals and objectives, even if those are sometimes not clearly articulated. In the case of capacity-building programs for judges these goals may be as prosaic as raising their awareness of the importance of environmental cases or of increasing their knowledge and confidence of environmental law so judges do not ignore or avoid dealing with such cases. More ambitious goals include improving the quality of judicial decisions on environmental issues and even improvement in the environment as a result of such decisions. ELI has found it difficult to demonstrate that it is meeting even the most basic of these goals and has long recognized the need for – and worked to design and implement – methods of monitoring and evaluating the results of its capacity-building programs. This has been particularly challenging with judicial education programs where, as is common, there is no funding for long-term follow-up with judges who have participated in education programs.

One of the methods of evaluating activities such as education is to establish indicators of success and measures of those indicators. Such measures have typically been used for determining if an individual course or other discrete activity has been successfully delivered, but have not often been applied to the more difficult but important issue of whether the activity succeeded in changing behavior or meeting other ultimate goals. Performance measures include those that measure outputs such as the number of educational programs conducted and the number of judges educated. Of more importance to demonstrating the success of a program are outcome measures, which show that the activity leads to results related to the goals and objectives of the program. Outcome measures may relate to ultimate goals or to intermediate steps that demonstrate progress toward the goals. Outcome measures include changes in environmental conditions or in behavior such as compliance with environmental and natural resource rules.

Course providers typically administer a course evaluation at the conclusion of a course. Such evaluations are useful in getting

immediate feedback on the quality of the program and on the performance of individual members of the faculty. One note of caution with respect to such evaluations in judicial courses is that judges often state a preference for other judges as members of the faculty, but may be reluctant to provide constructive criticism of their peers or judges that may out-rank them.

One means for obtaining a more objective measure of the effectiveness of a course is to administer pre- and post-course evaluations that include questions about the participants' level of knowledge and understanding of the topics covered in the course. Comparisons of an individual's two sets of responses can provide the most information about the effectiveness of particular segments, but participants often are reluctant to be identified. Comparison of aggregate changes in knowledge and awareness can still be useful in measuring the effectiveness of specific sessions and the program as a whole. Use of unique identifiers on pairs of evaluation forms allows respondents to maintain their confidentiality while allowing evaluators to match pre- and post-course responses.

In addition to contemporaneous evaluations, ELI has found it important to monitor the effectiveness of training over the medium to long-term. Such monitoring is much more difficult to implement than course evaluations, both in terms of obtaining responses from participants months and years after the course and in obtaining funding to conduct such monitoring.

Indicators of behavior change or change in environmental conditions need to be developed for environmental educational programs in general, and in particular for programs targeted at the judiciary. Care must be taken in developing measures for judicial education to avoid any suggestion that the decisions made by judges should be evaluated for their substantive effect. Thus, the success of educational programs should not be evaluated based on whether judges reach a particular result, which could be seen as seeking to influence the impartiality of judges and be contrary to the fundamental basis of the rule of law. Nevertheless, it may be possible to remain neutral regarding results in case decisions and still measure changes in behavior or performance by judges that indicate whether education was effective. Intermediate outcome measures might include measuring changes in time taken for disposition of cases or number of environmental and natural resource cases handled by the

trial court system as a whole after a majority of trial judges have received basic training. Other outcome measures might include improvements in compliance with environmental law, with a recognition that such an outcome is influenced by many actors and activities and that judges are only one part of the legal and enforcement system that affects this outcome.

### **Conclusion**

As demonstrated by the Johannesburg Principles, judges throughout the world understand that sustainable development is critical to meeting goals of development, environmental protection, and intergenerational equity, among many others. Judges also recognize the need to be better informed about environmental law and the law of sustainable development. Meeting this need requires substantial effort by judges, law schools, judicial education institutes, international organizations, attorneys, and NGOs, all of which have some role in the process. Experience working with these groups for two decades in twenty nations has demonstrated that the most effective educational programs are those designed specifically for the judges based on their jurisdiction, level of court, authority, and customary method of learning. Environmental law nevertheless has significant commonalities, even across dissimilar legal systems, which means that there is also value in cross-jurisdictional learning and comparative law programs. Although many jurisdictions have instituted programs on environmental law for judges, and the United Nations Environment Programme (UNEP) has produced materials for judges,<sup>3</sup> relatively few judges have benefited from these programs and materials to date. Significantly greater resources must be committed to educating judges about sustainable development and environmental law in order to assure that the law is implemented.

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3. See, e.g., DINAH SHELTON & ALEXANDRE KISS, UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005); UNEP, JUDICIAL TRAINING MODULES ON ENVIRONMENTAL LAW (2007).