

## **The Role of Judicial Networking and Information Sharing in Promoting and Implementing Environmental Law\***

In a paper published in 1999, Anne-Marie Slaughter noted that:

Law – particularly the law handed down by judges – still seems inherently national. Yet, notwithstanding this perception, judges are globalizing as well.<sup>1</sup>

Given the globalised world order where individuals, corporations, markets and States have developed strong connections and inter-dependencies, it is unsurprising that in 2016 globalisation has also influenced domestic legal systems.

The most direct way globalisation has impacted domestic legal systems is through international law, particularly through the treaty making and ratification process. Treaties are the primary legal mechanism by which international environmental norms are created, and their ratification the vehicle by which these norms are incorporated into domestic law.

International courts and tribunals, such as the International Court of Justice, the European Court of Human Rights, and the Dispute Settlement Body of the World Trade Organisation, have also significantly contributed to the globalisation of law, both in general, and more specifically, in relation to environmental law.

These mechanisms, however, may be characterised as formal and top-down. By contrast, judicial networks constitute an informal and vice versa mechanism by which domestic legal systems can be influenced by global norms.

Judicial networks consist of fora for the mutual exchange of ideas, both concerning legal jurisprudence, as well as structural or practical mechanisms concerning court management. This knowledge exchange creates the promotion of mutual assistance between jurisdictions by deepening participants' knowledge about particular legal areas, highlighting recent judicial trends, and identifying new or novel, jurisprudential approaches to existing problems - albeit mindful of the fact that each legal system is unique due to different constitutional and cultural norms, different powers and different resources.

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<sup>1</sup> Anne-Marie Slaughter, 'Judicial Globalization' (1999) 40 *Virginia Journal of International Law* 1103.

The ASEAN Chief Justices' Roundtable on the Environment is an excellent example of a judicial network.

The utility of judicial networks resonates loudly in the field of environmental law. This is because environmental law remains a relatively new discipline compared to other more established legal fields, and because it is reactive to scientific and technological advancements (for example, the need to eliminate greenhouse gas emissions) and social and economic developments. These characteristics require environmental law to be dynamic and responsive, something which judicial and legal networks facilitate and encourage.

This presentation examines the opportunities that judicial networks offer in the context of environmental law. It will highlight existing, successful structures, both at a domestic (particularly Australian) and international level, which promote judicial networking, and identify available legal judicial networking resources.

### **Judicial and Legal Networks**

At this stage it is useful to provide a working definition of the term “network”. A “network”, it has been suggested, is:

A set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests, acknowledging that cooperation is the best way to achieve common goals.<sup>2</sup>

This may be distilled to: a set of non-hierarchical relationships where the participants share a common interest and who exchange resources and ideas to achieve common goals.

Judicial networks are obviously networks between judges. The common goals plainly include strengthening the rule of law, including the environmental rule of law, and developing jurisprudence.

Judicial networks operate at both a local, national, and international level. Thus a judge has a network with her or his colleagues on the bench, with other domestic judges in other courts, and with judges internationally. At every level, judges

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<sup>2</sup> T Borzel, ‘Organizing Babylon – On the Different Concepts of Policy Networks’, (1998) 76 *Public Administration* 253, 254 quoted in Monica Claes and Maartje de Visser, ‘Are you networked yet? On dialogues in European judicial networks’ (2012) 8(2) *Utrecht Law Review* 1, 2.

therefore have the opportunity to learn from one another and promote mutual assistance.

In addition to judicial networks, it is also worth noting that there exist more general and broader legal networks, which comprise of networks consisting of all legal practitioners, including lawyers and academics. These more general legal networks share goals similar to those of more specialised judicial networks. A theme which is developed throughout this presentation is that judicial and legal networks interact with, and are in fact reliant on, each other.

### **Judicial and Legal Networks in the Australian Context**

The Land and Environment Court of NSW (“LEC”) provides an excellent example of a successful judicial network operating in a domestic context. Necessarily, there are multiple places where this network operates. Some of these places are managed by the Court itself, others are not. All, however, focus on the dissemination of information between both members and users of the Court.

One of the most important ways in which judicial networks are maintained and enhanced, both intra-jurisdictionally and inter-jurisdictionally, is through the process of publishing judgments. It is well appreciated that, in almost all cases, a judge will provide reasons for her or his decision. This has been recognised as an incident of the judicial process,<sup>3</sup> and more recently in Australia as an aspect of the judicial power protected by the Australian Constitution.<sup>4</sup> It is a fundamental aspect of an environmental rule of law by promoting transparency and by assisting in improved decision making.

Three reasons have been identified for the utility of providing reasons.<sup>5</sup> First, reasons provide parties with the opportunity to see the extent to which their arguments have been understood and accepted, as well as the basis of the judge's decision. Reasons therefore provide the foundation for the acceptability of the decision by the parties and by the public. Second, the giving of reasons furthers judicial accountability. Reasons are a justification for the exercise of judicial power and when reasons are published they reduce the likelihood of any excess use or

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<sup>3</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

<sup>4</sup> *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>5</sup> *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247.

abuse of power. And third, because courts determine what the law is, and how it will be applied in future cases. The giving of reasons therefore enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will be decided in the future.

In the LEC two practices have developed relating to the publication of judgments. The first is to ensure that all judgments, including *ex tempore* (oral) judgments, are publicly accessible by publishing them on the internet. Access is free. The official portal through which judgments are published in New South Wales is Caselaw.<sup>6</sup> The Caselaw website allows anyone to search judgments by a series of fields, including the case citation, the parties names, and catchwords (and thus subject-matter).

This practice is common across all superior courts in Australia, as well as some inferior courts.

But Caselaw is not the only website by which judicial decisions may be accessed. There are also a number of externally operated websites which are also free to anyone with internet access.

Two are worth noting:

(a) the Australasian Legal Information Institute (or as it is more widely known, “AustLII”).<sup>7</sup> This website is a comprehensive repository of almost all judicial decisions handed down by courts and tribunals in Australia. The site is easily navigable, with decisions sorted first by jurisdiction, then by year, then in chronological order of when they were published. Further, all cases and legislation cited within judgments are hyperlinked, allowing users to easily access cited judgments and statutes. This site is free, and is reliant on a mixture of public and private donations; and

(b) Jade.<sup>8</sup> It is very similar to AustLII and contains legal decisions from all Australian jurisdictions and is free at a basic level. What differentiates Jade from other databases is that it also identifies the paragraphs that are cited in subsequent judgments, allowing users to see how legal principles that have

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<sup>6</sup> <https://www.caselaw.nsw.gov.au>.

<sup>7</sup> <http://www.austlii.edu.au/>.

<sup>8</sup> <https://jade.io>.

emerged in one judgment have subsequently been applied in other judgments.

The second practice particular to the LEC, is the distribution between judges of all published judicial decisions of the Court. Given the small size of the Court (six judges) this can easily be done. The distribution assists the judges with keeping up to date with the latest jurisprudence of the Court. This is a form of 'paper' networking.

The publication of judgments facilitates justice being done and being seen to be done<sup>9</sup>. It enables judges to develop the law uniformly, all of which contributes to the rule of law. Additionally, where judgments are free and readily accessible, judges and legal practitioners from other jurisdictions, both domestic and overseas, are also able to access them thereby promoting mutual judicial assistance.

Another form of networking, and perhaps the most recognisable are those networks formed at conferences, such as this Roundtable, and by dint of membership of professional bodies.

The LEC holds an annual conference (over two days). Both the judges and the commissioners of the Court attend. The conference comprises presentations from both lawyers and non-lawyers. These include presentations from judges of superior courts, including the High Court of Australia and the NSW Court of Appeal, members of the bar, as well as from members of professions which frequently give evidence in matters before the Court, such as planners, architects, botanists and so on.

Judges and commissioners of the LEC also regularly attend seminars held by the Judicial Commission of NSW. The Judicial Commission is an independent statutory corporation established under the *Judicial Officers Act 1986* (NSW) which reports to State Parliament. It is responsible for:<sup>10</sup>

- providing continuing education and training for NSW judicial officers; and
- examining complaints concerning judicial officers.

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<sup>9</sup> The principle that "not only must justice be done; it must also be seen to be done": *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

<sup>10</sup> <https://www.judcom.nsw.gov.au/>.

The Judicial Commission provides educational seminars throughout the year to enhance legal knowledge and to provide judicial networking opportunities. All judicial officers in NSW are invited to attend and participate in the seminars.

Most judges are also a part of a number of professional bodies. These organisations provide a forum for judges to interact with members of the profession. These professional bodies often offer their members the opportunity to attend conferences, as well produce a range of materials.

Some examples of domestic environmental law professional associations include:

- National Environmental Law Association;<sup>11</sup> and
- Environment and Planning Law Association.<sup>12</sup>

Anyone can join these organisations. Most regularly disseminate information on environmental law developments.

The LEC also hosts delegations from overseas. Hosting delegations allows international judges to understand the mechanics and processes of the Court. It also provides domestic judges with the opportunity of meeting judges from other jurisdictions. It is mutually beneficial.

Finally, the Court's website is the interface between the Court and its users. It facilitates the provision of information to interstate and international judges, academics, and other entities. The website is comprehensive, well-designed and assists with inquiries allowing Court resources to be allocated elsewhere.

First, the website has been designed to be user friendly to both sophisticated and unsophisticated litigants (such as litigants in person). The tabs in the navigation bar provide information and, it is hoped, anticipate potential questions.

Second, the menu provides popular links to Caselaw NSW, the Court lists, Court Practice Notes and the Judicial Newsletter.

The Practice Notes published on the Court website are a set of mandatory directions from the Court to parties, detailing pre-trial and trial practice and procedure in:

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<sup>11</sup> <http://www.nela.org.au/>.  
<sup>12</sup> <http://www.epla.org.au/>.

- administrative law cases;
- criminal cases (including pollution); and
- planning cases.

The Judicial Newsletter is a quarterly publication of the Court which summarises the most important decisions of the Court, and other domestic and sometime international, cases from that period. Each judgment summary contains hyperlinks to the cases referred to therein. The Court Newsletter also contains legislative updates, and select case summaries from other, primarily appellate, courts. The Newsletter allows the Court to communicate its jurisprudence to the legal profession and the broader community. Anyone can have access to the Newsletter.

Third, there are links to Court publications, including the Annual Report, and speeches and papers that judges have delivered extra-curially.

Fourth, there is a Court Users Group which meets regularly.

From this discussion what emerges is that access to information promotes networking within a Court, between courts and with other legal practitioners. And in doing so, facilitates and improves the work of courts and the judges who operate within them.

### **International Judicial Networks**

The more information which a judge may have recourse to, the better informed they and their decision will be.

As stated above international conferences (such as this one) clearly provide a forum for this information to be shared.

Such conferences, or networks, operate as international information conduits, whereby information that may be well known or developed in one jurisdiction may be shared with others. This develops the capacity of all the participants. This is what is meant by the phrase “promoting mutual assistance”. It is therefore important that judges are aware of, and also participate in, international conferences.

Three international judicial networks which facilitate information sharing are emphasised:

(a) the Global Judicial Institute for the Environment.<sup>13</sup> The Institute was created in April this year. The mission of the Institute is to support courts and tribunals in applying and enforcing environmental laws and in promoting the environmental rule of law. The Institute is comprised of sitting judges from around the world and is led by an elected council of judges. The Institute provides opportunities for exchanging information, creating partnerships for collaboration, strengthening capacity, and providing research and analysis on topics important for environmental adjudication, court practices, and environmental rule of law;

(b) the International Union for Conservation of Nature (“IUCN”).<sup>14</sup> The IUCN is composed of both government and non-government organisations. It aims to provide all members with the knowledge and tools to enable human progress, economic development and nature conservation to take place together. Established in 1948, IUCN has evolved into the world’s largest environmental network. It harnesses the experience, resources and reach of 1,300 member organisations and the input of 16,000 experts. Its experts are organised into six commissions dedicated to species survival, environmental law, protected areas, social and economic policy, ecosystem management, and education and communication.

Every year the IUCN holds an Environmental Law Colloquium. This conference is attended by academics, judges, adjudicators, arbitrators, mediators and members of tribunals that deal with environmental matters, to discuss procedural and substantive aspects of environmental adjudication. An edited, peer-reviewed collection of selected papers following the colloquium is published; and

(c) the Australasian Conference of Planning and Environmental Courts and Tribunals (“ACPECT”).<sup>15</sup> ACPECT is a judicial network with a particular focus

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<sup>13</sup> <https://www.iucn.org/news/judges-establish-global-judicial-institute-environment>.

<sup>14</sup> <https://www.iucn.org/>.

<sup>15</sup> <http://www.plevin.com.au/acpect2016/index.html>.

on planning and development law. The conference focuses on complex issues relating to substantive law and procedure common to all jurisdictions. While the focus is on planning law, areas of law which intersect with this discipline, such as indigenous cultural heritage and natural resource management are also explored.

### **Available Resources which Facilitate Judicial Networking**

Having identified face-to-face conferences that promote judicial networks, it is also worth noting blogs and other resources (or 'electronic' networking), freely available on the internet, which are repositories of information and materials on environmental law and facilitate and promote judicial networking. For example:

- (a) Ecolex<sup>16</sup> is a site allowing users to search information on treaties, international soft-law and other non-binding policy and technical guidance documents, national legislation, judicial decisions, and law and policy literature. It is jointly operated by the Food and Agriculture Organisation of the United Nations ("FAO"), IUCN and the United Nations Environment Programme ("UNEP"). Its purpose is to build capacity worldwide by providing the most comprehensive possible global source of information on environmental law.

Ecolex was designed to allow easy access to information which has previously been limited, both in the sense that a limited number of people knew of its existence and location, and in the sense that access to it had previously been restricted;

- (b) the Sabine Centre for Climate Change<sup>17</sup> is another website that provides a locus for free information about climate change. The Sabine Centre aims to develop legal techniques to address climate change. It is auspiced by Columbia Law School, in conjunction with scientists at Columbia University's Earth Institute and governmental, nongovernmental and academic organisations. One excellent tool worth exploring is the "Database of non-US Climate Change Litigation", which contains a relatively comprehensive

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<sup>16</sup> <https://www.ecolex.org/>.

<sup>17</sup> <http://web.law.columbia.edu/climate-change>.

collection of climate change litigation, organised by country, with links to those decisions; and

(c) finally, the Law Review Commons<sup>18</sup> provides access to a sizeable collection of law reviews and legal journals, in an easily browsable and searchable format. It contains both current issues and archived content. Users can search journals by subject or use search terms.

### **Essential Elements which Foster the Creation and Maintenance of Judicial and Legal Networks**

Judicial networks create the potential for the widespread sharing of information between judges of different jurisdictions, both domestic and international. Creating judicial networks promotes a form of mutual assistance between judges and between jurisdictions. This increases individual capacities in terms of technical skills and expertise, which in turn results in improved decision-making and improved processes, all which contribute to the enhancement of the environmental rule of law.

Vital to the success of judicial networks, however, are robust legal networks, including infrastructure and technology, that allow for the wide dissemination of and access to information, particularly judgments. Without these resources - which promote transparency and consistent decision-making - it becomes more difficult to share, and thus learn from, the experiences of other jurisdictions.

It is apposite to conclude by observing that while it is likely that globalisation has increased stressors on the environment and contributed to climate change, globalisation, and global judicial networks, may be instrumental in promoting the protection of the environment.

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<sup>18</sup> <http://lawreviewcommons.com/>.