**SPECIAL CONTRIBUTION**

# THE ROLE OF THE COURTS IN DELIVERING ENVIRONMENTAL JUSTICE

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## I. INTRODUCTION

At the United Nations Sustainable Development Summit 2015, attending countries adopted the 2030 Agenda for Sustainable Development, which included 17 Sustainable Development Goals (SDGs).[1] One of the Sustainable Development Goals, SDG 16, is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[2]

SDG 16 involves three related goals. First, the promotion of peaceful and inclusive societies for sustainable development. This involves promoting societies that value and seek to achieve sustainable development. Second, the provision of access to justice for all. Third, the building of effective, accountable and inclusive institutions. Such institutions include those not only in the legislative and executive branches of government, but also the institutions in the judiciary of the courts and tribunals. For convenient expression, I will refer to these judicial institutions as courts. Courts play a vital role in achieving the first two goals: sustainable development and access to justice. These two goals are mutually reinforcing and create a third goal – promoting environmental justice.

The concept of justice is multi-faceted. In a world increasingly threatened by planetary crises, including the triple threats of climate change, loss of biological diversity and pollution, the concept of justice increasingly embraces environmental justice. Environmental justice involves at least three types of justice: distributive justice, procedural justice and recognition justice.[3] Distributive justice involves the substantive distribution of environmental benefits and burdens.[4] Procedural justice involves the procedure for providing access to justice for all.[5] Recognition justice involves recognition and respect for all.[6] The planetary crises are impacting severely on these aspects of justice. Climate change, for instance, impacts disproportionately on those who have contributed the least to the problem but who will suffer the most from it.[7] The tidal inundation of the Torres

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1 United Nations, 'The 17 Goals', *United Nations: Department of Economic and Social Affairs* (Web Page) <https://sdgs.un.org/goals>.

2 Ibid.

3 Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 10, 42-51.

4 Brian J Preston, 'The Effectiveness of the Law in Providing Access to Environmental Justice: An Introduction', in Paul Martin et al (eds), *The Search for Environmental Justice* (Edward Elgar, 2015) 23-33.

5 Ibid 34-38.

6 Ibid 38-40.

7 Maxine Burkett, 'Climate Reparations' (2009) 10 *Melbourne Journal of International Law* 509, 510, 513-514. See also Martin Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability* (Cambridge University Press, 2007) 796.

Strait Islands, and its dire consequences for the Islands' inhabitants, is a sombre illustration.[8]

If courts are to achieve their core purpose of providing access to justice for all, they need to be able to adapt their dispute resolution processes, critically adjudication, to respond to the planetary crises. This involves responsive environmental adjudication.

Warnock identifies four components of responsive environmental adjudication.[9] The first is identifying the distinct characteristics of environmental problems. The second is acknowledging the impact that those characteristics have on the law and dispute resolution, and the challenges they create for adjudication. The third is developing environmental law doctrine, procedure and remedies that respond to those challenges. The fourth is identifying and implementing particular adjudicative forms and functions to facilitate this process. This includes establishing courts with particular constitutions, competences and expertises that are better able to respond to and resolve environmental problems.[10]

These four components of responsive environmental adjudication interact. An adjudicative institution, such as a specialist environmental court, with a constitution, competences and expertises in resolving environmental problems (the fourth component) will be better able to identify the distinct characteristics of environmental problems (the first component), acknowledge their impact on the law and dispute resolution and the challenges they create for adjudication (the second component) and develop environmental law doctrine, procedure and remedies that respond to the challenges (the third component).

Courts that engage in responsive environmental adjudication are better able to deliver environmental justice. Specialist environmental courts have been identified as being such courts.[11] Specialist environmental courts are attuned, equipped and operated to manage and resolve environmental disputes.[12] Specialist environmental courts have constitutional and institutional competences, and contributory and interactional expertises, that enable them to perform their functional roles, develop doctrines and resolve disputes in ways that are responsive to environmental problems and promote the delivery of environmental justice.[13]

In this lecture, I will explore this role of the courts, especially specialist environmental courts, in delivering environmental justice. My exploration will be in two parts. I will first explain each of the three concepts of environmental justice. I will then explain the ways in which courts, again especially specialist environmental courts, have upheld access to environmental justice in these three senses. I will use three analytical frames to examine how the courts have delivered environmental justice: the functional roles courts perform, the doctrines courts

[8] Human Rights Committee, *Views: Communication No 3624/2019,* 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) ('*Billy et al v Australia*').

[9] Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing, 2020) 5.

[10] Ibid.

[11] Brian J Preston, 'Chapter 1: The Role of Environmental Courts and Tribunals in Delivering Environmental Justice' in Linda Yanti Sulistiawati, Sroyon Mukherjee and Jolene Lin et al (eds), *Environmental Courts and Tribunals in Asia Pacific* (BRILL, forthcoming).

[12] Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365.

[13] Brian J Preston, 'The Many Facets of a Cutting Edge Court: A Study of the Land and Environment Court of New South Wales' in Elizabeth Fisher and Brian J Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart, 2022) 1-28.

develop and the dispute resolution processes courts use.

## II. WHAT IS ENVIRONMENTAL JUSTICE?

Environmental justice includes at least three components: distributive justice, procedural justice and recognition justice.[14] I will explain each of these in turn.

### *A. Distributive Justice*

Distributive justice is concerned with the distribution of environmental goods or benefits and environmental bads or burdens.[15] Environmental benefits include clean air, water and land, green space and biological diversity, and a healthful ecology. Environmental burdens include polluted air, water and land, and loss of green space, biological diversity and ecological integrity. Distributive justice involves substantive justice in that it is concerned with the environmental benefits and burdens that are received by the members of the community of justice.[16]

The law establishes the framework within which distributions of environmental benefits and burdens occur.[17] Natural resource laws provide for the allocation of entitlements to access and use natural resources, including water, minerals, timber and other components of biological diversity. Planning laws provide for the spatial distribution and designation of land and its resources (by zoning), the opportunities to use them (by development control), and the allocation of entitlements to use land and its resources (by land use permits). Pollution laws regulate environmental externalities, such as the pollution of air, water and land, by allocating entitlements to cause environmental externalities (pollution licences). Such laws regulate the distribution of environmental benefits, as well as of environmental burdens.

The extent to which laws enable the achievement of distributive justice will depend on the answers to three questions. Who is the community of justice recognised by the laws? What are the environmental benefits and burdens distributed by the laws? What are the criteria governing the distribution of environmental benefits and burdens?

The community of justice is comprised of the entities entitled to be recipients of justice.[18] With respect to distributive justice, the community comprises the claimants for and recipients of environmental benefits and burdens respectively. The laws regulating or effecting distribution of environmental benefits and burdens affect the community of justice in two ways. First, the laws confine the membership of the community of justice. An example is that most environmental laws recognise only humans, and not non-human nature, as recipients of environmental justice. Even the few laws that do recognise non-human nature, only recognise living and not non-living matter.[19] Second, the laws affect who – within or without that membership – receives environmental benefits or burdens. An example is that laws skew the distribution of environmental benefits to consuming users

[14] Walker (n 3) 42-51.
[15] Preston (n 4) 23.
[16] Ibid 24.
[17] Ibid.
[18] Ibid 24-25.
[19] Christine Winter and David Schlosberg, 'What Matter Matters as a Matter of Justice?' (2023) *Environmental Politics* 1-20.

but environmental burdens to non- consuming users.[20]

The second question that needs to be addressed in achieving environmental justice is what is to be distributed. Environmental justice involves the distribution of both environmental benefits and environmental burdens. But these concepts are context- dependent and claim-dependent. Particular environmental features, materials, processes or activities can be viewed as both benefits and burdens depending on the claimant and the context of the claim. For example, energy consumption can be viewed as a benefit in providing essential energy services, and a burden in contributing to carbon emissions and climate change. Flooding can be a benefit for agriculture (by replenishing water storage and renewing soil fertility by alluvium deposition) and for non-human nature (such as sustaining wetland and riparian area habitats) and a burden (by damage to public infrastructure and private property, interruption of business activity and loss of life).[21]

The concepts of benefits and burdens are also relative, both as concepts and with respect to any particular group of potential resource users. There are also issues in defining what is to be distributed and concerning the evidence needed to make evaluative decisions. Naming and giving meaning to any particular benefit or burden is a social process and is therefore particular rather than universal.[22]

The third question to be addressed in achieving environmental justice is what are the principles for the distribution of environmental benefits and burdens. Many different criteria have been advanced by jurisprudential theorists for achieving distributive justice. Generally, the criteria can be grouped as goal-based, right-based or duty-based.[23]

Goal-based criteria involve some goal, such as improving the general welfare of the community of justice or some section of it. Right-based criteria involve some right, such as the right to life or liberty or other human rights. The right to a clean, healthy and sustainable environment, declared by the UN General Assembly on 28 July 2022,[24] may be seen as setting a right-based criterion. Duty-based criteria involve some duty, such as the duty to obey a commandment or moral quality. Some of the principles of sustainable development incorporate duty-based criteria. Three examples are: (1) the principle of intergenerational equity, which provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained and enhanced for the benefit of future generations; (2) the polluter pays principle, which states that those who generate pollution and waste should bear the cost of containment, avoidance and abatement; and (3) the user pays principle, according to which the users of goods and services should pay prices based on the full life cycle costs of providing the goods and services, including the use of natural resources, and the ultimate disposal of any waste. Each of these principles pronounces duties that can be used in distributive choices.[25]

Achieving distributive justice is not, however, simply a matter of the law ensuring a just distribution of primary environmental goods, such as environmental benefits. It also entails ensuring that such distribution

[20] Preston (n 4) 25-29.
[21] Ibid 29.
[22] Ibid; Walker (n 3) 43-45.
[23] Ibid 29-30.
[24] *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN Doc A/RES/76/300 (1 August 2022, adopted 28 July 2022); Brian J Preston, 'The Right to a Clean, Healthy and Sustainable Environment: How to Make it Operational and Effective' (2023) *Journal of Energy & Natural Resources Law* 1.
[25] Preston (n 4) 29-30.

enables individuals and communities to live fully functioning and flourishing lives.[26] Distributive justice is concerned not only with the amount of environmental goods distributed, but also with what those goods do for individuals and communities.[27] Here, the 'capabilities approach' developed by Sen and Nussbaum can be applied.[28] The capabilities approach is concerned with what is needed to transform primary goods (if they are available) into a fully functioning life and what it is that interrupts that process.[29]

Up to this point I have focused on the content of the laws which is necessary for the achievement of environmental justice. However, achieving distributive justice is not only a product of the laws' content, but also how the laws are applied in practice. Distributive injustice is caused not only by laws that provide for inequitable distributions of environmental benefits and burdens, but also by the inequitable application or non-application of laws that provide for equitable distributions. Access to distributive justice is promoted not only by the laws giving, but also by the courts upholding, substantive rights to members of the community of justice to share equitably in environmental benefits and to prevent, mitigate, remediate or be compensated for environmental burdens they suffer.[30]

### *B. Procedural Justice*

Procedural justice is concerned with the ways in which decisions are made, including decisions for the distribution of environmental benefits and burdens, and who is involved and who has influence in those decisions.[31]

Procedural justice is linked to distributive justice. Broad, inclusive and democratic decision-making procedures are a precondition for achieving distributive justice. Conversely, procedural injustice can be a cause of distributive injustice.[32]

However, procedural injustice is an element of justice itself. Justice involves not only fair or just distributive outcomes but also fair or just procedures by which those distributive outcomes are reached.[33] The importance of procedural fairness is evidenced by its centrality in public law, for administrative and judicial decision-making.

Procedural justice involves at least three elements: access to environmental information, entitlement of the public to participate in environmental decision-making; and access to review procedures before a court or tribunal to challenge environmental decision-making or the impairment of substantive or procedural rights.[34] Principle 10 of the Rio Declaration on Environment and Development declares these three access rights.[35] The

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[26] Ibid 31.
[27] David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2007) 30, 112-113.
[28] Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon Press, 1993); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006); Amartya Sen, *The Idea of Justice* (Allen & Lane, 2009).
[29] Schlosberg (n 27) 4.
[30] Preston (n 4) 24.
[31] Ibid 34.
[32] Ibid.
[33] Walker (n 3) 47-48.
[34] Preston (n 4) 34.
[35] *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (12 August 1992).

UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines), adopted in 2010, recommend norms and practices to achieve these access rights.[36] The Bali Guidelines Implementation Guide, developed in 2015, provides further guidance on the implementation of the Bali Guidelines.[37]

### *C. Recognition Justice*

Environmental justice involves not only distributive justice and procedural justice, but also the recognition of members of the community of justice.[38] Issues of recognition are distinct from, although closely related to, issues of distribution and procedure. Lack of recognition, in the social and political realms, demonstrated by various forms of insults, degradation and devaluation, inflicts damage to and constrains individuals, groups and communities and leads to inhibited or ineffective participation in the polity (procedural injustice) and to inequalities in the distribution of environmental benefits and burdens (distributive injustice).[39]

Recognition injustice can be manifested in three ways.[40] There is non-recognition – the ignoring of certain individuals, groups or communities in law and governance, including in environmental decision-making, effectively rendering them invisible. There is misrecognition, including cultural domination and oppression, or routinely disrespecting, insulting, disparaging, degrading or devaluing certain individuals, groups or communities. Finally, there is malrecognition – the malignant recognition of certain individuals, groups or communities, including taking action against individuals, groups or communities who are exercising their democratic rights in order to prevent them from continuing to exercise such rights effectively. An example of malrecognition is the bringing of strategic litigation against public participation (or SLAPP suits).[41] SLAPP suits seek to stifle people from exercising their human rights such as rights of access, public participation and protest, or to punish them for having done so.[42]

## III. HOW COURTS DELIVER ENVIRONMENTAL JUSTICE?

Courts can deliver environmental justice in these three senses by doing what courts do. There are three analytical frames to understand what courts do. The first frame is the functional roles that courts perform in resolving disputes. The second frame is the doctrines that courts develop in exercising their functional roles. The third frame is the processes that courts use to resolve disputes.

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[36] United Nations Environment Programme, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, UNEP Dec SS.XI/5 (26 February 2010).

[37] United Nations Environment Programme (UNEP), *Putting Rio Principle 10 into Action: An Implementation Guide* (UNEP, 2015).

[38] Preston (n 4) 38.

[39] Schlosberg (n 27) 14, 30.

[40] Preston (n 4) 38; Schlosberg (n 27) 16-18; Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Grethe B Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah Press, 1998) vol 19, 3, 7.

[41] See eg George W Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press, 1996); George W Pring, '"SLAPPs": Strategic Lawsuits Against Public Participation' (1989) 7 *Pace Environmental Law Review* 1; Judith Preston, 'Participation from the Deep Freeze: "Chilling" by SLAPP Suits' (2014) 31 *Environmental and Planning Law Journal* 47.

[42] Pring (n 41) 5-6.

### *A. Functional Roles Exercised*

Courts exercise at least five functional roles. First, courts resolve disputes that come before them. This involves determining claims of right and accusations of wrong or guilt, enforcing the law both civilly and criminally, and upholding the law and the rule of law. These are the products of the proper exercise of the jurisdiction and functions vested in the court.

For a specialist environmental court, the more extensive its jurisdiction and functions, the greater is its capacity to exercise this functional role of resolving environmental disputes. One of the characteristics of a successful specialist environmental court is a comprehensive and centralised jurisdiction.[43] The jurisdiction should be comprehensive in three respects. First, a specialist environmental court should have comprehensive subject-matter jurisdiction to resolve the different aspects of the disputes that arise under the environmental laws of the polity. A particular project, for example, may require statutory approvals under numerous environmental laws. A specialist environmental court should have jurisdiction to resolve all issues concerning approvals under all of the laws. Second, a specialist environmental court should enjoy comprehensive legal jurisdiction with respect to the administrative, civil and criminal enforcement of environmental laws. Jurisdiction to determine issues of compliance with environmental laws should not be spread between different courts and tribunals based on the nature of the issues as administrative, civil or criminal, as was historically the case in New South Wales, for example.[44] Third, a specialist environmental court should have comprehensive functional jurisdiction in relation to the types of cases it has authority to hear, such as review of administrative action (both judicial review and merits review), civil enforcement of environmental laws, and criminal prosecutions for offences against environmental laws. The specialist environmental court also needs to have centralised jurisdiction, enabling it to enjoy a comprehensive, integrated and coherent environmental jurisdiction. Centralisation facilitates the specialist environmental court having a critical mass of cases to achieve economies of scale.[45]

Dispute resolution does not merely serve a functional role. The processes and outcomes of dispute resolution have a quality and authority that go beyond the function of dispute resolution. As Fisher, Lange and Scotford observe:

> …courts are more than the sum of their parts and the judgment of a court has a symbolism and authority that few other documents have. The judgment is an 'icon of the rule of law' and a particular case is a 'carefully orchestrated process through which indeterminate aggregations of persons, words, stories, and materials are transformed into facts of intention, causality, responsibility and property'. Law, in the form of a judgment, has a 'homeostatic' quality in which any argument must be integrated into 'the integrity of the legal edifice.' The processes of courts are thus fundamental both to the construction of the legal discourse and to the authority of law itself.[46]

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[43] Preston (n 12) 372-377.

[44] See Brian J Preston, 'Specialist Environmental Courts: Their Objective, Integrity and Legitimacy' (Conference Paper, paper to be presented at the AAL, AIJA and ALJ Enduring Courts in Changing Times Conference, 10 September 2023).

[45] Ibid 375-377.

[46] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, 2nd ed, 2019) 184.

In both these ways, courts' resolution of disputes assists in the delivery of environmental justice. Depending on the dispute and its resolution, courts' judgments may contribute to (1) distributive justice, through achieving a more equitable distribution of environmental benefits and burdens; (2) procedural justice, by facilitating access to information, public participation and access to the court; and (3) recognition justice, by overcoming the non-recognition, misrecognition or malrecognition of alienated or marginalised people, groups or communities. Second, courts can facilitate interest representation in administrative decision-making. Environmental laws, especially planning laws, increasingly provide for public participation. McAuslan identifies public participation as one of the ideologies of planning law.[47]

Improving interest representation facilitates participatory democracy. Sax has argued that public interest litigation helps realise a truly democratic process. Citizen actions in the courts can force a reluctant or prevaricating executive to make decisions and to make them in accordance with the law.[48] The availability of the courts means that access to the executive, and securing government accountability, can be a reality for the ordinary citizen.[49] Citizen actions in the courts can also facilitate citizen access to the legislature, bringing important matters to legislative attention, 'to force them upon the agendas of reluctant and busy representatives.'[50] By restraining conduct of the government or industry that causes or threatens environmental harm, courts 'can thrust upon those interests with the best access to the legislature the burden of obtaining legislative action.'[51]

Sax's insights as to how litigation can be a form of political mobilisation and realise a truly democratic process help explain how courts can deliver environmental justice, particularly procedural and recognition justice. By bringing citizen actions in the courts, people, groups and communities who are alienated and marginalised by government and industry are able to have their interests taken into account by government and industry, and to secure the accountability of government and industry.

Third, courts provide not just a legal forum, but also a forum for public discourse.[52] Environmental disputes involve contested ideas, values, aspirations and mentalities of what we do and who we are. A court case provides a forum for a public discourse on these questions. Although the central purpose of the court case is the resolution of the legal dimensions of the dispute, the hearing of the case in public also provides a forum for a discourse of the non-legal dimensions of the case. Climate change cases are a topical illustration. This discourse on the non-legal dimensions may be of more interest to the public, and more influential generally, than the court's resolution of the legal dimensions. This explains in part the influence that a court case can have, even where the court rules against the plaintiff. Such a case may still catalyse action by government and industry to address the legal and non-legal dimensions of the case, notwithstanding the lack of legal compulsion to do so. There are many instances of unsuccessful climate change litigation that nonetheless influenced government and

[47] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press, 1980).
[48] Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971).
[49] Ibid 112.
[50] Ibid xviii.
[51] Ibid 152.
[52] Fisher, Lange and Scotford (n 46) 185.

industry to take action to address climate change in some way.[53] In these ways, even when the litigation itself does not result in a favourable outcome, by providing a forum for public discourse, courts can facilitate the delivery of environmental justice.

Fourth, through the adjudication of environmental disputes, courts play a role in explaining and upholding the values underpinning environmental laws. Values affect the making of environmental laws by the legislature. All statutes are explicitly normative.[54] Environmental statutes are especially so, as they reflect a choice of public values and a conception of the identity of society.[55]

Values also influence how environmental laws are understood and applied. Understanding environmental laws involves discerning the values of the laws.[56] This is true for administrative decision-making in applying the laws. Insofar as environmental laws give discretionary powers, the laws require normative choices to be made, which may be restricted to a greater or lesser degree by the terms of the laws.[57] The values of the decision-maker thus influence the application of the laws. This is also true for how environmental laws are interpreted by the courts. Values affect judicial decision-making. As Waldron observes, 'the idea of "neutral" or "value-free" decision-making by judges is a non-starter.'[58]

This clash of different values is an inseparable part of environmental law and of the work of the courts. It is responsible for the creativity and dynamism of environmental law and the doctrinal development of the law by courts. The courts' resolution of the contradictions and ambiguities in environmental law and its application leads to the doctrinal development of the law and the delivery of environmental justice. The judicial development of the principles of sustainable development and the environmental rule of law is illustrative of this process.[59]

Fifth, courts play a role in implementing the purposes of environmental legislation. The purposes of environmental legislation can, but may not necessarily, promote environmental justice. The purposes may include distributive justice (providing for more equitable distribution of environmental benefits and burdens); procedural justice (providing for access to environmental information, public participation in environmental decision-making, and access to the courts); and recognition justice (giving recognition to and overcoming misrecognition or malrecognition of alienated or marginalised people, groups or communities). Courts' upholding of these legislative purposes, when resolving disputes, facilitates the achievement of environmental justice.

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[53] Hari M Osofsky, 'The Continuing Importance of Climate Change Litigation' (2010) 1 *Climate Law* 3; Brian J Preston, 'The Influence of Climate Change Litigation on Governments and the Private Sector' (2011) 2 *Climate Law* 485.

[54] Jeremy Waldron, *The Law* (Routledge, 1990) 132.

[55] Mark Sagoff, *The Economy of the Earth* (Chicago University Press, 1988) 16-17.

[56] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) 163.

[57] Elizabeth Fisher, 'Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991?' (2015) *Resource Management Theory and Practice* 63, 74-76.

[58] Waldron (n 54) 146.

[59] Brian J Preston, 'The Judicial Development of Ecologically Sustainable Development' in Douglas Fisher (ed), *Fundamental Concepts of Environmental Law* (Edward Elgar, 2nd ed, 2022).

### *B. Doctrines Developed*

In performing these functional roles, courts may develop legal doctrines, mostly in environmental law but also in other areas of law such as administrative, civil and criminal law of relevance to environmental problems.[60] Collectively, courts can develop environmental jurisprudence.

Specialist environmental courts may develop environmental jurisprudence better than other courts. Specialist environmental courts are constituted with competences and expertises in understanding and adjudicating environmental disputes, which better enable them to develop environmental jurisprudence.[61]

The competences are twofold: constitutional and institutional. The constitutional competence of a court refers to how the court has been constituted, and in particular the jurisdiction and functions it is empowered to exercise. The institutional competence of a court refers to the capacity of the court to exercise its jurisdiction and functions. An aspect of capacity is the range of dispute resolution processes the court can use. The greater are the constitutional and institutional competences of a court, the greater will be the court's capacity to deliver environmental justice.

The expertises are also twofold: contributory and interactional. Contributory expertise refers to the knowledge needed to contribute to the application and development of law. This is legal expertise. Contributory expertise in environmental law is specialist legal expertise, requiring a broad and deep understanding of environmental law and of the functions and processes of the legal institutions charged with administering and enforcing environmental law. Interactional expertise refers to the expertise needed to interact with disciplines other than law such as scientific, social, political and economic disciplines of relevance to environmental problems. Interactional expertise assists in understanding the nature and scope of environmental problems and how they may be resolved.

The contributory and interactional expertises of a court affect its capacity to deliver environmental justice. The more extensive are the contributory and interactional expertise of the judges and members of the court, the greater the capacity of the court to deliver environmental justice. This is where specialist environmental courts stand at an advantage compared to conventional courts. This is illustrated by the Land and Environment Court of New South Wales.[62] The Court is established as a superior court of record, at the same level in the judicial hierarchy as the Supreme Court of NSW. It has a comprehensive and mainly exclusive jurisdiction under planning and environmental laws to hear and dispose of a wide range of administrative, civil and criminal matters. The Court is constituted by judges with knowledge and expertise in environmental law, and commissioners with scientific and technical knowledge and expertise in a range of disciplines of relevance to

[60] See eg the Land and Environment Court's contribution to administrative law and criminal law discussed in Elizabeth Fisher, 'The Administrative Law Expertise of the Land and Environment Court of New South Wales' in Elizabeth Fisher and Brian J Preston (eds), *An Environmental Court in Action* (Hart Publishing, 2022); and Rob White, 'Ecocentrism and Criminal Proceedings for Offences against Environmental Laws' in Elizabeth Fisher and Brian J Preston (eds), *An Environmental Court in Action* (Hart Publishing, 2022).

[61] Preston (n 13) 9-12.

[62] Ibid 14-16; Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396, 428-429, 434-435; Brian J Preston, 'The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action' (2020) 94 *Australian Law Journal* 631, 638-639 ('The Land and Environmental Court of New South Wales').

environmental problems. These conditions have enabled the Court to develop environmental jurisprudence through its decisions on aspects of substantive and procedural law and justice.[63]

To develop doctrine, courts may draw on multiple sources of law, principally the relevant domestic law but also international law as well as the law and judicial decisions of other countries.[64] The domestic law includes constitutional and statutory law, common law where applicable, the rule of law and principle of legality, and precedents of prior judicial decisions. International law includes hard law of international conventions and customary law, soft law of international agreements that are not treaties and international declarations, and international environmental principles such as the principles of sustainable development and the environmental rule of law. Foreign law includes judicial decisions of foreign courts on similar questions as those before the domestic court, which although not binding can provide persuasive guidance.

The process of developing doctrine involves courts finding, interpreting and applying the law on a case-by-case basis.[65] There are legitimate leeways of choice in each of these three steps. These provide opportunities for legal imagination and creativity in the development of environmental jurisprudence. The success of courts in developing environmental jurisprudence depends on whether and how the courts take advantage of these opportunities.

The environmental jurisprudence developed can include aspects of environmental justice. As I have earlier observed, the Land and Environment Court of NSW has been a leader in developing jurisprudence on distributive, procedural and recognition justice.[66] As to distributive justice, the Court's decisions have secured a more equitable distribution of environmental benefits and burdens, including by upholding principles of ecologically sustainable development such as intergenerational and intragenerational equity. With regard to procedural justice, the Court's decisions have upheld access to information, public participation and access to the courts. In respect of the third, the Court has lowered barriers to public interest litigation such as restrictive standing rules and adverse costs orders. Finally, in terms of recognition justice, the Court's decisions have recognised and given voice to marginalised and vulnerable people, groups and communities, including Indigenous peoples, by allowing access to the Court.[67] An example is the use of restorative justice conferencing in sentencing for offences involving harm to Aboriginal cultural heritage.[68]

### *C. Dispute Resolution Processes Used*

I have so far explained the functional roles that courts perform and how, in doing so, courts can contribute to the doctrinal development of environmental law and jurisprudence. The processes by which courts do these

[63] Preston (n 13) 23-25; Preston, 'The Land and Environmental Court of New South Wales' (n 62) 638-639.

[64] Preston (n 13) 17-19. An illustration of a court drawing on these multiple sources of law is the Land and Environment Court of NSW's decision in *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257.

[65] Preston (n 13) 20-23. See also the fuller discussion in Brian J Preston, 'The Art of Judging Environmental Disputes' (2008) 13 *Southern Cross University Law Review* 103, including the explanation of the Land and Environment Court of NSW's development of environmental jurisprudence on the principles of ecologically sustainable development. See also Preston (n 44).

[66] See the decisions summarised in Preston, 'The Land and Environmental Court of New South Wales' (n 62) 638-639.

[67] Ibid 639.

[68] *Garrett v Williams* (2007) 151 LGERA 92; *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* (2018) 235 LGERA 291.

things differ, depending on the function being exercised. Courts employ different processes to resolve the disputes before them.

Adjudication is the conventional dispute resolution process used by all courts, including specialist environmental courts. Adjudication is critical for the doctrinal development of environmental law and jurisprudence.

Nonetheless, other dispute resolution processes are increasingly being used by courts, especially specialist environmental courts such as the Land and Environmental Court of NSW. These include the consensual dispute resolution processes of conciliation and mediation.

Specialist environmental courts are employing pluralistic dispute resolution – adjudicative, consensual and facilitative processes – to resolve environmental disputes. The goal is appropriate dispute resolution. This involves fitting the 'forum' to the 'fuss'.[69] The forum is the type of dispute resolution process, such as adjudication, conciliation or mediation. The fuss is the dispute. Appropriate dispute resolution involves identifying the nature and characteristics of the different types of dispute resolution processes and of the particular dispute and disputants, and choosing the type of process that is best suited to the dispute and disputants.

To achieve this goal of appropriate dispute resolution, courts should offer a variety of dispute resolution processes, including the non-consensual mechanism of adjudication and the consensual mechanisms of conciliation and mediation. A court that offers a variety of dispute resolution processes operates as a form of multi-door courthouse. The concept of a multi-door courthouse is that of a dispute resolution centre offering intake services and an array of dispute resolution processes in one institution, so as to match the appropriate dispute resolution process to the particular dispute. The intake services comprise screening, diagnosis and referral of a dispute to the appropriate dispute resolution process.[70]

The conditions needed for a court to operate as a multi-door courthouse include offering a range of dispute resolution processes and having members trained in using them. For adjudication, this requires knowledgeable and experienced judges to adjudicate the legal dimensions of the dispute and expert members to adjudicate the non-legal dimensions. For consensual mechanisms, this requires members who are trained in mediation to facilitate negotiation between the disputants. Having subject matter expertise assists members in undertaking conciliation.

A characteristic of a successful specialist environmental court is operating as a multi-door courthouse.[71] Examples are the Land and Environment Court of NSW, the Environment Court of New Zealand, the Planning and Environment Court of Queensland and the Land Court of Queensland. These specialist environmental courts offer a variety of dispute resolution processes and have judges and members trained in these processes. A specialist environmental court that operates as a multi-door courthouse is better placed to deliver procedural and recognition justice. Appropriate dispute resolution delivers individualised justice, tailoring the dispute resolution process to the needs and interests of the individual disputants and their dispute. The disputants are

[69] Frank E A Sander and Stephen B Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49.

[70] Brian J Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse: Part 1' (2008) 19 *Australasian Dispute Resolution Journal* 72; Brian J Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse: Part 2' (2008) 19 *Australasian Dispute Resolution Journal* 144.

[71] Preston (n 12) 379-381.

given voice and are heard directly.

## IV. Conclusion

The delivery of justice is a core purpose of courts. In these times of environmental crises, this purpose includes delivery of environmental justice. This involves ensuring a just distribution of environmental benefits and burdens (distributive justice); just procedures, including access to environmental information, public participation in environmental decision-making and access to courts for remedy and redress (procedural justice); and just recognition and respect of all (recognition justice).

Courts can deliver environmental justice through the functions they perform, the doctrines they develop and the dispute resolution processes they use. Specialist environmental courts are better suited to delivering environmental justice by reason of their constitutions, competences and expertises. This is borne out in practice. Specialist environmental courts have played, and are continuing to play, a key role in delivering environmental justice in practice.